STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2009
v	No. 281875 Washtenaw Circuit Court
JO ANN CALDWELL, Defendant-Appellant.	LC No. 06-001873-FC

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant Jo Ann Caldwell appeals as of right her jury trial convictions of first-degree premeditated murder, MCL 750.316, and conspiracy to commit first-degree premeditated murder, MCL 750.157a. Defendant was sentenced to concurrent terms of life in prison without parole. We affirm.

Defendant's sole claim on appeal is that the trial court erred by denying her motion to suppress statements she made to the police after requesting the presence of her attorney. We review de novo a trial court's ultimate decision on a motion to suppress. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). However, absent clear error we will not disturb a trial court's factual findings, *People v Custer*, 248 Mich App 552, 558; 640 NW2d 576 (2001), and we defer to the trial court's credibility determinations. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Constitutional questions relevant to the suppression hearing are questions of law also reviewed de novo. *Custer, supra* at 559.

On November 2, 2006, officers executed a search warrant on defendant's residence. They left the residence after the search warrant was executed and, as they were going down the street, spotted defendant's maroon Suburban. The police pulled defendant over and asked her if she was willing to go to the Battle Creek Police Department for an interview. According to police, she said she was willing to go and agreed to ride with one of the officers to the department. They transported her to the station in one of their marked vehicles and told her that she was not under arrest. She was not handcuffed. She also gave the officers consent to drive her vehicle to the station so she could drive home after the interview.

Once defendant arrived at the police department, she was taken to an interview room and interviewed by Detective Everette Robbins, from the Washtenaw County Sheriff's Department, at about 11:30 a.m. She was not in handcuffs or restrained in any way. Detective Robbins

testified that he told defendant that she was not in custody and that she was free to leave at any time. Although defendant testified that Detective Robbins never told her that she was free to go, she said that she knew she could leave, but she wanted to know what was going on. Defendant did not want the interview taped because she did not trust the Battle Creek Police Department and she feared for her family. Detective Robbins agreed to her request.

According to police, about an hour into the interview, defendant said she would tell Detective Robbins what he wanted to know on three conditions, one of which was that her attorney would be present when she gave her statement. Defendant gave Detective Robbins the telephone number for her attorney. Detective Robbins relayed this message to Detective Raisanen who, in turn, called the attorney's office, but the secretary told him that the attorney was unavailable. Detective Raisanen left his cellular telephone number and told the secretary that the department was currently interviewing his client. According to police, defendant was informed that they were trying to contact her attorney. During this time, defendant was not interviewed, she was given three smoking breaks and refreshments, and she was offered food. The smoking breaks took place outside in front of the police department in a public setting.

About an hour and fifteen minutes later, the attorney called and said that he did not want the police speaking with his client. Detective Robbins told the attorney that they were at the Battle Creek Police Department and asked if he would like to speak to his client. The attorney informed Detective Robbins that he was unable to come to the police department at that time, but he was willing to speak to defendant on a secured line within the police department, or she could come see him in his office. According to Detective Robbins, he told defendant that her attorney did not want her speaking to them; that her attorney was not able to come to the department at that time; and if she wanted, she could speak to him either on a secured line within the police department or use the detective's cellular telephone. Defendant refused to talk to her attorney on any telephone within the department because she did not trust the department. Defendant then told Detective Robbins that if her attorney "didn't care enough to come down there when she asked him to," she did not need him.

Detective Robbins again informed defendant that she was not in custody and that she was free to leave. Defendant then said that she wanted the police to take her to jail because, if they did not keep her at least overnight, she and her children would be killed. She explained that she had to make some unidentified person or persons believe that she had been taken to jail based on the drugs they found at her house from the search warrant rather than that she was cooperating with the police. Once again, Detective Robbins reiterated that defendant was not in custody and was free to leave. Defendant said she could not leave yet. She asked what would happen to her if she were a witness to the victim's murder. Detective Robbins talked to her and gave her a cigarette and a restroom break. Defendant and Detective Robbins conversed for about two or three hours about "really nothing . . . you know her life on the farm and growing up and her relationship with [the victim]."

Sometime between 4:30 p.m. and 5:00 p.m., the decision was made to arrest defendant based, in part, on cellular telephone records that were obtained by Detective Neumann, which

placed defendant in the Ypsilanti area, contrary to statements she had made to Detective Raisanen. Detective Robbins advised defendant she was under arrest and "immediately" read defendant her *Miranda*[1] warnings. Defendant apparently made incriminating statements on both November 2, 2006 and again the next day after her formal arrest.

Importantly, the initial warrant in this case is dated November 4, 2006, the preliminary examination did not begin until December 20, 2006, and the criminal information was not issued until January 30, 2007.[2] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." US Const, Am VI.[3] However, "this right to counsel attaches only at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment." *People v Bladel (After Remand)*, 421 Mich 39, 51-52; 365 NW2d 56 (1984), aff'd by *Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986). Because defendant made the incriminating statements at issue here before her Sixth Amendment right to counsel attached, that right does not bar admission of the statements in this case.

Defendant argues that under the provision of the Michigan Constitution analogous to the Sixth Amendment, Const 1963, art 1, § 20, her interrogation prior to formal arraignment was a "critical stage" to which her right to counsel would attach, relying on Justice Cavanagh's concurring opinion in *People v Wright*, 441 Mich 140, 160; 490 NW2d 351 (1992). However, this Court previously considered that issue and determined that "a criminal defendant's right to counsel under the Michigan Constitution is identical to the right under the United States Constitution," *People v Justice*, 216 Mich App 633, 636, n 2; 550 NW2d 562 (1996); see also *People v Richert* (*After Remand*), 216 Mich App 186; 548 NW2d 924 (1996), and our Supreme Court has explicitly noted that *Wright* provides no binding principles. *People v Sexton*, 458 Mich 43, 66; 580 NW2d 404, citing *Justice*, *supra*. Any remaining question on this issue appears to have been put to rest when our Supreme Court indicated that it "has already noted in [*People v*] *Cheatham*, [453 Mich 1, 8, n 8; 551 NW2d 355 (1996)], albeit in obiter dictum, that a defendant's right to counsel under art 1, § 20 attaches only at or after the initiation of adversarial judicial proceedings." *People v Hickman*, 470 Mich 602, 608; 684 NW2d 267 (2004). Accordingly, absent clarified direction from our Supreme Court, defendant's Sixth Amendment right to counsel was not implicated in this case because adversary judicial criminal proceedings had not yet been initiated at the time defendant invoked her right to counsel.

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[1] *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] The preliminary examination was originally scheduled for November 12, 2006. However, the examination was adjourned for various reasons until it finally began December 20, 2006. It then continued on January 18, 2007 and January 25, 2007. Based on the evidence and arguments at the preliminary examination, a new information, dated January 30, 2007, was issued to include an added count of conspiracy.

[3] The Sixth Amendment's right to counsel is incorporated in the Due Process Clause of the Fourteenth Amendment and therefore binding upon the states. *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

Defendant also claims a violation of her Fifth Amendment privileges. However, defendant's *Miranda* rights also had not yet been triggered when defendant requested the presence of counsel. The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." US Const, Am V. To protect this right, custodial interrogation must be preceded by advice to the accused that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The trial court found that defendant was not in custody on November 2, 2006, when she requested the presence of her attorney. We agree. "Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. at 445. In determining whether defendant was in custody, the totality of the circumstances is considered, "with the key question being whether the accused reasonably could have believed that she was not free to leave." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). The subjective views of defendant or the officers are not controlling; rather the decision depends on objective circumstances. *Id.* at 219-220.

The record shows that on October 30, 2006, defendant willingly went to the police department to take a polygraph examination, free of any restraints. The polygraph examiner explained her rights to her at which point defendant exercised her rights by freely leaving the police department. On November 2, 2006, defendant agreed to go with an officer to the police department to make a statement, was told that she was not under arrest, and was not restrained in any way. Defendant gave officers consent to drive her vehicle to the department so she could drive home after the interview. At the department, she was told that she was not in custody and that she was free to leave. She said she knew she could leave, but she wanted to know what was going on. After defendant asked for her attorney, the detectives attempted to contact him and, while waiting to hear back from him, defendant went outside unescorted and unrestrained three times. She was ultimately given the opportunity to talk to her attorney, but she chose not to and decided to talk to the detectives alone. She was again informed that she was not in custody and was free to leave, but she insisted on being kept overnight. She subsequently spoke with the detectives about her life and about the victim. Based on this record, the trial court's finding that defendant was not in custody was not clearly erroneous. Accordingly, defendant's Fifth Amendment rights were not implicated at the time that she requested the presence of counsel.

Moreover, once defendant was taken into custody upon her formal arrest that night, she was given her *Miranda* rights. However, she did not request counsel be appointed and waived her Fifth Amendment rights. Defendant has not challenged that waiver on appeal and has not argued that she invoked her right to counsel subsequent to that waiver. Accordingly, we find no error in the trial court's decision to deny the suppression motion.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro