

[Cite as *State v. Harris*, 2002-Ohio-5141.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2001-12-098
 :
 -vs- : O P I N I O N
 : 9/30/2002
 :
 MASON A. HARRIS, JR., :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM COMMON PLEAS COURT

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, OH 45103-3033, for plaintiff-appellee

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 S. Main Street, Batavia, OH 45103, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Mason Harris, appeals the decision of the Clermont County Common Pleas Court denying his motion to suppress certain incriminating statements. We affirm the trial court's decision.

{¶2} In April 2000, police detectives Pete Ballauer and

Jeff Gearhart of the Union Township Police Department interviewed appellant at the Hamilton County Justice Center. Appellant was being detained there on another charge. The detectives questioned appellant in an interview room at the justice center. During the interview, the detectives asked appellant about several recent burglaries committed in Clermont County.

{¶3} Detective Ballauer first questioned appellant for approximately seven to ten minutes. Detective Ballauer did not inform appellant of his Miranda rights because, according to Detective Ballauer, he was attempting to establish a rapport with appellant. Appellant did not make any incriminating statements to Detective Ballauer.

{¶4} Detective Gearhart then questioned appellant. Prior to questioning appellant, Detective Gearhart informed appellant of his Miranda rights. At the suppression hearing, Detective Gearhart testified that he could not recall whether he asked appellant if he understood his Miranda rights. Detective Gearhart testified that he did not ask appellant if he wished to "waive" or "give up" his Miranda rights.

{¶5} Appellant eventually confessed to his involvement in two of the incidents the detectives were investigating. According to appellant, he was attempting to break into women's homes so he could covertly "watch" them. Appellant talked at length with the detectives about his background and his sexual urges to "watch" women. The detectives described the tone of

the interview as "polite," "cordial," and conversational. Appellant denied responsibility for a third incident the detectives were investigating. The entire length of the interview was one and a half hours.

{¶6} In July 2000, appellant was indicted for burglary in violation of R.C. 2911.12(A)(1), a second degree felony, and attempted burglary in violation of R.C. 2923.02(A), a third degree felony.

{¶7} In February 2001, appellant filed a motion to suppress with the trial court. In his motion, appellant argued that the statements he made to the detectives concerning the burglaries were obtained in violation of Miranda v. Arizona (1966), 384 U.S. 436, 86 S.Ct. 1602. According to appellant, because he did not waive his Miranda rights, the trial court should have suppressed the statements. The state argued that the requirements of Miranda were not triggered because, though appellant was being interrogated, he was not "in custody." Even if appellant was in custody, the state argued that appellant's behavior at the interview constituted an implied waiver of his Miranda rights.

{¶8} The trial court denied appellant's motion to suppress. The trial court found that appellant was in custody. However, the trial court found that, given all the surrounding circumstances, appellant's behavior at the interview constituted an implied waiver of his Miranda rights. Appellant then pled no contest to the charges. The trial court convicted

appellant of both charges and sentenced him accordingly.

{¶9} Appellant now appeals, assigning one error.

Appellee, the state, cross-appeals, also assigning one error.

Appellant's Assignment of Error

{¶10} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WRITTEN AND/OR ORAL."

{¶11} Under his assignment of error, appellant argues that the state did not prove appellant's waiver of his Miranda rights.

{¶12} When reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's findings if they are supported by competent, credible evidence, State v. McNamara (1997), 124 Ohio App.3d 706, 710, and relies upon the trial court's ability to assess the credibility of witnesses. State v. Anderson (1995), 100 Ohio App.3d 688, 691.

An appellate court, however, reviews de novo whether the trial court applied the appropriate legal standard to the facts. Id.

{¶13} It is settled law that a Miranda waiver need not be expressly made in order to be valid. State v. Murphy, 91 Ohio St.3d 516, 518, 2001-Ohio-112, citing North Carolina v. Butler (1979), 441 U.S. 369, 373, 99 S.Ct. 1755; see, also, State v. Crittenden (Nov. 19, 2001), Clermont App. No. CA2001-04-045, 2001-Ohio-8665. A court may infer a waiver from the suspect's behavior, viewed in light of all the surrounding circumstances. Murphy at 518.

{¶14} Detective Gearhart testified at the suppression hear-

ing that he read appellant his Miranda rights. Both detectives testified that appellant understood English. After appellant was read his Miranda rights, he spoke in detail about his involvement in two of the incidents being investigated. Both incidents involved appellant entering women's homes in order to covertly "watch" them. Appellant specifically denied responsibility for a third incident.

{¶15} Appellant also provided the detectives with information about his background. He stated where and with whom he was living, where he grew up, and where he worked. He said that he did not want to become like his father, who was incarcerated for rape. Appellant claimed that he was the product of one of his father's rapes.

{¶16} Appellant spoke candidly to the detectives about his sexual urges to "watch" women. He told Detective Gearhart that he wanted help for his "problem." Detective Gearhart informed him about 12-step programs designed to redirect sexual urges. Appellant stated that he did not feel sorry for the women he "watched" because he was not physically harming them. Appellant noticed that the detectives were wearing wedding rings, and asked them how they could be involved with just one woman.

{¶17} Detective Ballauer testified that the tone of the interview was "polite" and "cordial." Detective Gearhart testified that everyone remained seated and that their voices "never rose to argument." Both detectives testified that appellant

was not deprived of food, water, or a restroom break during the hour and a half interview. At no time did appellant ask to stop the questioning or ask for an attorney. Detective Gearhart testified that appellant appeared to speak freely. He also testified that no one made any promises of preferential treatment to appellant if he told them the truth.

{¶18} Based on the testimony in the record and all the surrounding circumstances, we find that the state proved appellant's knowing, voluntary, and intelligent waiver of his Miranda rights. Though he did not expressly waive his Miranda rights, the detectives' testimony showed that appellant's behavior constituted an implied waiver of his Miranda rights. After being informed of his Miranda rights, appellant spoke freely and extensively about his background and his involvement in the crimes being investigated. Appellant even spoke in detail about the nature of his sexual urges to "watch" women, and other matters only tangentially related to the crimes. It is apparent from the record that appellant was providing the detectives with information of his own free will and with an understanding of the consequences. Additionally, nothing in the record indicates that the detectives used improper questioning tactics or that the interview was otherwise coercive.

{¶19} We agree with the trial court that the better police practice is to obtain an express waiver. While not guaranteeing the validity of a waiver, an express written or

oral statement waiving Miranda rights is strong proof of the validity of the waiver. See Butler, 441 U.S. at 373.

Nevertheless, considering all the surrounding circumstances in this case, we find that appellant's behavior at the interview constituted an implied waiver of his Miranda rights.

Appellee's Cross-Assignment of Error

{¶20} "THE TRIAL COURT ERRED IN HOLDING THAT THE DEFENDANT WAS IN CUSTODY FOR PURPOSES OF THE MIRANDA RULE."

{¶21} Under its cross-assignment of error, the state argues that appellant was not "in custody" when the detectives interrogated him.

{¶22} Due to our resolution of appellant's assignment of error, the state's cross-assignment of error is now moot. Even if appellant was "in custody," he impliedly waived his Miranda rights. Thus, the trial court did not err in denying appellant's motion to suppress.

Judgment affirmed.

YOUNG, J., concurs.

WALSH, P.J., concurs in part and dissents in part.

WALSH, P.J., concurring in part and dissenting in part.

{¶23} Although I agree with the majority's resolution of appellant's assignment of error, I disagree with the conclusion that this resolution renders the state's cross assignment of error moot. I would reverse the trial court's decision finding that appellant was in custody, and thus write separately to ad-

dress the issue raised in the state's cross appeal.

{¶24} It is well-established that, before a suspect may be subjected to a custodial interrogation, he must be advised of his rights under Miranda v. Arizona (1966), 384 U.S. 436, 467-471, 86 S.Ct. 1602. The state contends that notifying appellant of these rights was not required because appellant was not the subject of a custodial interrogation. The trial court concluded otherwise, finding that "one who is in custody may not be questioned regarding a separate offense without being advised of the Miranda warnings."

{¶25} Custodial interrogation consists of "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. A person is considered in custody for purposes of Miranda when he is placed under formal arrest or his freedom of action is restrained to a degree associated with a formal arrest. Minnesota v. Murphy (1984), 465 U.S. 420, 434, 104 S.Ct. 1136. When determining whether an individual is in custody, the relevant inquiry is whether a reasonable person in the individual's position would have believed that he or she was not free to leave given the totality of the circumstances. Berkemer v. McCarty (1984), 468 U.S. 420, 442, 104 S.Ct. 3138; State v. Gumm, 73 Ohio St.3d 413, 429, 1995-Ohio-24.

{¶26} However, this "freedom to leave" analysis is inapplicable when questioning individuals such as appellant who are

already in prison, because they are obviously not free to leave in the usual sense. See State v. Bradley (Sept. 22, 1987), Scioto App. No. 1583 citing Cervantes v. Walker (C.A.9, 1978), 589 F.2d 424, 427-428; United States v. Conley (C.A.4, 1985), 779 F.2d 970, 972-973; United States v. Ozuna (C.A.6, 1999), 170 F.3d 654, 658 n. 3. In such cases, courts require Miranda warnings if there is any "change in the surroundings of the prisoner which results in an added imposition on his freedom of movement." Cervantes at 428; Conley at 973. The majority of Ohio courts that have addressed this issue have followed that reasoning. See Bradley; State v. Simpson, Franklin App. No. 01AP-757, 2002-Ohio-3717; State v. Peeples (1994), 94 Ohio App.3d 34, 41-42; State v. Farrell (1999), Miami App. No. 99-CA-24; but, see, State v. Holt (1997), 132 Ohio App.3d 601, 606.

{¶27} I agree with the majority of Ohio courts which conclude that Miranda warnings must be given to individuals in prison before questioning only when there is some added restriction on the prisoner's already restricted freedom. To hold otherwise would require Miranda warnings whenever a prisoner is questioned, regardless of the circumstances. See Simpson. Such a rule would give a prisoner greater rights than the prisoner would have were he or she not in prison. Therefore, I reject the contention that appellant was in custody for purposes of Miranda merely because he was incarcerated.

{¶28} The need to provide Miranda warnings prior to a custodial interrogation of a person already jailed, should, under conventional logic, be linked to the charges that gave rise to the interrogation, not to an unrelated charge. The question of whether the person being interrogated is under additional custody of the questioning officers, for Miranda purposes, should be answered by utilizing the analysis espoused in Cervantes, 589 F.2d at 427-428. In determining whether there was some additional restriction on a prisoner's freedom, thus requiring that questioning officers provide Miranda warnings, the Cervantes court considered four factors: (1) the language used to summon the individual; (2) the physical surroundings of the interrogation; (3) the extent to which he is confronted with evidence of his guilt; and (4) the additional pressure exerted to detain him. Id. at 428.

{¶29} In the present matter, the conversation was held in an interview room within the jail. Appellant was seated across a rectangular table from the officers. He was not denied food, water, or restroom breaks. The exchange was described as cordial and conversational, without any threatening or intimidating language. It does not appear from the record that appellant was placed under any additional restriction of his freedom during the interview, nor was the conversation unduly coercive. Accordingly, I conclude that appellant was not in custody for purposes of Miranda, when he spoke with the police officers and, therefore, was not entitled to Miranda warnings

before he was questioned.

{¶30} Because I agree with the majority's resolution of appellant's assignment of error, but would address and sustain the state's assignment of error, I respectfully concur in part and dissent in part.