

AFFIRM; and Opinion Filed December 20, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-01136-CR

**ALBERT AYALA, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 292nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1470946-V**

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Boatright

A jury convicted Albert Ayala of aggravated sexual assault and assessed punishment at life imprisonment. In two issues, Ayala challenges the admissibility of a police interview recording, and the constitutionality of some of the court costs assessed against him. We affirm the trial court's judgment.

BACKGROUND

Complainant E.P. was sexually assaulted while waiting at a bus stop. The police took her to Parkland Hospital for a sexual assault examination, and forensic testing on vaginal swabs from her sexual assault kit tested positive for semen. A forensic biologist at Southwestern Institute of Forensic Sciences (SWIFS) determined that the swab contained a mixture of DNA from two individuals—male sperm cells and female epithelial cells. Some years later, Dallas Police

Department detectives identified Ayala as a probable match to the DNA profile generated from E.P.'s swab. Ayala was in prison for a different conviction so Detectives Katrina Ahrens and Abel Lopez went to the prison to interview Ayala about the assault on E.P. and to execute a warrant for a sample of Ayala's DNA. A buccal swab from Ayala's cheek was submitted to SWIFS for analysis, Ayala's DNA profile matched the DNA profile of the male contributor on E.P.'s vaginal swab, and Ayala was indicted for aggravated sexual assault. The jury convicted him of the crime and sentenced him to life in prison. This appeal followed.

DISCUSSION

A. Admissibility of Recorded Interview

Ayala's first issue concerns the admissibility of the recording of his prison interview with Detectives Ahrens and Lopez. During trial, the State sought to admit three excerpts from the recorded interview (State's Exhibit 37). Defense counsel objected that the recording was inadmissible as a custodial interview in violation of Ayala's rights under the Fifth Amendment, Eighth Amendment, and article 38.23. The trial court overruled Ayala's objection and allowed the jury to hear the recording excerpts.

A trial court's ultimate custody determination presents a mixed question of law and fact. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). We review the trial judge's determination under an abuse of discretion standard giving almost total deference to the trial judge's determination of historical facts and any mixed questions of law and fact that depend on witness credibility, while reviewing de novo pure questions of law and mixed questions that do not depend on credibility determinations. *State v. Saenz*, 411 S.W.3d 488, 494 (Tex. Crim. App. 2013). When, as in this case, the trial court has not issued written findings of fact, we assume that "the trial court implicitly resolved all issues of historical fact and witness credibility in the light most favorable to its ultimate ruling." *Id.* at 495, n.4.

The constitutionally required warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), and the warnings mandated by article 38.22 of the code of criminal procedure, are intended to safeguard a person's privilege against self-incrimination during custodial interrogation. *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009). Unwarned statements obtained as a result of custodial interrogations may not be used as evidence by the State in its case-in-chief. *Herrera*, 241 S.W.3d at 525. The defendant bears the initial burden of proving that a statement was the product of custodial interrogation. *Id.* at 526.

A person is in "custody" only if, under the circumstances, a reasonable person would believe his freedom of movement was restrained to the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 322 (1994); *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). And not all restraints on freedom of movement constitute custody. "Imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*." *Howes v. Fields*, 565 U.S. 499, 511 (2012); *see also Herrera*, 241 S.W.3d at 531 (incarceration does not always constitute "custody" for *Miranda* purposes when inmate is questioned by law enforcement about unrelated offense). In *Howes*, the United States Supreme Court considered a petition for habeas corpus relief in which a prisoner argued he was subjected to custodial interrogation without being given *Miranda* warnings while serving a jail sentence for an unrelated offense. The Supreme Court declined to focus solely on freedom of movement, and instead it asked whether the relevant environment presented the same inherently coercive pressures as the type of station-house questioning at issue in *Miranda*. *Howes*, 565 U.S. at 509. The Supreme Court opined that when a prisoner is questioned, "the determination of custody should focus on all of the features of the interrogation." *Id.* at 514. Relevant factors may include the location of the questioning, its duration, the language used in summoning the suspect to the interview, the manner in which the interview is conducted, statements made during the interview, whether the suspect was in restraints

during questioning, and the release of the suspect at the conclusion of the interview. *Id.* at 509, 514.

Focusing on the features of Ayala's interrogation, the record reveals that Ayala did not invite the interview or consent to it in advance. The interview took place in an office area near the front of the prison, in a conference room with a table and chairs. The detectives were already in the room when Ayala was brought in. The detectives wore badges and introduced themselves; they were not armed. Although Ayala's appellate brief states several times that he was "possibly in shackles," Detective Lopez testified he did not recall Ayala being in shackles, and there is nothing in the record to indicate Ayala was physically restrained. Ayala was not given *Miranda* warnings, nor was he advised that he did not have to speak with the detectives. About three minutes into the interview, Detective Ahrens told Ayala that he was meeting with them voluntarily, he did not have to speak to her, and he was free to leave the interview at any time. Ayala stated that he understood. Ayala did not stop the interview or indicate his desire to leave the room. At times the detectives used sharp tones and even profanity. Although the interview lasted approximately thirty minutes, the last eight or nine minutes were devoted to executing the search warrant and obtaining Ayala's DNA sample.

Ayala first argues that the interview was custodial because he did not feel free to leave throughout the interview. He acknowledges being told he could leave the interview, but he contends he could not really leave because (1) he was in prison, and (2) a guard was posted in the doorway of the conference room. As discussed above, Ayala's imprisonment alone was not enough to make the interview custodial. *Howes*, 565 U.S. at 511. As for the guard, there is nothing in the record to suggest that a guard was posted in the doorway to keep Ayala from leaving the interview. Detective Lopez testified that Ayala was brought to the conference room. Detective Ahrens told Ayala that the guard was there to escort him back to his cell. Although Ayala was not free to leave

the conference room by himself, and he was not free to leave the prison, he would have been subject to these same restraints if he had been taken to the conference room for any other reason.

Ayala also argues that the interview was custodial because the detectives did not immediately tell him he was free to leave or terminate the conversation. Instead, they asked several questions before informing Ayala, about three minutes into the interview, that the interview was voluntary and he could leave any time. During those three minutes detectives did not ask Ayala questions about the assault. The State played an audio recording of only the first minute of the interview for the jury. In that recording, Ayala responded to questions about his Dallas residence, stating that he lived with his grandmother. He gave her name and address, and stated that no one else lived with them during a specified period of time. Ayala contends that his statement about his address was incriminating because it revealed that he lived near the bus stop where E.P. was assaulted. He argues that the interview was necessarily custodial because his statement about his address was made before he was told he could leave. However, Ayala provides no legal authority to support that argument, and we have found none. Instead, the fact that he gave his address and his grandmother's name before he was told he could leave is one feature of the interview that we will consider in determining whether the interview was custodial. *See Howes*, 565 U.S. at 514 (requiring consideration of all features of an interrogation).

Ayala also argues that the interview was custodial because late in the interview he was told he was not free to leave. The record does not support this argument. The detectives interviewed Ayala for approximately twenty minutes before executing their search warrant for his DNA. According to the evidence, the detectives told Ayala they had a warrant, he could not say no, and he could not refuse to give them a DNA sample. They did not tell him he could not leave or terminate the interview.

The evidence shows several factors weighing in favor of determining that the interview was custodial, including: (1) Ayala did not invite the interview or consent to it in advance; (2) the detectives questioned Ayala for three minutes before telling him he was free to terminate the interview and leave; (3) a guard was present in the doorway of the conference room; and (4) the detectives occasionally used a sharp tone or profanity in questioning Ayala. The evidence also shows several factors consistent with noncustodial interrogation, including: (1) before the detectives asked any questions about the assault of E.P., they told Ayala the interview was voluntary and that he did not have to talk to them; (2) the detectives told Ayala that he could leave and go back to his cell at any time; (3) the interview was in a conference room; (4) it lasted just twenty minutes; (5) the detectives were not armed; (6) Ayala was not physically restrained; and (7) he was told the guard was present to escort him back to his cell.

Of these factors, the most are important are (1) that Ayala was not told at the outset of his interrogation that he could leave, but (2) he was told later in his interrogation that he could leave. *Id.* at 515. The United States Supreme Court has not explained whether either of these factors is more important than the other. Nor has the Supreme Court held that either or both of these factors must be present in order for the interrogation to be custodial. It has simply held that the most important factor to consider in determining whether an interview was custodial is whether the defendant was informed at the outset and later in an interview that he could leave. *Id.* Accordingly, we will include both of these factors—that Ayala was not told at the outset of his interrogation that he could leave, but that he was told later that he could leave—in our effort to take into account all of the circumstances of the questioning. *Id.* at 517. When we do so, we see that the most important feature in determining whether an interview is custodial does not weigh against concluding that the interview was noncustodial, and that more factors weigh in favor of concluding that it was noncustodial.

We are also mindful of the fact that the Supreme Court in the *Howes* case held that the interrogation of (1) a shackled prisoner who (2) was questioned for seven hours and who (3) was never told that he was free to decline to speak to his (4) armed interrogators was noncustodial. *Id.* at 518–19. The dissent in *Howes* focused on those four factors and reasoned that they rendered the interrogation custodial. *Id.* at 519. None of those four factors is a feature of the interview in this case. Because the interview in this case bears fewer features of a custodial interrogation than did the interrogation which the Supreme Court held to be noncustodial in *Howes*, and because the interview in this case does not bear the features that the dissent in *Howes* found to be indicative of a custodial interrogation, we conclude that Ayala’s interview is noncustodial under *Howes*.

Having considered all of the circumstances of Ayala’s interview, we conclude that a reasonable person would have felt free to terminate the interview and leave. *Herrera*, 241 S.W.3d at 532. Accordingly, the trial court did not abuse its discretion in admitting excerpts of the recording of that noncustodial interview. We overrule Ayala’s first issue.

B. Court Costs

Ayala’s second issue concerns the court costs assessed against him that he argues are, in part, unconstitutional. The judgment assessed costs of \$539.00, including \$133.00 for consolidated court costs, a portion of which was statutorily allocated to the comprehensive rehabilitation and abused children’s counseling accounts. In his second issue, Ayala argues that he was charged fees that the court of criminal appeals’ *Salinas* opinion held constitutionally impermissible. The *Salinas* holding does not apply to this case because it is not a pending petition for review, and the legislature remedied the unconstitutional portion of the fees statute identified by *Salinas*. See TEX. LOC. GOV’T CODE § 133.102(3) (amended by Act of Apr. 27, 2017, 85th Leg. R.S., ch. 966, § 1 (effective June 15, 2017)); *Salinas v. State*, 523 S.W.3d 103, 113 (Tex. Crim. App. 2017). We overrule Ayala’s second issue.

CONCLUSION

Having resolved both of Ayala's issues against him, we affirm the trial court's judgment.

/Jason Boatright/

JASON BOATRIGT
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ALBERT AYALA, Appellant

No. 05-16-01136-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 292nd Judicial District
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Trial Court Cause No. F-1470946-V.

Opinion delivered by Justice Boatright.

Justices Lang-Miers and Brown
participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 20th day of December, 2017.