IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-844

Filed: 16 May 2017

Gaston County, No. 14CRS061004

STATE OF NORTH CAROLINA

v.

REBECCA ELLEN CRAIN, Defendant.

Appeal by Defendant from judgments entered 21 April 2016 by Judge Christopher W. Bragg in Gaston County Superior Court. Heard in the Court of Appeals 23 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathy M. McCraw, for the State

Richard Croutharmel for the Defendant.

DILLON, Judge.

Rebecca Ellen Crain ("Defendant") appeals from convictions for trafficking heroin by possession and trafficking heroin by transportation. For the following reasons, we find no error.

I. Background

Defendant was arrested after officers found heroin in a truck she was driving and in which her son was a passenger. Officers had observed the truck stopped in a parking lot, side-by-side with another vehicle driven by a known drug dealer where an exchange occurred through a window of each vehicle. Officers followed the truck to a gas station. While the truck was stopped at the gas station, officers placed Defendant's son under arrest and conducted a search of the truck, where they discovered a large amount of heroin. Defendant was then placed under arrest.

Defendant was convicted of trafficking heroin by possession and trafficking heroin by transportation. Defendant timely appealed.

II. Analysis

On appeal, Defendant makes two arguments: (1) she argues that the trial court erred in denying her motion to suppress an inculpatory statement she made to officers during the stop prior to her arrest; and (2) she argues that the trial court erred in denying her motion to dismiss the charges based on an insufficiency of evidence to prove that she was in constructive possession of the heroin. For the reasons set forth below, we find no error.

A. Denial of Defendant's Motion To Suppress Her Statement

Defendant argues that the trial court erred in allowing testimony concerning a lie she told the officers during the stop before being given her *Miranda* rights; specifically, she stated that she did not know the person she was riding with in the

car, who was her own son. We conclude that Defendant was not under arrest for purposes of *Miranda* when she made her inculpatory statement; and, therefore, we find no error in the trial court's denial of her motion to suppress the statement.

Here, Defendant made her inculpatory statement after officers began searching the vehicle and had placed her son under arrest. She had not been placed under arrest or otherwise been restrained when she made her statement. Specifically, the evidence tends to show that several uniformed officers were in the vicinity of her truck at the time and that one of them asked her to stand behind the tailgate. Another officer conducted a K-9 search of the truck and was alerted to the presence of drugs. Defendant was not handcuffed and was not informed that she was under arrest. It was at this time that Defendant made her inculpatory statement to the officer standing near, a false statement to the effect that she did not know the identity of the other occupants of the truck, which included her son. Based on these facts, Defendant may have been subject to a "seizure" for purposes of the Fourth Amendment; however, she was not "in custody" for purposes of *Miranda* under the Fifth Amendment.

The Fifth Amendment guarantees the criminally accused protection from compelled self-incrimination. U.S. Const. amend. V. The United States Supreme Court in *Miranda v. Arizona*, held that the criminally accused must be warned of their the Fifth Amendment right against self-incrimination prior to initiation of

custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 498 (1966). "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or is *otherwise deprived of his freedom of action in any significant way*." *Miranda*, 384 U.S. at 444 (emphasis added). To determine whether *Miranda* warnings were required in a given situation, the court must first determine whether or not the defendant was "in custody" at the time the statement was made. *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 827 (2001); *see also State v. McNeill*, 349 N.C. 634, 644, 509 S.E.2d 415, 421 (1998); *State v. Gregory*, 348 N.C. 203, 207-08, 499 S.E.2d 753, 757 (1998); *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997); *State v. Daughtry*, 340 N.C. 488, 506-07, 459 S.E.2d 747, 755 (1995).

The "restraint on freedom of movement" test required for *Miranda* custodial situations is distinct from the "free to leave" test, applied for Fourth Amendment "seizure" evaluation. *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. Under the "free to leave" Fourth Amendment test, the court conducts an objective inquiry as to whether a reasonable person would have felt free to leave or terminate the encounter. *Id.*; *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (stating examples of circumstances that might indicate a seizure). Under the facts of this case, Defendant was unquestionably "seized" for purposes of the Fourth Amendment.

However, "the appropriate inquiry in determining whether a defendant is 'in custody' for purposes of *Miranda* under the Fifth Amendment, our inquiry is based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. It is an objective test, evaluated from the perspective of a reasonable person in the defendant's position asking whether he "would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992).

Here, because Defendant's inculpatory statement was made *prior* to formal arrest or the administration of *Miranda* warnings by officers, Defendant's motion to suppress should have been granted only if a reasonable person in Defendant's position would believe that her freedom of movement had been restrained to a degree commensurate with formal arrest. Applying this standard, the Supreme Court has held that while traffic stops curtail a motorist's freedom of movement, standing alone, they do not impair free exercise of defendant's privilege against self-incrimination. *Berkemer v. McCarty*, 468 U.S. 420, 438-442 (1984). Our courts have been persuaded that defendants' freedom of movement is sufficiently restrained as to render them "in custody" for purposes of *Miranda* when they are handcuffed, placed in patrol cars, and questioned by police. *See In re L.I.*, 205 N.C. App. 155, 160, 695 S.E. 2d 793, 798

(2010); *State v. Crudup*, 157 N.C. App. 657, 659, 580 S.E.2d 21, 24 (2003); *State v. Johnson*, 154 N.C. App. 500, 501, 572 S.E.2d 438, 440 (2002).

Conversely, our courts have routinely found a defendant's freedom of movement insufficiently restrained to amount to "custody" for purposes of *Miranda* in situations that are arguably more "coercive" then the facts before us. *See State v. Garcia*, 358 N.C. 382, 390-91, 597 S.E.2d 724, 733 (2004) (finding insufficient restriction of freedom of movement to amount to "custody" during stationhouse interview where defendant had been frisked, escorted in police cruiser, engaged in polite conversation with officers, seated in unlocked interview room, and was not handcuffed); *State v. Gaines*, 345 N.C. 647, 658-63, 483 S.E.2d 396, 402-05 (1997) (finding insufficient restriction of freedom of movement to amount to "custody" during stationhouse interview where defendant was informed he was not under arrest, was not handcuffed, was offered food, and officer failed to answer whether or not defendant was free to leave); *State v. Waring*, 364 N.C. 443, 471, 701 S.E.2d 615, 633 (2010) (defendant not in custody during voluntary stationhouse interview where defendant was informed he was not under arrest, was not handcuffed, was permitted bathroom breaks, was left alone in interrogation with door unlocked, and was not threatened). We, therefore, conclude that Defendant was not "in custody" for purposes of *Miranda*.

B. Denial of Defendant's Motion to Dismiss

Defendant's final argument is that the trial court committed reversible error in denying her motion to dismiss the charges because the State failed to present sufficient evidence that Defendant was in constructive possession of the heroin, that is, evidence of "other incriminating circumstances" linking Defendant with the heroin found in the truck. Officers had found the heroin hidden in soda cans located behind the driver's seat. We disagree and conclude that there was sufficient evidence from which the jury could conclude that Defendant was in constructive possession of the heroin found in the truck.

Constructive possession "occurs when a person lacks actual physical possession, but nonetheless has intent and power to maintain control over the disposition and use of the [controlled] substance." *Id.* (quoting *State v. Wilder*, 124 N.C. App. 136, 139-40, 476 S.E.2d 394, 397 (1996)). Without exclusive possession of the narcotics, "the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

The evidence tends to show that Defendant lacked exclusive possession of the heroin because it was surreptitiously concealed in a false soda can, and further concealed in a larger pack of sodas, in the rear of a vehicle occupied by three people. Thus, the State was required to present "other incriminating circumstances" from which the jury could infer that Defendant constructively possessed the heroin.

Considering the evidence in the light most favorable to the State, we conclude that the State presented sufficient evidence of "other incriminating circumstances" to allow the jury to infer that Defendant had constructive possession of the heroin found in the vehicle. Of significance is Defendant's inculpatory statement to police at the scene of the arrest that she was without knowledge of the identity of her traveling companions. After arrest, Defendant admitted that she was actually the mother of one of the occupants of the vehicle, and that she "believed she was brought along so it wouldn't look like anything was going on." These incongruent statements are unquestionably "incriminating circumstances" that would permit a reasonable juror to infer that Defendant had knowledge of what she and her companions were doing and her role in the operation.

Also, the evidence demonstrated that Defendant was in close proximity to the narcotics at all relevant times. The timeline of events included stopping at a grocery store, picking up two additional passengers, stopping at a fast food restaurant, following a known drug dealer, and riding to the end of a dead-end road to meet with the known drug dealer, all of which was observed by officers acting on the tip of an informant that such a drug deal was going to occur. Defendant was present in the vehicle, or drove it herself, during these events. The heroin was found in close proximity to Defendant's purse. *See State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991). Furthermore, an officer on the scene testified that prior to

the car being searched, defendant was "nervous acting and had very shallow fast breathing. She acted frantic and kept looking back at the truck." *See State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002) (nervous behavior around law enforcement).

Although a juror could draw inferences favorable to Defendant from the evidence, we must view the evidence in the light most favorable to the State. We conclude that the evidence was sufficient to sustain the jury's determination that Defendant was in constructive possession of the heroin found in the truck.

NO ERROR.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).