IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: FEBRUARY 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000345-MR

RANDY SHOUSE — APPELLANT

V.

ON APPEAL FROM OWSLEY CIRCUIT COURT
HON. WILLIAM W. TRUDE, JR., JUDGE
NO. 05-CR-000015

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Randy Shouse, was convicted of murdering his girlfriend. On appeal, he claims the trial court erred by failing to suppress a statement he made to the police shortly after the shooting, which was being investigated as possible suicide. Finding no error in the trial court's ruling, Appellant's conviction is affirmed.

I. Background

Appellant's conviction was for events that occurred on December 31, 2004. That morning, Appellant's girlfriend, Sandra Westwood, was released from the hospital where she had spent the previous two days being treated for her diabetes. Appellant picked her up and drove her to their shared residence, a small camper trailer owned by Appellant's brother, Charlie Shouse.

They then went to visit Charlie, who berated them for the condition of the camper trailer because they had damaged it and allowed their dogs to defecate and urinate inside. Westwood then returned to the camper trailer, and Appellant left to look into a

new place for them to live. Some time later, Appellant returned to his brother's trailer and accompanied him to get supplies for a party later that evening. Upon their return to the property, Appellant saw Westwood out walking her dog up a hill toward a dirt road that led to a nearby strip-mining operation. Appellant helped his brother unload the party supplies, then got his own dog to join Westwood on the walk.

Some time later, Appellant showed up at his brother's trailer asking to be driven up the hill, which was wet and muddy from rain that day. They came upon Westwood lying on the ground. A gun was near her right hand and she was bleeding from her head. Charlie drove back down the hill to get his father-in-law, who had EMS training, and to call 911. When they returned to the top of the hill, Appellant was upset. They wrapped Westwood's head in gauze, put her in the back of Charlie's Jeep, and drove her down the hill out of fear that an ambulance could not make it there because of the mud. Westwood was taken to the local hospital, then to the UK Medical Center in Lexington, where she later died.

Kentucky State Police officers arrived at the scene shortly after the ambulance. It was cold and raining, and Appellant was sitting on a nearby tarp, visibly upset and shaking. Trooper Jon Allen placed Appellant in the front seat of one of the cruisers for a short period while the paramedics prepared Westwood for transport to the hospital. A short time later, Appellant was moved to the front seat of Trooper Allen's cruiser. Trooper Allen was also in the front seat and another trooper sat in the back. Trooper Allen interviewed Appellant about what had happened that day. The interview was tape recorded, and no Miranda rights were read to Appellant.

At the beginning of the interview, Trooper Allen said he was investigating "a shooting." His questioning led Appellant to describe Westwood's time in the hospital,

and the time she had been through the rest of the day. Appellant had picked her up and taken her to get her paycheck, which she cashed. On their way back to the camper trailer, Appellant and Westwood made a few short shopping stops and Westwood called her daughter. They then went over to his brother's trailer, where they stayed for 10-15 minutes, but he did not mention any argument taking place. He described going to town with his brother and seeing Westwood walking the dog on their return, after which he got his dog and caught up with her on the hill. He claimed that as they walked, they talked about a house they were supposed to be renting the next day.

He said he had on house shoes and the ground was muddy, so he went back to put on some boots. He claimed that about three-fourths of the way down the hill, he heard three or four gun shots, two close together and the other two spaced apart. He said he knew people had been doing a lot of hunting, so he went to get his brother, who had a four-wheel drive, to get him up the hill quickly. At the top of the hill, they found Westwood lying on the ground with Appellant's pistol beside her right hand.

Trooper Allen then asked specifically how she was lying, to which Appellant said she was on her back, and blood was running from the back of her head. Appellant then said that Charlie went back down the hill and called the ambulance, and came back with his father-in-law, who used to be a paramedic. The father-in-law wrapped Westwood's head, then the three men loaded her into the back of the Jeep because there was no way an ambulance could get up. They were sitting at the trailer when the ambulance came, and the troopers came shortly after.

Trooper Allen then returned to the subject of the gun and asked what Appellant did with it. Appellant said he threw it about 18 inches away from Westwood's body so it didn't get smashed down in the mud. Trooper Allen asked again about the gunshots

and what he said about them to his brother. Appellant responded that he told his brother that he heard gunshots up the hill, and they went up the hill to see what was going on because Charlie was the overseer of the strip mine. Appellant also claimed that he said nothing to his brother about Westwood having his gun. The trooper then asked where Appellant normally kept the gun. Appellant replied that he kept it on a shelf in the camper behind a box of shells and out of sight, but that he did not keep the gun loaded. They discussed the number and type of shells, then the trooper asked Appellant whether he went back in his trailer when he came down the hill. Appellant said he put his dog in the trailer and that was it.

Trooper Allen asked if Appellant was alarmed when he heard gunshots as he came down the hill. Appellant replied he had not thought Westwood might have a gun, but that she had access to it and "you never know." Appellant then stated that Westwood had never used the gun, and had only touched it a couple of times, and never since they lived in the camper trailer.

Trooper Allen then returned to how many shots Appellant heard (three to four), and asked what kind of gun Appellant owned (a revolver with six shots). Trooper Allen asked if anyone else heard any shots, and Appellant said no. He explained that his brother had been listening to a CD loudly because his father-in-law had a hearing problem.

Trooper Allen then returned to what Appellant and Westwood had been talking about. Appellant said that they were looking to move out from the trailer and that he had found a house. Trooper Allen asked Appellant whether Westwood had said anything about them "not going to make it or anything like that as far as your relationship goes," to which Appellant replied, "No, we was getting along great."

Trooper Allen asked if Appellant could tell where she had been shot. Appellant could not tell where the bullet had gone in, but that the whole back of her head was covered in blood. Trooper Allen asked if Westwood had previously tried suicide or to harm herself; Appellant said not since they had been dating (about 5 months), but he did not know before then. Trooper Allen asked if Appellant moved Westwood's body, to which Appellant said yes, so that his brother could turn the Jeep around to go down the hill.

Finally, the trooper asked, "Do you have anything else you want to tell me today?" Appellant replied that he wished it had never happened. Trooper Allen then asked whether Appellant had fired a gun that day, and he said no. When asked the last time he had fired a weapon, Appellant said maybe three months ago. The interview was finished and Appellant exited the car.

The recording of the interview was played at trial.

A short time after the interview, Appellant's hands were swabbed to be tested later for gunshot residue (the result was inconclusive). The police interviewed several other people at the scene, but no arrests were made because the police were investigating the incident as a suicide at that point. Later that night, the police received information from the hospital that Westwood's wound was inconsistent with suicide because it was to the back of her head. Though this information ultimately turned out to be incorrect, the officers changed the nature of their investigation and went back to Charlie Shouse's property, where they arrested Appellant and charged him with having shot Westwood. Appellant was read his Miranda rights at that time.

At trial, testimony from various witnesses conflicted with Appellant's original version of events, or at least included details that he had omitted. For example, his

brother testified that when Appellant came to his trailer after walking down the hill, he specifically said, "The bitch has got my gun. I need to get to the strip job." He noted that on the night of the shooting he had pointed out this inconsistency to Detective Joie Peters, to whom Appellant had then just claimed to have come to Charlie because he was the overseer of the strip mine. Charlie also testified that Appellant did not mention having heard gunshots until after they began driving up the hill, and that while the police were still at the property Appellant had referred to a discussion with Westwood about whether they were "going to make it." Charlie also testified that he had an argument with Appellant and Westwood when they came to his trailer just after returning from the hospital.

Detective Joie Peters testified at trial about having interviewed Appellant separately from Trooper Allen while at the property. With regard to the incident in which Charlie Shouse corrected Appellant about what he had said on first coming down the hill, Detective Peters claimed Charlie said Appellant stated Westwood had his gun and had shot herself, but that Appellant denied having made the statement. The detective also testified that when Appellant was arrested later in the evening after the shooting, his demeanor had changed so that he appeared angry, and he had been drinking alcohol. The detective also claimed that when they arrived, Appellant's sister tried to calm him down and that he angrily blurted out, "She would not give me her check." (This was the only motive implied by the prosecution.)

Westwood's daughter, who was not present the day of the shooting, testified that she heard about the incident from Appellant. She testified that Appellant told her that Westwood had "stuck a gun in her mouth" and "blown her head off." She also testified that Appellant claimed not to have seen the gun because it had been in Westwood's

purse. Testimony from the police officers, however, revealed that Westwood's purse was in the camper trailer the entire time and that she had not carried it with her on the hill.

The medical examiner who performed the autopsy also testified at trial. He clarified the location of the single bullet entrance wound as on the side of her head, approximately 5.5 inches above and 0.4 inches behind the canal of her right ear. He also gave the most damaging testimony when he stated that because of the lack of stippling around the entrance wound, the shot had to have been fired from at least three feet away.

Appellant testified in his own defense. He largely recounted the version of events in his tape-recorded interview, though he added several things. One added element of his story was that when he came down the hill after hearing the gunshots, he went inside the camper trailer where he noticed that objects on the shelf where he kept his gun had been moved, from which he inferred that the gun had been taken (though he did not check). He claimed this discovery was what prompted him to run over to his brother's trailer to get a ride back up the hill. He attempted to explain the omission of this from his interview and later discussion when arrested by stating that he thought he had already told the police about going into the camper trailer and seeing the items moved around. He also admitted that he and Westwood talked about whether they were "going to make it" and that he had mentioned this to his brother.

The jury convicted Appellant of intentional murder. To avoid having the jury consider sentencing, the prosecutor and Appellant agreed to the minimum sentence, and Appellant was ultimately sentenced to twenty years in prison. His appeal to this Court, therefore, is a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant raises a single issue on appeal: he claims that because he was not read his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prior to being interviewed by Trooper Allen on the day of the shooting, his statement was improperly admitted into evidence. Appellant raised the issue in a pretrial motion to suppress his tape-recorded statement. The trial court held an evidentiary hearing at which Trooper Allen and Appellant testified, after which the court denied the motion, finding that Miranda was not applicable because Appellant was not in custody when he was interviewed in the trooper's cruiser.

The inquiry under Miranda is whether the statement in question "stemm[ed] from custodial interrogation . . . ." Id. at 444, 86 S.Ct at 1612. This requires that a court find that the suspect was both in custody and was subject to interrogation when the offending statements were made.

Trooper Allen testified at the suppression hearing that he conducted the interview in the context of what was then only a suicide investigation. Neverthless, he admitted that he actively guided the discussion with his questions and that he asked questions he would also ask in a homicide investigation.

In light of this testimony, and the content of the interview itself, there is no question that Appellant was interrogated as that term is used in Miranda. Though Trooper Allen may have at the time viewed the interview as a mere formality required in a suicide investigation, his active participation and the type of questions he asked show that he was clearly engaged in an interrogation. See Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689-90, 64 L.Ed.2d 297 (1980) (holding interrogation refers "not only to express questioning, but also to any words or actions on the part of the

police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (footnotes omitted)).

However, on the issue of custody, Trooper Allen testified that he placed Appellant in the cruiser and also conducted the interview there only to get him out of the cold and the rain, and that he believed Appellant was not in his custody. When Appellant was asked if he felt he could "get up and leave" during the interrogation, he testified, "In a way I did, but in a way I didn't because there were so many cops around the vehicle and there were two police officers in the vehicle also." He stated there were at least three other officers outside the vehicle.

Whether the officer or Appellant believed he was in custody, however, is not the proper inquiry. See Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293 (1994) ("[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."). Rather, the standard is that custody is shown

> where there has been such a restriction on a person's freedom as to render him "in custody." In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Id. at 322, 114 S.Ct. 1528-29 (per curiam) (internal quotation marks and citations omitted). "Some of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police." Commonwealth v. Lucas, 195 S.W.3d 403, 405-06 (Ky. 2006).

Only part of one of the factors identified in Lucas—the presence of several officers—was present in this case. There is nothing to indicate that their presence was threatening. There was no evidence the Appellant was physically touched (despite the repeated description of having been "placed" in the cruiser) or that the trooper used a commanding tone or language to induce Appellant to give the interview (Appellant even agreed that Trooper Allen was "very cordial" to him). Appellant answered the questions cooperatively. To top it all off, Appellant was not arrested at the end of the interview and was allowed to go free and remain with his family. See id. at 408 (Cooper, J., dissenting) (noting that whether a suspect is arrested at the end of questioning is an important indicia of custody). Though the setting of the interview, in a police car with two officers present, could in some circumstances tend to show custody, Trooper Allen addressed that concern in his suppression hearing testimony: "We were on a remote stretch of roadway. It's raining outside and it was very cold and that was the most suitable location to complete an interview with my witness." That Appellant was allowed to sit in the front seat and the interview took place in the car solely to get out of the rain and cold (and presumably to avoid the extremely messy nearby camper trailer) militate against finding that he was in custody.

Appellant appears to have been subjected to the standard taking of a witness's statement in the course of an investigation into an apparent suicide. That this took place in a police car does not alter what happened in this case because that setting was employed solely for the comfort and convenience of the officers and Appellant. Based on the record developed at the suppression hearing, including the recording of the interview itself, this Court concludes that Appellant was not in custody when he gave his interview to Trooper Allen. Cf. Farler v. Commonwealth, 880 S.W.2d 882, 885 (Ky.App.

1994) ("Further, we do not see the fact that the questioning took place in the police cruiser as being material. There was no restraint on appellant's freedom while in the car and the environment was not coercive. After appellant gave his statement, he left freely and was arrested later that day. During his recorded statement, appellant stated that he did not mind answering the detective's questions. He explicitly stated that no threats or promises were made and that his statement was voluntary. In our opinion, appellant was not in custody when his statement was given . . . ."). Therefore, the trial court ruled correctly in declining to suppress the statement.

For the foregoing reasons, the judgment of the Owsley Circuit Court is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT:

Shelly R. Fears
Assistant Public Advocate
Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601-1133

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General

Michael Harned
Assistant Attorney General
Office of Attorney General
Criminal Appellate Division
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204