COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1820-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

JASEN DUANE DOSH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

MYSE, J. The State appeals an order denying its motion to reconsider a suppression ruling. The trial court suppressed evidence obtained after Jasen Duane Dosh was questioned regarding his knowledge of the location of firearms. The trial court concluded that Dosh was in custody at the time of the questioning, and that the failure to provide ***Miranda***[1] warnings required the

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

suppression of all evidence obtained resulting from Dosh's response. The State's first contention is that ***Miranda*** warnings were not required because the questions were asked before Dosh was in custody. Alternatively, the State contends that the evidence should not have been suppressed because it fell within a public policy exception to ***Miranda***, and also because it was sufficiently attenuated from the misconduct. Because this court concludes that the questions initially asked of Dosh were in violation of ***Miranda***, and further, that no exception to ***Miranda*** applies, the order is affirmed.

On the afternoon of October 15, 1996, an off-duty police officer at the River Falls Rifle Club called to report that he believed he was under fire after bullets began damaging things around him. Deputy Thomas Vandeberg responded to the call for assistance, but failed to see or hear any shots. Vandeberg then conferred with the officer about the source of the bullets, and drove to the residence closest to the spot from where the officer believed the bullets originated. The officer who made the call and several others approached the residence on foot.

As Vandeberg arrived at the driveway of the residence he saw four young people standing around a vehicle. Immediately Vandeberg crouched behind the door of his squad car, displayed his rifle, and said "police, hands up." The group, consisting of two young men and two young women, complied, and Vandeberg ordered the two men to the ground. All four were then patted down, either by Vandeberg or by the other officers. Vandeberg testified that the four would not have been allowed to leave the area if they desired.

At this point, Vandeberg began questioning the individuals. Vandeberg explained his presence, and after being told by the group that they had been target-practicing, asked whether any of those present had firearms. One

member of the group, Jeremy Sylvester, answered that he had a gun, and pointed it out to Vandeberg. Vandeberg picked up the gun, which was located next to the vehicle the group had been standing by when he initially saw them, and arrested Sylvester for a DNR violation. Vandeberg then asked whether anyone else had a gun, and Dosh replied that he had one in the trunk of his car.[2] Dosh was then permitted to get up off the ground and open his trunk. Vandeberg removed a cased gun, opened it, and saw a bullet in the chamber. Dosh was then arrested, also for a DNR violation. Vandeberg next searched the car and seized more ammunition.

Dosh was afterwards transported to the St. Croix County Jail. Once there, he was given ***Miranda*** warnings for the first time and interrogated concerning these events. Dosh then gave a statement acknowledging his possession of the rifle in question.

A hearing was later held to determine whether the questions asked by Vandeberg when he first approached the individuals amounted to a custodial interrogation, triggering the ***Miranda*** warnings. In addition to testifying to the facts described above, Vandeberg testified that he had kept the actions of the four individuals controlled at all times. The trial court concluded that the questioning near the vehicle violated ***Miranda***. The court further concluded that Dosh's station house statement, given after ***Miranda*** warnings were issued, was not sufficiently attenuated from the initial unlawful conduct. Accordingly, the court ordered the evidence suppressed. The State thereafter moved to reconsider, and the trial court affirmed its earlier suppression ruling. The State appeals.

[2] It is subject to dispute whether Vandeberg directed this question to Dosh alone, or to the three remaining youths as a group.

When reviewing a ***Miranda*** challenge, this court is bound by the trial court's findings of historical fact unless they are clearly erroneous; however, whether the defendant's ***Miranda*** rights were violated is a constitutional fact that is reviewed de novo. ***State v. Ross***, 203 Wis.2d 66, 79, 552 N.W.2d 428, 433 (Ct. App. 1996). When a trial court does not expressly make a finding necessary to support [a] legal conclusion, an appellate court can assume that the trial court made the finding in the way that supports its decision. ***State v. Echols***, 175 Wis.2d 653, 673, 499 N.W.2d 631, 636 (1993).

The State first contends that the trial court erred by concluding that ***Miranda*** warnings were required before Vandeberg could inquire about additional firearms. The State argues that Dosh was not in custody as required by ***Miranda***, even though it "readily concedes that a reasonable person in [Dosh's] place would not have thought he was free to leave." Rather, the State argues that the initial stop and questioning was more akin to a ***Terry***[3] stop, and that ***Miranda*** was not yet implicated.

Because ***Terry*** stops often involve a restriction on one's liberty, the State is correct in asserting that a restriction alone does not implicate ***Miranda***. At some point during the limited ***Terry*** stop and frisk, however, a suspect may become in custody for ***Miranda*** purposes. Discerning when this moment occurs involves a review of the totality of the circumstances. ***State v. Pounds***, 176 Wis.2d 315, 319-21, 500 N.W.2d 373, 376-77 (Ct. App. 1993). Ultimately, "'[t]he test is whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under

[3] ***Terry v. Ohio***, 392 U.S. 1 (1968).

the circumstances.'" ***Id***. at 321, 500 N.W.2d at 376 (quoting ***State v. Swanson***, 164 Wis.2d 437, 446-47, 475 N.W.2d 148, 152 (1991)).

This court concludes that the facts demonstrate a sufficient degree of restraint to require ***Miranda*** warnings prior to the questioning. Dosh had been ordered to the ground and frisked at gun point by several officers, and while not handcuffed, was within the total control of the officers. While in this position, and just moments after his friend was arrested, Dosh was questioned with respect to evidence in a crime in which he was suspected. Although there is no dispute that Vandeberg's initial ***Terry***-type stop was proper, he went beyond ***Terry*** after the group was subdued. The initial stop-and-frisk investigation had essentially informed Vandeberg that the group had been firing guns at the rifle range for target practice, that none of the group was in the possession of any weapons, and that the only weapon nearby had been recovered. At this point questioning the suspects about other guns could only have been an attempt to obtain incriminating evidence. The trial court concluded as much, and this factual finding is not clearly erroneous. This court therefore holds that the questions asked concerning additional firearms required ***Miranda*** warnings to have been given beforehand.

This court of course recognizes that the police are, and should be, accorded some latitude when acting out of concerns for the public and their own safety. *See* ***New York v. Quarles***, 467 U.S. 649, 657-659 (1984). But this is not such a case. Even though Vandeberg testified that his actions were prompted by safety concerns, the investigation disclosed that the shooting was by a group of young people aiming at targets and not at police officers,[4] and the police already

[4] The criminal complaint charges Dosh only with criminal damage to property, and not to firing upon the officer.

had complete control of the situation. Under these circumstances, ***Miranda*** warnings were required.

The State next argues that if this court concludes ***Miranda*** was violated, the evidence should not be suppressed because it falls within one of two exceptions. First, the State contends that the questioning falls within the "public safety" exception announced in ***Quarles***. In ***Quarles***, the Supreme Court created a limited public safety exception to the requirement that ***Miranda*** warnings be given before results of a custodial interrogation are admitted into evidence. ***Id***. at 655-56. In that case, officers pursued an armed rape suspect into a supermarket, and upon finding him, observed that his holster was empty. ***Id***. at 652. The suspect was asked where his gun was, and he pointed it out to the police and said, "the gun is over there." ***Id***. The Court determined that ***Miranda*** warnings were not required in that situation because of the danger the missing gun posed to the public safety, because the question asked was reasonably prompted by a concern for public safety, and because the question was not designed solely to elicit testimonial evidence. ***Id***. at 656-59.

The State also refers this court to ***United States v. Brady***, 819 F.2d 884 (9th Cir. 1987), in support of its argument that Vandeberg's questions fall within the public policy exception. In ***Brady***, a handcuffed suspect was asked whether he had a gun.[5] ***Id***. at 888. The court reasoned that this fell within the ***Quarles*** exception because the questions arose from a concern for public safety and a desire to control what was becoming a dangerous situation, for a crowd had

[5] There was apparently no factual basis for the officer to suspect that Brady might have had a gun.

gathered that included a knife-wielding suspected gang member, the neighborhood was rough, and it was getting dark. ***Id***.

This court does not agree that the ***Quarles*** exception applies to the situation at issue here. Unlike ***Quarles***, there was no suggestion that other guns might be present. Unlike both ***Quarles*** and ***Brady***, there was no hint of danger to the public. The only people present at the time of the confrontation were the armed police officers and the unarmed suspects. Given the fact that Vandeberg felt he was in total control of the situation, the questions asked could not have been posed for the purpose of gaining control of a dangerous situation. As already noted, questioning the suspects under these facts can only have been for the purpose of eliciting an incriminating response, and therefore ***Miranda*** warnings were required.

The State also argues that Dosh's jail house statement, which was obtained after a ***Miranda*** warning was administered, was sufficiently attenuated from any earlier violation and should not be suppressed. In attenuation cases, the "primary concern" is "whether the evidence objected to was obtained by exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint." ***State v. Anderson***, 165 Wis.2d 441, 447-48, 477 N.W.2d 277, 281 (1991). That ***Miranda*** warnings are given before a second statement is not itself sufficient to purge the statement of the prior illegality. ***Id***. at 448, 477 N.W.2d at 281. A court must also look to "the temporal proximity of the official misconduct and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct." ***Id***. In addition, a court should keep in mind that ***Miranda*** warnings given before a second round of questioning may be insufficient where the defendant has already "let the cat out of the bag." ***United States v. Perdue***, 8 F.3d 1455, 1468 (10th Cir. 1993).

In this case, the station house statement was taken within one hour of Dosh's arrest and his initial admission of ownership of the gun. The only events that occurred between the time of the misconduct and the giving of the statement were that Dosh was arrested, transported to the jail, given ***Miranda*** warnings, and immediately interrogated. This close proximity and lack of intervening circumstances supports a conclusion of insufficient attenuation. In addition, the misconduct was flagrant. The questions asked of Dosh, as explained above, were for the sole purpose of obtaining incriminating evidence. The questions were not, therefore, the product of a good faith error or an inadvertent omission.

The need to give ***Miranda*** warnings when conducting a criminal investigation has been the clear and unequivocal requirement of law enforcement officers since ***Miranda*** was decided in 1966. Although such warnings were given before Dosh's second admission was obtained, the close proximity to the first statement, particularly when Dosh had already "let the cat out of the bag," does not demonstrate sufficient attenuation.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.