COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1167-CR **Cir. Ct. No. 02CF000029**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JOHN S. TROYER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Price County: PATRICK J. MADDEN, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The State appeals an order suppressing John Troyer's inculpatory statement in his trial for 106 counts of photographing nude persons without their knowledge or consent. Troyer's motion suggests three

grounds for suppressing evidence: (1) he was in custody at the time he made the statements and the police did not inform him of his ***Miranda***[1] rights; (2) the statements were involuntary; and (3) police engaged in "outrageous government conduct" by tricking Troyer into going to the police station for questioning. The trial court concluded that Troyer was in custody and had not been read his ***Miranda*** rights. It did not specifically rule on the other grounds for suppression. Because we conclude that Troyer has not established grounds for suppressing his statements as a matter of law, we reverse the order suppressing evidence and remand the matter for further proceedings.

¶2 Two of Troyer's employees discovered that he was secretly videotaping customers in a tanning booth at his business. They turned over evidence to the police, who obtained a search warrant and seized videotapes and equipment without informing Troyer. Believing that Troyer possessed firearms at his home and business, the police decided to avoid any possible confrontation by inviting Troyer to the police station with a false story that a burglary had been committed at his business. Troyer arrived at approximately 12:30 a.m. and was led into the officers' training room where the officers informed him that they had seized the videotapes from his business. When the officers asked Troyer what he could tell them about the tapes, Troyer made inculpatory statements admitting his involvement.

¶3 Although this court accepts the trial court's findings of historical fact, whether Troyer was in custody and whether his statements were voluntary pose questions of constitutional law that we decide without deference to the trial

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

court. *See* ***State v. Buck***, 210 Wis. 2d 115, 124, 565 N.W.2d 168 (Ct. App. 1997); ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1985). The test for whether a person is in custody for ***Miranda*** purposes is an objective one, that is, whether a reasonable person in the suspect's position would have considered himself to be in custody. *See* ***State v. Pounds***, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993). A person is in custody if he is deprived of his freedom of action in any significant way. ***Miranda*** warnings are not required merely because the individual is a suspect or because the questioning takes place at the police station. *See* ***Oregon v. Mathiason***, 429 U.S. 492, 495 (1977); ***United States v. Jones***, 21 F.3d 165, 170 (7th Cir. 1994). In determining whether a person is in custody, we consider the totality of the circumstances including the defendant's freedom to leave, the purpose, place and length of interrogation, and the degree of restraint. *See* ***State v. Gruen***, 218 Wis. 2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998).

¶4 Troyer was not in custody for ***Miranda*** purposes at the time he made his inculpatory statements. Before any questioning began, the officers informed Troyer that he was not under arrest and he was free to leave. He transported himself to the police station and was never handcuffed or frisked. The questioning took place in a room that was not locked from the inside and was not even an official interrogation room. The fact that the officers lied to Troyer about being a victim of a burglary to get him to go to the police station would not have caused a reasonable suspect to believe that he was not free to leave or under arrest. A reasonable suspect in Troyer's position would not have believed that he was in custody under these circumstances.

¶5 Although the trial court did not make a specific ruling on the voluntariness of Troyer's statement, Troyer argues that his statement was

involuntary as an alternative basis for affirming the suppression order. The record does not support Troyer's argument. The statement was not procured by any coercive or improper police conduct. *See* ***Clappes***, 136 Wis. 2d at 235-36. The only witness at the suppression hearing, Corporal Jerome Ernst, testified that Troyer had a cordial relationship with the officers and often came to the police station in the morning to socialize with the police. The officers were also customers of Troyer's store. The questioning was very brief and involved no threats or promises or any form of coercion. On the basis of the uncontradicted evidence presented at the suppression hearing, Troyer's statements were voluntary as a matter of law.

¶6 Finally, the doctrine of "outrageous government conduct" does not apply. Outrageous government conduct is comparable to entrapment and occurs when the government is enmeshed in a criminal activity. *See* ***State v. Albrecht***, 184 Wis. 2d 287, 296-300, 516 N.W.2d 776 (Ct. App. 1994). The officers' trickery in enticing Troyer to come to the police station did not enmesh the government in criminal activity. The trial court's opinion that "trickery and artifice is not a good police practice" does not constitute a basis for suppressing evidence.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.