[Cite as *State v. Gradisher*, 2009-Ohio-6433.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24716
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BETH L. GRADISHER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CR-2008-04-1401

DECISION AND JOURNAL ENTRY

Dated: December 9, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Dennis Corrigan, a compliance agent for the Ohio Board of Nursing, and L.R. Mandi, an investigator for the Ohio Board of Pharmacy, questioned Beth Gradisher, a licensed practical nurse, about a complaint that had been filed against her. Following the interview, Mr. Mandi reported to the Summit County Sheriff's Department what Ms. Gradisher had told them. After the Grand Jury indicted her, Ms. Gradisher moved to suppress her statements. The trial court granted her motion because it determined the statements were the result of custodial interrogation and Messrs. Corrigan and Mandi had not given her *Miranda* warnings. The State has appealed, arguing that *Miranda v. Arizona*, 384 U.S. 436 (1966), does not apply because Ms. Gradisher was not in custody at the time of the interview. This Court reverses because a reasonable person in Ms. Gradisher's position would have felt free to terminate the interview and leave.

FACTS

{¶2} Mr. Corrigan called Ms. Gradisher regarding a complaint that had been filed against her and told her that he wanted to talk to her about her nursing license. They arranged to meet at a public library. Mr. Corrigan also invited Mr. Mandi to the meeting, but did not tell Ms. Gradisher that he would be there.

{¶3} It is not disputed that the meeting occurred in a small room that had glass walls on three sides. The door to the room was closed, but not locked. Ms. Gradisher sat on one side of a table closest to the door, and Mr. Corrigan and Mr. Mandi sat across from her. Both men asked questions during the interview, which lasted just under an hour. The men did not tell Ms. Gradisher that her presence was voluntary and did not administer *Miranda* warnings. During the interview, they told Ms. Gradisher that she would probably be charged with a crime and that her license would probably be suspended and offered leniency in exchange for additional information.

{¶4} Following the interview, Mr. Mandi gave his report to the sheriff's department. After Ms. Gradisher was indicted, she moved to suppress the statements she had made, arguing that "she was in 'custodial interrogation'" and had not received *Miranda* warnings. The trial court agreed that the interview was a custodial interrogation because of "[t]he threat of penalties by state authorities, in a closed door environment where there is no . . . evidence that [she] was informed that her appearance was voluntary, and no evidence that she was permitted to leave." The court also noted that Mr. Corrigan and Mr. Mandi had allowed the "interrogation to proceed under the guise of an administrative interview." It, therefore, granted the motion to suppress and ordered all evidence or testimony gained from the interview excluded at trial. The State has assigned one error regarding whether the court correctly granted the motion to suppress.

CUSTODIAL INTERROGATION

{¶5} A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8. A reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* But see *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8.

{¶6} "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). "The prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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 444.

{¶7} The State has conceded that the trial court's factual findings are supported by competent, credible evidence. It also has not argued that Mr. Corrigan and Mr. Mandi were not law enforcement officers or their agents. See *State v. Watson*, 28 Ohio St. 2d 15, 26 (1971) ("The Miranda requirements 'do not apply when admissions otherwise admissible are given to persons who are not officers of the law or their agents.'") (quoting *People v. Morehead*, 259 N.E.2d 8, 11 (Ill. 1970)). Instead, it has argued that *Miranda* warnings were not required because Ms. Gradisher was not in custody at the time of the interview.

{¶8} "[T]he touchstone of the Fifth Amendment is compulsion . . . ." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). "Custodial arrest is said to convey to the suspect a message that [s]he has no choice but to submit to the officers' will and to confess." *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984). "Moreover, custodial arrest thrusts an individual into 'an unfamiliar atmosphere' or 'an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner.'" *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 457 (1966)). "Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment." *Id.* "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Id.*

{¶9} "In order to determine whether a person is in custody for purposes of receiving *Miranda* warnings, courts must first inquire into the circumstances surrounding the questioning and, second, given those circumstances, determine whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave." *State v. Hoffner*, 102 Ohio St. 3d 358, 2004-Ohio-3430, at ¶27 (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). "Once the factual circumstances surrounding the interrogation are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry' of whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Id.* (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). "[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Beheler*, 463 U.S. at 1124 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). "[T]he only relevant inquiry is how a reasonable [person] in the suspect's

position would have understood [her] situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

{¶10} Although Ms. Gradisher was not told that her presence at the interview was voluntary, Mr. Corrigan and Mr. Mandi did not do anything during the interview to restrain her freedom of movement. The interview was held at a public library in a meeting room that had glass walls. The door of the room was unlocked. Ms. Gradisher was seated closest to the door and there was nothing preventing her from exiting the room at any time. The officials did not tell Ms. Gradisher that she could not leave and did not make any threats about what would happen if she did not answer their questions. They did not have firearms. While they told Ms. Gradisher that her license would probably be suspended and that she would probably be charged with a crime, they did not tell her that until after she made statements suggesting that she had committed a crime. They also never told her that she was under arrest.

{¶11} Having reviewed the totality of the circumstances, this Court concludes that a reasonable person in Ms. Gradisher's position would not have felt as if she "was not at liberty to terminate the interview and leave." *State v. Hoffner*, 102 Ohio St. 3d 358, 2004-Ohio-3430, at ¶27 (citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). Her freedom of movement was not restrained to "the degree associated with a formal arrest." *Id*. (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). The trial court, therefore, incorrectly concluded that Mr. Corrigan and Mr. Mandi had to give her *Miranda* warnings before speaking with her.

{¶12} In its decision, the trial court also concluded that the officials had violated Section 9.84 of the Ohio Revised Code. That section provides, in part, that "any person appearing as a witness before . . . any representative of a public official, department, board, bureau, commission, or agency, in any administrative or executive proceeding or investigation . . . shall

be permitted to be accompanied, represented, and advised by an attorney . . . . The witness shall be advised of the right to counsel before the witness is interrogated." As the trial court recognized, however, "[i]t is well settled in Ohio that courts ordinarily will not apply the exclusionary rule to evidence that is the product of a statutory violation falling short of a constitutional violation, unless the legislature specifically mandates such exclusion." *Fairborn v. Mattachione*, 72 Ohio St. 3d 345, 346 (1995). Because Section 9.84 does not specifically mandate exclusion of evidence, the court correctly concluded that Ms. Gradisher's statements could not be suppressed solely for a violation of that section. Accordingly, because the failure to tell Ms. Gradisher about her right to counsel did not rise to the level of a constitutional violation, the court should have denied her motion to suppress. The State's assignment of error is sustained.

CONCLUSION

{¶13} The trial court incorrectly granted Ms. Gradisher's motion to suppress. The judgment of the Summit County Common Pleas Court is reversed.

Judgment reversed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, J.
DISSENTS, SAYING:

{¶14} I respectfully dissent. The U.S. Supreme Court held in *Miranda v. Arizona* (1966), 384 U.S. 436, 444, that "the prosecution may not use statements * * * stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." See also *Moran v. Burbine* (1986), 475 U.S. 412, 420 (*Miranda* warnings are grounded in the Fifth Amendment's prohibition against self-incrimination). *Miranda* warnings are not required any time an individual is in custody, only when he or she is subject to "custodial interrogation." *State v. Mason* (1998), 82 Ohio St.3d 144, 153, citing *Berkemer v. McCarty* (1984), 468 U.S. 420, 435.

{¶15} The *Miranda* Court defined custodial interrogation as a situation in which the defendant is questioned while in "custody or is otherwise deprived of his freedom of action in

any significant way." *Miranda*, 384 U.S. at 444. See, also, *State v. Prunchak*, 9th Dist. No. 04CA0070-M, 2005-Ohio-869, at ¶26, quoting *California v. Beheler* (1983), 463 U.S. 1121, 1125 (Custody for *Miranda* purposes occurs when restraint on freedom of movement rises to a level associated with a formal arrest.). In determining whether Gradisher experienced a restraint on her freedom of action, and hence was in custody, the relevant inquiry is whether under the totality of the circumstances, a reasonable person in Gradisher's position would have believed he or she was not free to leave. *Berkemer v. McCarty* (1984), 468 U.S. 420, 442. See also *State v. Gumm* (1995), 73 Ohio St.3d 413, 429, quoting *United States v. Mendenhall* (1980), 446 U.S. 544, 554 ("In judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a 'reasonable person would have believed that he was not free to leave.'"). Thus, the trial court "must examine 'all of the circumstances surrounding the interrogation' and determine 'how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.'" *Yarborough v. Alvarado* (2004), 541 U.S. 652, 663, quoting *Stansbury v. California* (1994), 511 U.S. 318, 322, 325.

{¶16} As stated by the majority, review of a motion to suppress, presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. When considering the motion to suppress, the trial court sits as the trier of fact and is in the best position to resolve factual questions and evaluate the credibility of the witnesses. Id. Thus, the appellate court must accept the trial courts findings of fact if they are supported by competent, credible evidence. Id. In this appeal, the State has acknowledged that the record contains competent, credible evidence in support of the trial court's factual findings.

{¶17} Upon review of the record, the trial court's unchallenged factual findings support its conclusion that a reasonable person in Gradisher's position would not have felt free to leave

the interrogation. The record reveals that Gradisher received a phone call from agent Corrigan who asked to meet her to discuss the complaint of the nursing board. Corrigan could not recall if he had told her that her appearance was strictly voluntary. Although she was told she would be meeting with agent Corrigan, Gradisher arrived to find two men and not one. Both agents questioned her extensively in a closed room at a public library. The trial court found that there was a "blatant misrepresentation" of the nature of the hearing. Gradisher was not informed that she would be questioned about having committed criminal offenses. Although the agent's initial suggestion that the purpose was administrative in nature, the entirety of the questioning reveals otherwise. At the commencement of the questioning, agent Corrigan told Gradisher that he was going to review the complaint with her, suggesting that the nature of the interview was to simply inform her of the contents of the complaint and the administrative process that might follow. However, agents Corrigan and Mandi quickly shifted the focus to asking questions concerning potential felonies that Gradisher might have committed. These questions were designed to obtain criminally incriminating admissions. Neither agent fully disclosed their prior interactions with the police and both agents confronted Gradisher with incriminating evidence and informed her that that they believed that she had committed multiple felonies. It was not until the end of the questioning that the agents told Gradisher that they were going to turn over the information that they had obtained to the police and that Gradisher would be criminally charged.

{¶18} The trial court correctly found that Agent Mandi threatened Gradisher with criminal prosecution and leniency. In the early stages of the questioning, agent Mandi told Gradisher: "Just to let you know I am now. I am from the Board of Pharmacy and I am going to charge you." He also threatened adverse consequences in the event that Gradisher was not being truthful. He also stated: "I'm willing to work with you if you are able to help me out." The tape

of the proceedings indicates that within sixteen minutes of the questioning, the questioning became progressively more aggressive aided by Mandi's participation. The trial court found that Gradisher was never told that the she could leave. This finding is confirmed by the tape recording as neither agent told Gradisher that her presence was voluntary, nor was she ever told that she could leave.

{¶19} The trial court also found that Corrigan told Gradisher that the Tallmadge police "should have done something * * * they were kind of pushing it off onto us." Both agents were already aware that there was a criminal complaint pending before the interview and the agents were "investigating what was already known to be a potentially criminal matter."

{¶20} At the suppression hearing, Gradisher stated that she did not feel free to leave and that she felt that she was going to be arrested. She stated that the agents were threatening criminal prosecution. She also stated that she was scared and described the agents as very intimidating. She also stated that she felt as though she had to speak to them. There is nothing in the record indicating that Gradisher had any prior experience with any state board nor any prior experience with law enforcement. While the inquiry at hand is an objective one, the trial court could properly evaluate how Gradisher actually perceived her situation, when evaluating whether a reasonable person under the circumstances would have felt free to simply terminate the questioning and leave the room.

{¶21} Based upon the undisputed factual findings, the trial court determined that Gradisher had been subjected to a custodial interrogation. In examining the totality of the circumstances, I cannot find that the trial court committed reversible error in determining that a reasonable person would not have felt free to leave. There is no evidence that establishes that Gradisher was told either on the telephone or in person that her appearance was voluntary. Nor

was she ever told that she was free to decline the questioning or leave the room. Gradisher was in a closed room with two men. Shortly into the questioning, agent Mandi introduced himself and immediately told Gradisher that he was going to "charge" her, thereby reinforcing a reasonable belief that the agents had the power to arrest her. During the questioning, both agents make clear to Gradisher that they believe that she has committed multiple felony offenses while at the same time the agents indicate that if she cooperates there will be leniency. Under these circumstances, I cannot conclude that the trial court erred in finding that a reasonable person in Gradisher's position would not have felt free to simply terminate the questioning and leave.

{¶22} The majority places much emphasis on the fact that neither agent did anything to physically restrain Gradisher so as to prevent her from leaving the room. Furthermore, the door to the room was unlocked. I feel that such emphasis misses point of the inquiry. The issue is not whether the agents actively prevented Gradisher from leaving, rather it is whether a reasonable person in Gradisher's position would have felt she could leave without hindrance. See *United States v. Jacobs* (C.A.3, 2005), 431 F.3d 99, 106-07 ("[T]he test for custody is not whether the police in fact let a suspect leave *at the end* of the questioning without hindrance. Rather, it is whether, under the circumstances, a reasonable person *would have believed* that *during* the questioning he or she could leave without hindrance."). (Emphasis in original.) Thus, just because Gradisher was allowed to leave at the end of the questioning, does not mean that a reasonable person under the circumstances would have actually felt free to leave during the questioning. Here, Gradisher was told early into the questioning that she would be "charge[d]." Gradisher was repeatedly told that she had committed multiple felonies and the agents made many statements indicating that they had power and authority over her: if she cooperated, the agents could offer leniency, if she did not cooperate, there would adverse consequences. This

conduct was not only coercive, but also would lead a reasonable person to believe that he was not free to leave.

{¶23} Although not dispositive of this case, the trial court also expressed a concern that government agents should not pose as "straw men" in order to effectuate police investigations. The extent of the interaction of the agents and the police was not fully explored at the suppression hearing. However, one of the agents specifically stated that the Tallmadge police were "pushing [the investigation] off onto us." In light of that admission, there is good reason to be concerned that in some cases government overreaching could easily occur by pushing off criminal investigations to state agents so as to bypass the protection against the abridgement of an individual's Fifth Amendment rights.

APPEARANCES:

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN DIMARTINO, assistant prosecuting attorney, for appellant.

EDMUND M. SAWAN, attorney at law, for appellee.