IN THE COURT OF APPEALS OF IOWA

No. 3-214 / 12-0873
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES DISMORE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek (motions to suppress) and Mark D. Cleve (trial), Judges.

James Dismore appeals from his convictions for sponsoring a gathering where controlled substances were unlawfully used and contributing to the delinquency of a minor. **AFFIRMED.**

John O. Moeller, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

James Dismore appeals from his convictions for sponsoring a gathering where controlled substances were unlawfully used and contributing to the delinquency of a minor. He contends the district court improperly denied his motions to suppress his incriminating statements and insufficient evidence was presented to support his convictions. We affirm.

I. Facts and Proceedings.

On February 24, 2011, James Dismore overdosed on heroin and was found unconscious on his bathroom floor by two young men who consumed drugs with him. One of the men contacted paramedics, who revived Dismore. Once conscious, Dismore refused the request of police officers to search his apartment before he was transported to a hospital. At the hospital, police once again attempted to obtain Dismore's consent for the search of his apartment, which he denied. At this time, Dismore was given warnings under *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966). He responded to officers that he did not want to speak with them because he had previously been told "by an attorney not to talk to the police." Questioning ceased, and shortly thereafter the officers obtained and executed a search warrant for Dismore's apartment.[1]

Police returned to Dismore's apartment the next day, February 25, 2011, after Dismore was discharged from the hospital. Dismore allowed the officers to enter; two other men were present in the apartment. The officers noted the apartment smelled of marijuana. When asked whether one of the occupants had smoked marijuana in the apartment, Dismore responded that he did not "really

[1] The search pursuant to the warrant is not at issue on appeal.

want to do any talking right now without a lawyer." The officer replied Dismore was not under arrest and he did not have to talk with the officer, the officer was concerned about getting heroin off the streets and wanted Dismore's cooperation, though Dismore would likely be facing charges. Dismore and the officer at some point in the conversation moved to Dismore's bedroom and shut the door. The officer stated, "If you want to talk to an attorney, you can talk to an attorney. I'm not reading you your rights, [you] are not under arrest. . . . Do you want to talk with me?" Dismore responded he did. The officer proceeded to ask Dismore about the circumstances of his overdose, including how the heroin was acquired, who was present when he used the heroin, and who else used heroin. Dismore answered these questions. The entire discussion lasted about forty minutes; an audio recording was made of the interaction.

Dismore was later arrested and charged with sponsoring a gathering where controlled substances are unlawfully used, solicitation to commit a felony, and contributing to the delinquency of a minor.[2] He pleaded not guilty, and filed two motions to suppress his statements to police officers on Fifth and Sixth Amendment grounds, arguing he invoked his right to remain silent and his right to an attorney. Hearings were held on these motions in June 2011 and January 2012. In addition to testimony, the court listened to the audio recording of the February 25 conversation between Dismore and the officer. The court found the two interviews—at the hospital and at Dismore's apartment—were not custodial interrogations, no coercion or promissory leniency occurred, and Dismore

[2] One of the young men who shared the heroin in Dismore's apartment was a minor, and another minor shared marijuana with Dismore.

voluntarily made his statements. The court ruled Dismore did not invoke his Fifth Amendment right to counsel the second day,[3] and the contacts twenty hours apart did not overcome Dismore's free will.

Trial was held to the bench, and Dismore was found guilty of sponsoring a gathering where controlled substances were unlawfully used and contributing to the delinquency of a minor. Dismore appeals.

II. Analysis.

Dismore appeals from the denial of his motions to suppress, asserting his statements "were obtained in violation of his constitutional privilege against self-incrimination, his right to counsel, due process voluntariness requirement or *Miranda* requirement." He also asserts the evidence against him was insufficient to sustain the conviction. We review the denial of a motion to suppress on constitutional grounds de novo. *State v*. *Palmer*, 791 N.W.2d 840, 844 (Iowa 2010). We evaluate the totality of the circumstances as shown by the whole record. *Id.* We give deference to the fact findings by the trial court but are not bound by those findings. *Id.* We review a challenge to the sufficiency of the evidence for the correction of errors at law. *State v*. *Henderson*, 696 N.W.2d 5, 6 (Iowa 2005).

A. Sixth Amendment right to counsel.

> Our Sixth Amendment analysis involves two steps: (1) whether the right to counsel had attached when the accused made the incriminating statements, and (2) if so, whether the accused waived his or her right before making the statements. An accused's Sixth Amendment right to counsel attaches upon initiation of adversary

[3] The recording is difficult to hear, and the court did not "discern" Dismore's statement that he did not want to talk without a lawyer, a statement conceded on appeal by the State.

> criminal judicial proceedings. Such proceedings are initiated by formal charge, preliminary hearing, indictment, information, or arraignment.

State v. *Peterson*, 663 N.W.2d 417, 426 (Iowa 2003) (internal citations and quotation marks omitted). The statements Dismore seeks to suppress occurred during interactions with police officers before initiation of adversary criminal judicial proceedings. *See id.* Dismore's Sixth Amendment right to counsel had not attached at that time.

B. Miranda.

Police are required to give a suspect warnings under *Miranda* prior to questioning only if that suspect is in custody. *State v*. *Bogan*, 774 N.W.2d 676, 680 (Iowa 2009).

> A suspect is in custody if the suspect's freedom of action is curtailed to a degree associated with formal arrest.
>
> To determine if a suspect is in custody we look to whether the suspect was formally arrested or whether the suspect's freedom of movement was restricted to such a degree to be associated with a formal arrest.
>
> To determine whether the suspect's freedom of movement was restricted to such a degree, we apply an objective analysis and ask whether a reasonable person in the defendant's position would have understood his situation to be one of custody. A custody determination depends on objective circumstances, not the subjective belief of the officers or the defendant.
>
> To make a determination as to whether [a suspect] was in custody, we use a four-factor test. These factors are
> (1) the language used to summon the individual;
> (2) the purpose, place, and manner of interrogation;
> (3) the extent to which the defendant is confronted with evidence of his guilt; and
> (4) whether the defendant is free to leave the place of questioning.

Id. (internal citations and quotation marks omitted). We agree with the district court that Dismore was not in custody in his apartment on February 25, 2011.

The officer repeatedly informed Dismore that he did not have to answer his questions and he was not under arrest. *See United States v. Griffin*, 922 F.2d 1343, 1348 (8th Cir. 1990) (stating informing a suspect that response to questioning is voluntary is a mitigating factor against custody). While the two spoke in Dismore's bedroom, Dismore was not placed in handcuffs or otherwise restrained. The officer told Dismore he would likely be charged, but did not confront him with evidence of his guilt. Further, as our court has previously noted, in-home interrogations are not typically custodial:

> The interrogation by the officers was held in Evans' own home, and the general rule is that in-home interrogations are not custodial for purposes of *Miranda*. In fact, the Supreme Court in *Miranda* itself made it clear that this is so because the "compelling atmosphere" giving rise to the rule is not present[.]

State v. Evans, 495 N.W.2d 760, 762–63 (Iowa 1993) (referencing *Miranda*, 384 U.S. at 478 n.46). Because the encounter between Dismore and the officer in Dismore's apartment on February 25th was not custodial, no further *Miranda* warnings were required.

Similarly the interaction between the officer and Dismore at the hospital was not custodial. When the officer visited the hospital room, Dismore was accompanied by a nurse. The officer informed Dismore the police were investigating his drug overdose but he was not under arrest. Dismore received *Miranda* warnings, and the interaction was very brief. Again, we consider how the defendant was summoned; the purpose, place and manner of the interaction; whether evidence of guilt is presented; and whether the suspect can leave. *Bogan*, 774 N.W.2d at 680. Applying these factors, we find this interaction at the hospital was not custodial. *See State v. Cain*, 400 N.W.2d 582, 584 (Iowa 1987)

(finding two-hour interaction at hospital not custodial where officer only questioned suspect briefly).

C. Invocation of Fifth Amendment rights.

Dismore claims two invocations of his Fifth Amendment rights during custodial interrogation: the first at the hospital on February 24th when he said he was told by an attorney not to talk to the police after which the officers ceased questioning, and the second in his living room on February 25th when he told officers he did not "want to do any talking right now without a lawyer" after which the officer continued questioning him in the bedroom. *Miranda* "provides a second level of procedural safeguards law enforcement must follow after a suspect invokes his or her Fifth Amendment privilege against self-incrimination by asserting either the right to remain silent or the right to the presence of counsel." *Palmer*, 791 N.W.2d at 845.

Dismore argues both his response at the hospital and the next day in his apartment constituted an invocation of his Fifth Amendment rights. Even assuming Dismore's statements in both instances were sufficiently unambiguous invocations of these rights (*see Berghuis v*. *Thompkins*, 130 S.Ct. 2250, 2260 (2010) (holding a suspect must invoke his right to remain silent "unambiguously"); *see also Davis v. United States*, 512 U.S. 452, 459 (1994) ("[T]he suspect must unambiguously request counsel.")), our conclusion that Dismore was not in custody at either point is fatal to Dismore's claim.

The procedural safeguards of *Miranda*, including the warnings and the requirement that officers "must cease" interrogation following an invocation of the right to counsel (s*ee Edwards v*. *Arizona*, 451 U.S. 477, 485 (1981)) are triggered

only by a custodial interrogation. *Minnesota v*. *Murphy*, 465 U.S. 420, 424 n.3 (1984). "Although a request for a lawyer during custodial interrogation is sufficient to invoke the privilege against self-incrimination, [the suspect] was not in custody, and he had no federal right to have an attorney present at the meeting." *Id.* (internal citations omitted). Because Dismore was not in custody either at the hospital or in his apartment, his statement that he was told not to speak with police and that he did not "want to do any talking right now without a lawyer" did not require the officers to cease questioning.

D. Voluntariness.

Dismore next argues his statements to the officers were not voluntary due to the "combination of psychological stratagems employed by police." Dismore does not point to any particular statements by the officer, nor does he cite to any authority to support a separate finding that Dismore's statements were involuntary. "When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived." *State v*. *Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001); *see also* Iowa R. App. P. 6.903(2)(g)(3).

E. Sufficiency of the evidence.

Finally, Dismore asserts the evidence against him was insufficient to sustain a conviction, claiming statements by Dismore's fellow drug-user were not credible. Dismore refers us to no authority regarding his sufficiency of the evidence claim, though he does discuss *State v*. *Vesey*, 241 N.W.2d 888 (Iowa 1976), which sets forth our requirement of corroboration of accomplice testimony. The evidence presented against Dismore was overwhelming, including

statements by police, Dismore's own recorded statements, and physical evidence seized from his apartment. The court made specific corroboration and credibility determinations regarding Dismore's accomplice. We find substantial evidence exists to support Dismore's conviction. *See Henderson*, 696 N.W.2d at 6.

The evidence against Dismore was sufficient to support his convictions. The district court correctly denied Dismore's motions to suppress his incriminating statements. We therefore affirm Dismore's conviction.

AFFIRMED.