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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001516-MR

JOSEPH BROOKS APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 16-CR-00874

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, LAMBERT AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Following a jury trial, Joseph Brooks was convicted of second-degree rape, no force, and sentenced to five-years' imprisonment. The sole issue on appeal is whether the trial court properly denied his motion to suppress statements made to police without being fully apprised of his rights under *Miranda* *v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Because we conclude Brooks was not in custody when the statements were made, we affirm.

At the suppression hearing, Kentucky State Police (KSP) Detective Bryan Washer testified and the recorded interview, supplemented by a transcript for easier reference, was introduced. Brooks did not testify.

Washer received a report that Brooks had an inappropriate relationship with J.H., who was thirteen-years old. Washer spoke with J.H. who admitted that she and Brooks had sex on at least two occasions.

On October 24, 2016, Washer went to Brooks's home to speak with Brooks who was then nineteen-years old. Washer was wearing plain clothes but was wearing a gun on his hip and identified himself as a police officer. Upon arrival, Washer asked Brooks if he would be willing to come to the KSP post with him without indicating Brooks was suspected of any crime.

Brooks agreed to the interview but said he did not have a vehicle to drive to the KSP post, which was approximately two miles from his home. Washer offered to drive him, and Brooks accepted. Brooks rode to the KSP post in the back of Washer's vehicle.[1] Washer explained at the suppression hearing that he

[1] It is not clear whether the vehicle was a police cruiser. For purposes of the suppression motion, the trial court assumed its was a "marked" vehicle because to do otherwise could be harmful to Brooks' contention that he was in custody of purposes of *Miranda*. For the same reason, we make the same assumption.

did not allow anyone to ride in the front seat where he kept his computer and other equipment. Brooks was not handcuffed and there was no interrogation during the brief ride to the post.

When Washer and Brooks arrived at the KSP post, Washer recalled Brooks let himself out, although Washer may have opened the door from the outside. The two entered the post and Brooks sat in the lobby while Washer prepared the interview room. Brooks entered the interview room unrestrained and there is no indication that during the thirty-eight-minute interview, the door to the room was locked or that Brooks could not access the door. Washer and Brooks were the only participants in the interview. As the trial court found, Washer did not raise his voice during the interview and kept a comfortable conversational distance from Brooks.

At the outset of the interview, Washer began to give *Miranda* warnings to Brooks, informing Brooks he had the right to remain silent, the right to an attorney and if he could not afford an attorney, one would be provided. However, he did not inform Brooks that anything Brooks said could be used against him. Washer testified that he started to give *Miranda* warnings but realized the warnings were not necessary because Brooks was not in custody. Washer then asked Brooks if he was okay having a conversation with him and Brooks responded, “that’s fine.”

Before questioning Brooks about the rape allegations, Washer told Brooks: “I don’t plan on taking you to jail. I don’t plan on putting you in handcuffs and walking out of here or anything like that. But I need you to tell me the truth.” Eventually, Brooks confessed to having sex with J.H. ten to fifteen times when she was between twelve and thirteen-years old.

After his interview with Brooks, Washer explained that he was not going to arrest Brooks but would present the case to the grand jury. Washer then drove Brooks home. After an indictment was returned, Brooks was arrested.

The issue presented is whether Brooks’s right under the Fifth Amendment to the United States Constitution not to be compelled to incriminate himself was violated. That right is protected by the rule established by the United States Supreme Court in *Miranda* that a defendant's statements during custodial interrogation are not admissible at trial unless prior to those statements he is warned: (1) he has the right to remain silent; (2) anything said can be used against him in court; (3) he has the right to an attorney, and (4) if he cannot afford an attorney, one will be appointed prior to any questioning if he desires. *Miranda*, 384 U.S. at 479, 86 S. Ct. at 1630. In *Griggs v. Commonwealth*, 2006-SC-000846-MR, 2008 WL 1851080, at 4 (Ky. 2008) (unpublished), our Supreme Court cautioned that “[a]n officer's failure to give the *Miranda* warnings, however, particularly the critical warning that the person's statements can be used against him" renders any statements made while in custody inadmissible.[2]

Washer did not warn Brooks that his statements could be used against him. Therefore, if *Miranda* warnings were required, the trial court erroneously denied his motion to suppress. However, that is not the result we reach because Brooks was not in custody for purposes of *Miranda* when those statements were made.

Miranda warnings are only required when the suspect being questioned is "in custody." *Thompson v. Keohane*, 516 U.S. 99, 102, 116 S.Ct. 457, 460, 133 L.Ed.2d 383 (1995). Where there is a formal arrest, the custody determination is straightforward. However, when a suspect is questioned by police without a formal arrest, the issue is whether there was a restraint on freedom of movement to the degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983). As the Supreme Court explained *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977):

> [P]olice officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required

[2] We cite this unpublished case pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c).

> only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

The test is whether, considering the surrounding circumstances, "a reasonable person would have believed he or she was free to leave." *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006).

The United Supreme Court has not left the courts without guidance in determining whether a person is in custody. The following is indicative of custody: the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980).

On appeal from the denial of a motion to suppress based on a *Miranda* violation, "[t]he factual findings made by the trial court on this issue are conclusive if they are supported by substantial evidence. But the determination of whether a defendant is in custody is a mixed question of law and fact, meaning that we review de novo the trial court's ultimate decision on that point." *Beckham v. Commonwealth*, 248 S.W.3d 547, 551 (Ky. 2008).

Brooks points to facts, which he argues require a determination that he was in custody when he made his incriminating statements. We summarize those fact as follows: (1) Washer initiated the encounter at Brooks's home; (2) Washer transported Brooks to the police post; (3) Washer told Brooks where to sit in the interview room; (4) Washer did not tell Brooks he was free to leave; (5) Washer told Brooks he did not plan to put Brooks in handcuffs but he needed to tell the truth and later reminded him he needed to tell the truth; and (6) Washer gave him all but one *Miranda* warning.

Washer testified that Brooks agreed to be questioned at the police post and to ride in his vehicle. Washer did not coerce or force Brooks into the vehicle, Brooks was not handcuffed during the short ride and, according to Washer, Brooks exited from the vehicle on his own. Approaching Brooks at his home and riding in the back of Washer's vehicle are not facts that weigh in favor of custodial situation where Brooks's freedom was not involuntarily restrained. *See Id*. (suspect who agreed to speak to officers, and the officers transported him in a police vehicle to a local probation and parole office was not in custody).

Additionally, there is nothing coercive or restrictive about Washer instructing Brooks where to sit in the interview room. Such an instruction is commonly given to a person unfamiliar with any room, including an interview room, and is not a restraint on freedom.

During the interview, Brooks was not told he was free to leave. The United States Supreme Court has indicated that fact weighs in favor of the conclusion that Brooks was in custody. *Yarborough v. Alvarado*, 541 U.S. 652, 665, 124 S.Ct. 2140, 2150, 158 L.Ed. 2d 938 (2004). However, it is not conclusive as it is just a factor.

In *Lucas*, the suspect came to the police station voluntarily and, after being questioned for approximately one hour, confessed to a crime against his nephew. At no time during that interview was the suspect told he was free to leave. *Lucas*, 195 S.W.3d at 404.[3] Nevertheless, the Court held the suspect was not in custody because he was not formally arrested and voluntarily came to the police station. *Id*. at 406. Likewise, Brooks voluntarily came to the KSP post, was not restrained or coerced in any manner and left without being arrested. The lack of an explicit statement that he was free to leave has little weight in the determination of whether he was in custody.

Washer told Brooks he needed to tell the truth. However, there is nothing inherently coercive about telling a suspect that he needs to tell the truth. "Absent improper threats or promises, law enforcement officers are permitted to urge that it would be better to tell the truth." *People v. Williams*, 49 Cal.4th 405, 444, 111 Cal.Rptr.3d 589,624-25, 233 P.3d 1000, 1030 (2010). Although Washer urged Brooks to tell the truth, Washer did not threaten Brooks if he was untruthful

[3] This was the second time officers questioned the suspect.

or make any promises if he told the truth. Washer's urging did not change what was a noncustodial interview into a custodial interview.

Although Brooks was not in custody when the interview occurred, and *Miranda* warnings were not required, Washer gave Brooks partial *Miranda* warnings. The question is whether the unnecessary giving of *Miranda* warnings operates to convert an otherwise noncustodial situation into a custodial one. The answer is no.

Confronted with the same question, in *United States v. Owens*, 431 F.2d 349, 352 (5th Cir. 1970), the Court held that "[b]y gratuitously advising Owens of his rights, the agent in no way conferred additional rights on him." Further explanation why such gratuitous warnings do not transform a noncustodial interrogation into a custodial interrogation was given in *United States v. Akin*, 435 F.2d 1011, 1013 (5th Cir. 1970), where the Court stated:

> The only basis suggested by appellant for finding that there was 'custodial interrogation' in this case is that the FBI did give some warning to appellant prior to questioning him. Thus, appellant asks, 'If this were not a custodial interrogation, why would the agents give warnings?' We cannot accept appellant's suggestion. To rule that an FBI agent's extra-cautious efforts to inform a person of his constitutional rights converts an otherwise non-custodial situation into 'custodial interrogation' could easily work to defeat one of the Supreme Court's main objectives in Miranda, the objective of encouraging law enforcement agencies to develop ways of protecting individual rights that are in harmony with effective law enforcement. We conclude, therefore, that a custodial

> situation cannot be created by the mere giving of modified Miranda warnings.

In accord with the Fifth Circuit, the Sixth Circuit Federal Court of Appeals rejected the argument that giving *Miranda* warnings produces a custodial interrogation that is otherwise noncustodial. It stated: "The precaution of giving *Miranda* rights in what is thought could be a non-custodial interview should not be deterred by interpreting the giving of such rights as a restraint on the suspect, converting a non-custodial interview into a custodial interrogation for *Miranda* purposes." *United States v. Lewis*, 556 F.2d 446, 449 (6th Cir. 1977).

We have considered the totality of the circumstances under which Brooks made his incriminating statements. While Brooks now regrets the words he spoke, there is no evidence they were spoken while in custody. He voluntarily rode to the KSP post with Washer after agreeing to speak with him. At all times before and during the interview, Brooks was unrestrained. Washer, who was the only officer present in the brief interview, used a conversational voice and kept a conversational distance from Brooks. After the interview, Brooks left the KSP post and was not arrested until after the grand jury returned an indictment. The trial court properly denied his motion to suppress.

The judgment and conviction of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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