COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2704-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN T. LADWIG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 DYKMAN, P.J. Brian T. Ladwig appeals from a judgment convicting him of possessing marijuana with intent to deliver, contrary to § 961.41(1m)(h)1, STATS. Ladwig argues that the trial court erred by not suppressing two statements he made while in police custody, but before he was

given ***Miranda*** warnings. He also asserts that the court should have suppressed a bag of marijuana the police found in a pickup truck at his residence because the search of the truck was prompted by one of his unwarned statements. Finally, he contends that the police exceeded the scope of his consent to search the truck when they allowed a police dog to damage it. We conclude that Ladwig's first statement should have been suppressed, but that the trial court was correct in not suppressing the second statement and the bag of marijuana. We also conclude that the police did not exceed the scope of the search. Because the trial court's decision not to suppress the first statement was harmless error, we affirm.

I. Background

¶2 At 11:58 a.m. on August 14, 1997, City of Monroe Police Officer Larry Keegan and ten other officers executed a search warrant at Ladwig's trailer home. Five members of the Monroe Emergency Response Team (ERT) knocked on Ladwig's door several times, announcing that they were police officers and had a search warrant. Receiving no answer, the ERT members entered the trailer and found Ladwig in a bedroom. They brought Ladwig, who was wearing only boxer shorts, out to the living room and handcuffed him. Officer Keegan and the other officers entered the trailer, and Keegan served the search warrant on Ladwig. At the time he served the warrant, Keegan, the five ERT members and the other five officers all had their guns drawn. After securing the residence, the ERT members left.

¶3 Keegan and the other five officers remained in the trailer to search for drugs. After serving the warrant, Keegan asked Ladwig if there were any drugs in the trailer and Ladwig replied, "No, not in the residence." A canine unit also entered the trailer to assist in the search. While the search was conducted,

one or two officers guarded Ladwig, and Ladwig provided information for a personal history form. The search lasted about twenty minutes and, although the dog alerted several times, the officers did not find any drugs in Ladwig's trailer.

¶4 Keegan then asked the canine officer to take the dog outside and run it around a pickup truck and car parked next to the trailer. While Ladwig remained in the living room, Keegan stepped outside and the canine officer told him the dog had alerted on the doors of the pickup truck. Keegan went back inside, but did not tell Ladwig that the dog had alerted on the truck. Ladwig stated, "What you're looking for is in the pickup truck." Keegan asked for consent to search the truck and, at about 12:52 p.m., Ladwig said they could search the truck as long as they did not damage it or let the dog near it. Ladwig also filled out a consent to search form, and Keegan told him that he had a right to refuse consent. Ladwig told Keegan that they would find what they were looking for in a plastic bag inside a paper sack underneath the driver's seat. Keegan opened the truck and the officers allowed the dog to sniff the interior. The dog alerted again, and Keegan found a plastic bag of marijuana under the seat where Ladwig said it would be. Keegan placed Ladwig under arrest for possession of marijuana with intent to deliver and possession of drug paraphernalia.

¶5 Keegan testified that Ladwig was not given any ***Miranda*** warnings until after he was arrested. Keegan also testified that Ladwig remained handcuffed until about an hour or an hour and fifteen minutes after the police first found him in the bedroom. Keegan said that Ladwig was never told that he was free to leave, and that, in fact, he was not free to leave. While all eleven police officers had their guns drawn when they entered the trailer, the record does not indicate whether or when they each put their guns back in their holsters. Keegan also stated that the canine may have scratched the driver's door and part of the

interior of the truck. Ladwig testified that he believed the dog scratched the paint on his truck, and that the glove box and emergency brake were also damaged.

¶6 Ladwig filed pretrial motions seeking to suppress any statements he made during the execution of the warrant, and to suppress the evidence found in the pickup truck. He argued that his statements were the result of a custodial interrogation before which he was not given any ***Miranda*** warnings. He also argued that the search was illegal because, when the officers allowed the dog to damage the truck, they exceeded the scope of his consent. The trial court denied the motions. It found that Ladwig's statement, "What you're looking for is in the pickup truck," was not in response to a custodial interrogation, but in response to the dog alerting to the truck. The court also explained that the search of the truck was valid because there was nothing demonstrating that the officers did not do their best to keep the truck from being damaged.

¶7 Ladwig entered a no contest plea and the State agreed to dismiss the charge of possessing drug paraphernalia. The court convicted him of possessing marijuana with intent to deliver. Ladwig appeals.

II. Analysis

*A. **Miranda** Issues*

¶8 Ladwig asserts that the trial court erred by not suppressing his statements "No, not in the residence," and "What you're looking for is in the pickup truck." Ladwig contends that admitting his two statements violated ***Miranda v. Arizona***, 384 U.S. 436 (1966), because they were the result of a custodial interrogation that was not preceded by ***Miranda*** warnings. He also argues that the police found the bag of marijuana in the truck because of his

second statement, and since he made the statement in violation of ***Miranda***, the marijuana should have been suppressed as well.

¶9 The State may not use statements made by a defendant during a custodial interrogation unless the defendant was given ***Miranda*** warnings. *See* ***State v. Armstrong***, 223 Wis.2d 331, 351, 588 N.W.2d 606, 615 (1999); ***State v. Pounds***, 176 Wis.2d 315, 320-21, 500 N.W.2d 373, 376 (Ct. App. 1993). The "police must read the ***Miranda*** warnings to any person who is both 'in custody' and under 'interrogation.'" ***Armstrong***, 223 Wis.2d at 352, 588 N.W.2d at 615 (quoting ***State v. Mitchell***, 167 Wis.2d 672, 686, 482 N.W.2d 364, 369 (1992)). A person is in custody for ***Miranda*** purposes "when he or she is 'deprived of his [or her] freedom of action in any significant way.'" ***Id.*** at 353, 588 N.W.2d at 616 (quoting ***Miranda***, 384 U.S. at 444). We must consider whether, under the totality of the circumstances, a reasonable person would have considered himself or herself to be in custody. *See* ***Pounds***, 176 Wis.2d at 321, 500 N.W.2d at 376. A person is under interrogation when that "person is 'subjected to either express questioning or its functional equivalent.'" ***Armstrong***, 223 Wis.2d at 356, 588 N.W.2d at 617 (quoting ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980)).

¶10 When we review a ***Miranda*** challenge, we may not overturn the trial court's findings of historical fact unless they are clearly erroneous. *See* ***State v. Ross***, 203 Wis.2d 66, 79, 552 N.W.2d 428, 433 (Ct. App. 1996). Whether, based on the historical facts, a person's ***Miranda*** rights were violated is a question of "constitutional fact" that we review de novo. *See* ***id.***

¶11 We conclude that Ladwig's statement, "No, not in the residence," should have been suppressed. Based on the totality of the circumstances, Ladwig was in custody when he made that statement and the statement, "What you're

looking for is in the pickup truck." At the time he made both statements, Ladwig was handcuffed in his living room in only his boxer shorts. Although the ERT members had left, six police officers, who had all entered Ladwig's trailer with guns drawn, remained at the scene. While the police conducted the search, one or two officers guarded Ladwig. Under those circumstances, a reasonable person would not have considered himself or herself free to leave. In addition, Ladwig's statement "No, not in the residence," was elicited by interrogation. Ladwig made the statement in response to Officer Keegan's question of whether there were any drugs in the trailer. Although the statement was exculpatory, it should have been suppressed because ***Miranda*** "excludes exculpatory, as well as inculpatory, statements where a suspect is under custodial interrogation." ***McClellan v. State***, 53 Wis.2d 724, 727, 193 N.W.2d 711, 714 (1972).

¶12 However, we also conclude that the trial court was correct in not suppressing Ladwig's statement, "What you're looking for is in the pickup truck." Although Ladwig made that statement while in custody, the trial court found that it was not in response to interrogation, but in response to the canine alerting on the truck. When a statement is volunteered and not elicited by interrogation, it is not subject to ***Miranda*** even if it is made while in custody. *See* ***Martin v. State***, 87 Wis.2d 155, 166, 274 N.W.2d 609, 613 (1979). Although Keegan did not tell Ladwig that the dog had alerted on the pickup truck, the trial court could reasonably infer: that Ladwig knew that the canine officer took the dog outside to have it check the vehicles; that Ladwig knew there was a bag of marijuana in the truck that would cause the dog to alert; and that Ladwig thus volunteered the location of the marijuana when Keegan came back in the trailer because he knew the police would find the marijuana whether he told them or not. Keegan argues that he did not volunteer the statement in response to the dog alerting, but instead

made the statement in response to Keegan's original question of whether there were drugs in the trailer. However, when more than one inference can be drawn from the facts, we must accept the inference drawn by the trial court as long as it is reasonable. *See* ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). The trial court's inference is based on a reasonable view of the evidence, and we will not upset its findings. Since Ladwig's statement was volunteered and not in response to interrogation, it was admissible.

¶13 Since the statement, "What you're looking for is in the pickup truck," was not made in violation of ***Miranda***, we will not consider Ladwig's argument that the bag of marijuana was derived from that statement and should have been suppressed as tainted by a ***Miranda*** violation.

B. Scope of Consent

¶14 Ladwig argues that, even if the bag of marijuana was not found based on a statement given in violation of ***Miranda***, it should have been suppressed because, when the police searched the pickup truck, they exceeded the scope of his consent. He asserts that he limited the scope of the search by conditioning his consent on the police not damaging the truck or allowing the dog near it. He contends that when the dog damaged the truck, the police exceeded the scope of the search. In addressing the scope of the search, we will not upset the trial court's findings of fact unless they are clearly erroneous, but the application of constitutional principles to these facts is a question of law that we review de novo. *See* ***State v. Stankus***, 220 Wis.2d 232, 238, 582 N.W.2d 468, 471 (Ct. App. 1998), *review denied*, 220 Wis.2d 366, 585 N.W.2d 158 (1998).

¶15 The police may conduct a search without a warrant if they obtain consent. *See* ***State v. Rogers***, 148 Wis.2d 243, 248, 435 N.W.2d 275, 277 (Ct.

App. 1988). A search conducted with consent is "constitutionally reasonable to the extent that the search remains within the scope of the actual consent." ***Id.*** Generally, the scope of a search is defined by its expressed object. *See* ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991). The United States Supreme Court explained:

> When an official search is properly authorized–whether by consent or by the issuance of a valid warrant–the scope of the search is limited by the terms of its authorization. Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers.

Walter v. United States, 447 U.S. 649, 656-57 (1980) (footnote omitted).

¶16 We conclude that Ladwig misconstrues the meaning of the scope of a search. A person can limit the scope of a search by limiting what can be searched, but not by limiting how the search is to be conducted. Perhaps Ladwig could have limited the scope of his consent by allowing the police to search the cab of the pickup truck, but not the glove compartment. But he did not do that. He consented to a search of the pickup truck, and the police remained within the scope of that consent. The fact that the officers may have inadvertently damaged Ladwig's truck did not render the search constitutionally unreasonable.

III. Conclusion

¶17 We have determined that Ladwig's statement, "What you're looking for is in the pickup truck," and the bag of marijuana the police found in the truck were admissible. We also determined that the statement, "No, not in the residence," should have been suppressed. However, we conclude that this error was harmless.

¶18 Under § 805.18(2), STATS., if the trial court improperly admitted evidence, we may not reverse unless the admission of the evidence "affected the substantial rights of the party seeking" reversal. A party's substantial rights are not affected by trial court error unless "there is a reasonable possibility that the error contributed to the conviction." ***Armstrong***, 223 Wis.2d at 368-69, 588 N.W.2d at 622 (quoting ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985)). In this case, there is no reasonable possibility that the failure to suppress the statement, "No, not in the residence," contributed to Ladwig's conviction. The trial court properly admitted Ladwig's other statement, which pointed the police to the location of the drugs, and properly admitted the drugs themselves. In the face of such evidence, it is improbable that, had the trial court suppressed his statement that he did not have any drugs in his residence, Ladwig would not have entered a plea or would not have been convicted.

¶19 The State filed a motion with this court to correct the record to include the search warrant because the State wished to argue that the warrant authorized a search of the pickup truck. We ordered the parties to submit letter-briefs on the issues involved. After reviewing the letter-briefs, we concluded that the issue required further legal analysis. We ordered the parties to brief, as one of the issues on appeal, whether the search warrant was made part of the trial court record. However, without addressing the issue of the search warrant, we have affirmed the judgment of the trial court. In light of our decision, we need not consider whether the search warrant should be a part of the record on appeal.

By the Court.—Judgment affirmed.

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