STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0479

State of Minnesota,
Appellant,

vs.

Spencer Charles Nichols,
Respondent.

Filed October 22, 2018
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-17-4684

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Steven L. Schleicher, Melissa Muro LaMere, Maslon LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Cleary, Chief Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

In this pretrial appeal by the state, appellant challenges the district court's order suppressing respondent's statements to law enforcement, as well as drug evidence found as a result of those statements. The state argues that the district court erred in determining that respondent was in custody when he was interrogated by law-enforcement officers in his dorm room and that he therefore should have been provided a *Miranda* warning. We affirm.

FACTS

Appellant State of Minnesota charged respondent Spencer Charles Nichols with attempted first-degree controlled-substance sale and attempted second-degree controlled-substance possession of MDMA.[1] The charges were based on statements Nichols made when law-enforcement officers visited his dorm room at the University of Minnesota, as well as drug evidence seized as a result of those statements.

Nichols came to the attention of the Department of Homeland Security when the department identified an encrypted conversation between Nichols and another individual regarding Nichols's purchase of drugs on the dark web.[2] At approximately 9:15 a.m. on

[1] Methylenedioxymethamphetamine, otherwise known as MDMA, is a hallucinogen and a Schedule I controlled substance. Minn. Stat. § 152.02, subd. 2(d)(2) (2016); Minn. R. 6800.4210, subp. C(7) (2015).

[2] The "dark web" is an isolated part of the internet made up of websites not accessible by common internet search engines. Because the dark web is designed so that users are difficult to trace, it is a host for marketplaces that advertise a variety of criminal activity such as the sale of illegal drugs.

February 21, 2017, University of Minnesota Police Sergeant James Nystrom, as well as Department of Homeland Security Special Agents Heidi Whereatt and Jesse Tabolich and their supervisor Mike Hillis, went to Nichols's dorm room on the University of Minnesota's Minneapolis campus to seek Nichols's cooperation with an ongoing narcotics investigation. The officers knocked on the door to Nichols's dorm room, and Nichols answered. The officers introduced themselves as law-enforcement officers and showed Nichols their credentials. After a brief conversation at the door about the reason for the visit, Special Agent Whereatt asked to enter Nichols's room, and Nichols agreed.

Upon entering the room, the officers immediately saw drug paraphernalia, including a bong, a vacuum sealer, vacuum sealer bags, and a large amount of plastic-wrapped U.S. currency. Nichols asked the officers if they had a search warrant. One of the officers told Nichols that they did not have a warrant but that they could freeze the scene while they sought a warrant to search his room.[3] Special Agent Whereatt sat down with Nichols and discussed why the officers were there, explaining that they knew that Nichols had ordered marijuana on the dark web. Whereatt asked Nichols if he had ordered drugs over the internet, and Nichols admitted that he had. Nichols asked if he was going to be arrested, and Whereatt told him that the Department of Homeland Security had no intention of arresting him because the amount of drugs Nichols allegedly ordered did not meet federal thresholds.

[3] The record is inconsistent regarding precisely when the officers told Nichols that they could freeze the scene, but it is clear that it occurred early in the encounter.

Nichols signed a Consent to Search form, and Supervisor Hillis and Special Agent Tabolich searched his dorm room. Nichols pointed out where the officers could find certain items, including a marijuana grinder in a backpack, steroids and syringes in a locked safe, and a large amount of U.S. currency underneath a garbage bin. However, Nichols denied the officers permission to search his cell phone and his computer, and they did not do so.

Nichols had use of his cell phone during the encounter and sent texts to his girlfriend that said, "I'm literally tempted to just beat the s--t out of all these ppl" and "I'm pretty sure I won't be getting arrested." At one point during the encounter, Nichols asked to use the restroom. Sergeant Nystrom escorted Nichols to the restroom, entered and remained in the restroom with Nichols, and escorted Nichols back to his dorm room. Later in the encounter, Special Agent Whereatt asked Nichols if he was expecting any other packages from the dark web. Nichols answered that he was expecting a shipment of "molly" or MDMA. Law enforcement had previously been unaware of any orders for or shipments of MDMA to Nichols. The officers left Nichols's dorm room at approximately 11:15 a.m. They did not provide a *Miranda* warning to Nichols during the two-hour encounter.

Based on Nichols's statements, law enforcement seized a package addressed to Nichols at his dormitory the day after their visit. Officers opened the package pursuant to a search warrant and found 53.9 grams of MDMA. On March 8, 2017, law enforcement seized another package addressed to Nichols at his dormitory. Officers opened the package pursuant to a search warrant and found 124.389 grams of MDMA.

Nichols moved to suppress the statements that he made to the officers in his dorm room and the drug evidence discovered as a result of those statements. The district court

held a two-day evidentiary hearing on the motion and heard testimony from Special Agents Whereatt and Tabolich, and Sergeant Nystrom.[4] Following the hearing, Nichols submitted a memorandum of law in which he argued that his statements and the resulting drug evidence should be suppressed because he was in custody for *Miranda* purposes during his encounter with law enforcement and should have been given a *Miranda* warning.[5]

The district court granted Nichols's motion to suppress, ruling that the statements were inadmissible because they were obtained during in-custody interrogation and the officers did not read Nichols a *Miranda* warning. The district court suppressed the MDMA, reasoning that law enforcement would not have known about and seized that evidence but for Nichols's un-*Mirandized* statements. The state appeals.

D E C I S I O N

I.

The state's ability to appeal in a criminal case is limited. *State v. Lugo*, 887 N.W.2d 476, 481 (Minn. 2016). The state may generally appeal "from any pretrial order" where the "district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subds. 1(1), 2(2)(b). "Critical impact is shown where the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Hunn*, 899 N.W.2d 541, 544 (Minn. App. 2017)

[4] The recitation of facts above is based on the district court's findings of fact following the evidentiary hearing.

[5] Nichols also argued that his statements and the drug evidence should be suppressed because the statements were not recorded, the statements were involuntary, the officers violated his right to counsel, and the officers exceeded the scope of his consent to search. The district court did not rule on these issues.

(quotation omitted), *aff'd on other grounds*, 911 N.W.2d 816 (Minn. 2018). "[G]enerally the suppression of a confession will have a critical impact on the prosecution." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (citation omitted).

The state contends that the critical-impact requirement is satisfied because "without [Nichols's] statements, the MDMA shipments" that form the basis for the controlled-substance charges in this case "would not have been discovered." Nichols does not dispute that the state has satisfied the critical-impact requirement.

We agree that the suppression of Nichols's statements and the drug evidence significantly reduces the likelihood of a successful prosecution. Indeed, the district court's suppression order appears to leave the state without any evidence that Nichols attempted to procure MDMA. We therefore conclude that the critical-impact requirement is satisfied.

II.

The state contends that the "district court erred in suppressing [Nichols's] voluntary statements made in his dorm room and the evidence seized as a result of those statements because [Nichols] was not in custody and a *Miranda* [warning] was not required."

Miranda v. Arizona provides procedural safeguards to protect an individual's Fifth Amendment privilege against self-incrimination. 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630 (1966). Statements made by a suspect during a custodial interrogation are admissible only if the statements were preceded by a *Miranda* warning. *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010). There are two components to the *Miranda* rule: custody and interrogation. *Id.* The interrogation component is not disputed in this case. The

disputed issue is whether Nichols was in custody for *Miranda* purposes when he made the incriminating statements in his dorm room.

"[A]n interrogation is custodial if, based on all the surrounding circumstances, a reasonable person would believe he or she was in police custody to the degree associated with formal arrest." *State v. Scruggs*, 822 N.W.2d 631, 637 (Minn. 2012). The test is not merely "whether a reasonable person would believe he or she was not free to leave." *State v. Champion*, 533 N.W.2d 40, 43 (Minn. 1995). A determination regarding whether a suspect was in custody is "based on all the surrounding circumstances" and "no factor alone is determinative." *Thompson*, 788 N.W.2d at 491. The determination is an "objective inquiry," and the suspect's subjective beliefs about whether he was in custody are therefore irrelevant. *See State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998) (noting that the standard refers to "a reasonable person in the suspect's situation").

Factors suggesting that a person is in custody include:

> (1) the police interviewing the suspect at the police station; (2) the suspect being told he or she is a prime suspect in a crime; (3) the police restraining the suspect's freedom of movement; (4) the suspect making a significantly incriminating statement; (5) the presence of multiple officers; and (6) a gun pointing at the suspect.

Scruggs, 822 N.W.2d at 637 (quotation omitted).

Factors suggesting that a person is not in custody include:

> (1) questioning the suspect in his or her home; (2) law enforcement expressly informing the suspect that he or she is not under arrest; (3) the suspect's leaving the police station without hindrance; (4) the brevity of questioning; (5) the suspect's ability to leave at any time; (6) the existence of a

> nonthreatening environment; and (7) the suspect's ability to make phone calls.

Id. (quotation omitted). However, "the mere fact that questioning occurred in a suspect's home does not by itself mean that the questioning was not custodial in nature." *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998).

A determination of whether a suspect was in custody involves a mixed question of law and fact. *State v. Horst*, 880 N.W.2d 24, 31 (Minn. 2016). This court reviews the district court's underlying factual findings for clear error. *Id.* The state does not challenge the district court's factual findings in this case. Whether the facts support a determination that the suspect was in custody is a legal conclusion reviewed de novo. *Id.*

However, if a district court "used the proper legal standard and made a fact-specific determination that [a] police interrogation" was custodial, an appellate court gives "considerable, but not unlimited, deference to a [district] court's fact-specific resolution of such an issue when the proper legal standard is applied." *Champion*, 533 N.W.2d at 44 (citing *Minnesota v. Olson*, 495 U.S. 91, 100, 102, 110 S. Ct. 1684, 1690-91 (1990) (stating that the Supreme Court was "not inclined to disagree with [the Minnesota Supreme Court's] fact-specific application of the proper legal standard" for determining the existence of exigent circumstances)).

Because the Minnesota Supreme Court has consistently applied the *Champion* deferential standard when reviewing a custody determination for *Miranda* purposes, we apply this deferential standard when reviewing the district court's determination that

Nichols was in custody for *Miranda* purposes.[6] *See, e.g.*, *Horst*, 880 N.W.2d at 31 ("If the district court applies the correct legal standard, we grant considerable, but not unlimited, deference to the district court's fact-specific resolution of whether the interrogation was custodial." (quotation omitted)); *State v. Sterling*, 834 N.W.2d 162, 167-68 (Minn. 2013) (stating that even though an appellate court "makes an independent review of the [district] court['s] determination regarding custody and the need for a *Miranda* warning," it grants "considerable, but not unlimited, deference to a [district] court's fact-specific resolution of such an issue when the proper legal standard is applied" (quotations omitted)); *Scruggs*, 822 N.W.2d at 637 (citing *Champion*, 533 N.W.2d at 44, for the proposition that "[w]e give considerable, but not unlimited, deference to a [district] court's fact-specific" determination of custody); *State v. Heden*, 719 N.W.2d 689, 694-95 (Minn. 2006) ("We make an independent determination about whether a suspect was in custody. We grant considerable, but not unlimited, deference to a [district] court's fact-specific resolution of such an issue when the proper legal standard is applied." (quotation and citation omitted)).

The district court articulated and applied the custody-determination standard and factors set forth above. It reasoned that the following facts supported a finding that

[6] Although neither party cited or discussed the supreme court's opinion in *Lugo*, we are aware that the opinion discusses the *Champion* standard of review, referring to it as a "purported deferential standard." *Lugo*, 887 N.W.2d at 485. We do not read the supreme court's discussion of *Champion* in *Lugo* as changing the deferential standard that the supreme court has consistently used to review a custody determination for *Miranda* purposes. We note that the standard-of-review issue in *Lugo* was whether an appellate court must apply "a deferential standard of review on [all] pretrial State appeals, even as to legal issues," and that the legal issue in *Lugo* was not whether a suspect was in custody for *Miranda* purposes. *Id*. at 479, 483.

Nichol's interrogation was custodial: (1) the officers observed drug paraphernalia in plain sight in Nichols's dorm room; (2) an officer told Nichols the officers could "freeze the room" to get a search warrant if Nichols were to withdraw consent to search or attempt to leave the room;[7] (3) Nichols admitted to ordering marijuana products online and was expecting a shipment of them in the mail; (4) the officers outnumbered Nichols four to one; (5) three officers stood between Nichols and the door throughout the encounter; (6) Nichols admitted that he was expecting a shipment of MDMA; (7) an officer escorted Nichols to the restroom, followed him into the restroom, and escorted him back to his room; and (8) Nichols's encounter with the officers lasted approximately two hours.

The district court reasoned that the following facts supported a finding that Nichols was not in custody: (1) Nichols was not put in any restraints, (2) the location of the interrogation was familiar to Nichols, (3) the officers were in plainclothes and did not display any weapons, (4) Nichols willingly signed a consent-to-search form, (5) Nichols retained possession of his cell phone and continually used it during the encounter, (6) Nichols denied the officers permission to search his phone and his computer, and (7) Nichols was never placed in formal custody or arrested.

[7] The parties dispute whether the officers told Nichols that he could leave during the encounter. There is no evidence that the officers made any statements to Nichols that expressly addressed his ability to leave. However, the officer's statement about freezing the room suggested that Nichols's ability to terminate the encounter with the officers was limited, and the district court reasonably interpreted that statement as communicating that Nichols was not free to leave. Indeed, at oral argument, the state seemed to agree that if Nichols had insisted on a warrant and the officers had frozen the scene, it is not likely that Nichols would have been allowed to leave.

On balance, the district court concluded that the totality of the circumstances supported a finding that Nichols's interrogation was custodial, reasoning:

> where [Nichols] was being questioned in a small room with four law enforcement officers, where [Nichols] was warned that the room could be "frozen" to allow the officers to get a search warrant if [Nichols] wished to leave or if [Nichols] withdrew consent to search, where [Nichols] felt the need to ask to use the restroom, where [Nichols] was escorted to the bathroom, followed into the bathroom, and escorted back to his room, and where [Nichols] made several severely incriminating statements in direct response to officer questioning, a reasonable person in [Nichols's] position would have felt themselves to be in custody to the degree associated with formal arrest.

The state assigns error to the district court's analysis in two respects. First, the state criticizes the district court's failure to consider "the text message [Nichols] sent to his girlfriend during the encounter stating, 'I'm pretty sure I won't be getting arrested.'" The state also notes that Nichols told his girlfriend that he was "literally tempted to just beat the s--t out of all these ppl." The state argues that these messages show that Nichols "did not believe that he was in custody." This criticism is unavailing because, as the district court correctly explained in its order, its determination "whether [Nichols] was in custody [did] not turn on whether [Nichols] felt he was in custody to the degree associated with formal arrest. The test, instead, is whether a reasonable person in [Nichols's] position would feel they were in custody to the degree associated with formal arrest."

Second, the state criticizes the district court's weighing of the custody factors, arguing that the district court overemphasized whether Nichols was seized during the encounter and therefore improperly applied the standard for determining custody. But

police restraint of the suspect's freedom of movement is a factor suggesting custody. *Scruggs*, 822 N.W.2d at 637. The district court considered that factor in light of all of the custody factors, including the circumstances that weighed against a finding of custody. We do not discern error in the district court's application of the standard for determining custody.

The state also relies on several cases to show that Nichols was not in custody, including *State v. Horst*, 880 N.W.2d at 32, and *State v. Vue*, 797 N.W.2d 5, 11-13 (Minn. 2011). But, as Nichols argues, these cases are factually distinguishable. For example, in *Horst*, the defendant voluntarily accompanied officers to a police station, a single investigator interviewed the defendant in a conference room containing a telephone and a door without a lock, the defendant did not make any significantly incriminating statements during the course of the interview, and the investigator treated the defendant "as a grieving widow" rather than as a suspect. 880 N.W.2d at 31-32. And in *Vue*, the defendant voluntarily went to a police station to give a statement, officers left the defendant alone in the lobby of the police station for a long enough time that the defendant could have left if he had wanted to leave, the defendant freely left the police station at the close of the interview, and the officers did not stay with the defendant at his home after he accepted their offer to give him a ride home. 797 N.W.2d at 12-13. The state notes that a law-enforcement officer escorted the defendants in *Horst* and *Vue* to restrooms during their interrogations. 880 N.W.2d at 31; *see* 797 N.W.2d at 12-13 (noting that the police allowed defendant to use the restroom and accompanied him through secured areas of the police station). But again, the circumstances here are distinguishable: the restrooms in *Horst* and

Vue were at police stations, and not in the suspects' homes. 880 N.W.2d at 31; 797 N.W.2d at 12-13.

Nichols argues that other cases support a finding of custody, such as *State v. Rosse*, 478 N.W.2d 482, 486 (Minn. 1991), in which the supreme court concluded that a defendant was in custody despite later being told she was free to go when, prior to being questioned by law enforcement, law enforcement blocked the defendant's car, multiple officers approached the defendant's car with their guns drawn, the defendant was ordered out of the car and pat searched for weapons, and the car was searched. *See also State v. Lynch*, 477 N.W.2d 743, 746 (Minn. App. 1991) (affirming custody determination where officers observed "immediate and apparent indications" that defendant was involved in a crime upon stopping him, law enforcement searched defendant's vehicle, and law enforcement questioned defendant regarding that crime rather than about the traffic violation that was the basis for the stop).

The cases cited by the parties illustrate that a custody determination for *Miranda* purposes is heavily fact-driven and that each case must be decided based on its own circumstances. In the end, we are not aware of any case that compels a conclusion that Nichols was not in custody, for purposes of *Miranda*, as a matter of law. Moreover, we recognize that the district court's decision was based on the testimony of three witnesses, which was presented over the course of a two-day evidentiary hearing. The district court's first-hand observation of the testimony of Special Agents Whereatt and Tabolich, and Sergeant Nystrom, no doubt influenced its decision. We do not have the benefit of those observations. We must rely on the written record.

As to that record, our independent review leads us to conclude that the following facts support a finding of custody: (1) four law-enforcement officers approached Nichols in his dorm room to advise him that he was suspected of purchasing controlled substances on the internet, and Nichols readily admitted his involvement in that activity; (2) the four officers remained in or near Nichols's dorm room during the ensuing two-hour interrogation and search; (3) the officers effectively communicated to Nichols that he was not free to leave when they told him that they could freeze the scene while they sought a warrant to search his room; (4) the officers searched Nichols's room while they questioned him about his drug-trafficking activity and found evidence of such activity; (5) Nichols was under the supervision of one or more of the four officers during the entire encounter; and (6) an officer escorted Nichols to his dormitory restroom, entered and remained in the restroom with Nichols, and escorted Nichols back to his room.

We have also considered the facts that do not support a finding of custody, such as the federal officers' assurance that Nichols would not be arrested for a federal crime, Nichols's unlimited use of his cell phone during the encounter, and the lack of a formal arrest at the end of the encounter. But those facts do not necessarily negate a conclusion that the totality of circumstances during the two-hour encounter would have caused a reasonable person to believe he was in police custody to the degree associated with formal arrest.

In sum, we have independently considered the relevant custody factors. Although another judge could have decided the custody issue differently, that is not a basis to reverse. *See Champion*, 533 N.W.2d at 44 ("In this case, while individual members of this court

might well have resolved the dispute differently, we conclude that the trial court did not clearly err in resolving the matter as it did."). Moreover, because the district court applied the correct standard in making its custody determination, we give some deference to the district court's custody determination. *See id*.

We hold that the district court did not err by determining that Nichols was in custody during his dorm-room interrogation and that the officers' failure to provide Nichols a *Miranda* warning required suppression of Nichols's statements and the drug evidence discovered as a result of his statements.[8] *See Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 3385 (1984) (noting that exclusionary rule applies to "evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree" (quotation omitted)); *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007) ("Generally, evidence seized in violation of the constitution must be suppressed."). Because we affirm on this ground, we do not consider Nichols's additional appellate arguments that the evidence should be suppressed because his statements were not voluntary and because the officers violated his right to counsel.

Affirmed.

[8] The state does not challenge the district court's conclusion that the drug evidence was obtained as a result of Nichols's statements.