

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 13, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2015AP2533-CR

Cir. Ct. No. 2013CF4195

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

OMAR QUINTON TRIGGS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Reversed and cause remanded.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. Omar Quinton Triggs appeals a judgment of conviction, following a guilty plea, of possessing more than 200 grams, but less than 1000 grams, of marijuana with the intent to deliver. Triggs contends that the circuit court erroneously denied his motion to suppress evidence because he was

unlawfully detained without receiving *Miranda*¹ warnings and did not voluntarily consent to a search of the area containing the contraband. We agree and reverse the circuit court.²

BACKGROUND

¶2 On September 15, 2013, Triggs was charged with one count of possession with intent to deliver a controlled substance (marijuana) in an amount greater than 200 grams but less than 1000 grams. According to the criminal complaint, on the evening of September 13, 2013, Milwaukee police officer Christopher Schlachter and other officers observed an illegally parked BMW in an alley on the north side of Milwaukee. The officers also observed that the BMW's windows appeared "illegally tinted." When the officers made contact with the driver (Triggs), they detected "the strong odor of fresh, unburnt marijuana emanating from the passenger compartment of the BMW." Triggs told the officers that he was armed, showed the officers his gun, and told the officers that he had a valid concealed carry permit. The complaint further alleged that Triggs told the officers he used the garage at the location he was parked and that Triggs consented to a search of the garage. Once the officers entered the garage, they located a large amount of marijuana and various drug-distribution materials, including a digital scale, boxes of sandwich bags, and empty corner-cut bags. Triggs was subsequently arrested and charged.

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

² Ordinarily, a guilty plea waives all nonjurisdictional defects and defenses. See *County of Racine v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). A narrowly crafted exception to this rule exists in WIS. STAT. § 971.31(10) (2015-16), which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. *Id.*

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 On November 11, 2013, Triggs filed a motion to suppress any statements made to officers prior to the garage search and to suppress any evidence recovered from the search because Triggs was unlawfully detained without *Miranda* warnings. The motion alleged that Triggs was forcefully removed from his car, handcuffed, and surrounded by five police officers, two squad cars, and one detective car. Triggs argued that a reasonable person in his situation would not feel free to leave the premises. The motion also argued that Triggs did not voluntarily consent to a search of the garage. Rather, Triggs alleged that consent was a precondition to the officers removing his handcuffs. The motion further argued that after Triggs was formally arrested, he consented to answering questions by Officer Andrew Molina in the back of Molina's squad car. Triggs admitted that he planned to sell marijuana to pay for a family funeral. The motion argued that Triggs's statements to Molina "are the fruit of a poisonous tree" and should also be suppressed. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

¶4 The circuit court held a hearing on the motion, during which the court viewed dashcam video footage of Triggs's traffic stop. The video shows officers conducting a traffic stop of Triggs's car and three police cars surrounding Triggs's car before officers even approach him. Four officers approached Triggs's driver's side door, while a fifth officer approached the passenger-side door. All four officers remained at the driver's side door as three of the four physically removed Triggs from the car. Triggs was placed in handcuffs immediately and was patted down by one officer while other officers conducted a search of Triggs's car. Triggs remained surrounded by officers during the entirety of the car search. Triggs remained handcuffed for approximately eight minutes, at which point his handcuffs were removed and he immediately opened the garage. Approximately a

half hour after the initial stop, after the garage search was completed, Triggs was placed in the back of a squad car. It was at that time that Triggs was *Mirandized* and formally placed under arrest. The video also shows the garage on one side of Triggs's car, a police car on the other, and police cars both in front and behind Triggs's car.

¶5 The circuit court also heard testimony from Schlachter and Molina. Schlachter testified that on the evening of September 13, 2013, he, Officer Angela Juarez, and another squad car were patrolling the neighborhood at issue in this case. Schlachter stated that he noticed a parked BMW partially blocking an alley and witnessed “an individual close a garage door and quickly run to the driver’s door of the BMW.” When Schlachter made contact with the driver, Triggs, Schlachter smelled marijuana coming from the car and asked Triggs whether Triggs had any drugs or guns in the car. Triggs told Schlachter that he had a gun and “began to move around the vehicle” to search for his gun permit. Schlachter said that Triggs became agitated, prompting Schlachter and other officers to physically remove Triggs from the vehicle, remove Triggs’s gun from his person, and handcuff Triggs. Schlachter could not recall how many officers physically removed Triggs from the car, but stated that it could have been up to three. Schlachter stated that five police officers in total were present at that time and that squad cars were parked both in front of, and behind, the BMW during this time.

¶6 Schlachter also stated that while Triggs was handcuffed, Schlachter asked Triggs for consent to search the garage. Triggs consented. Schlachter told the other officers he wanted to “conduct our investigation a little bit further and see if we could investigate the garage” because when he first saw Triggs, Triggs quickly closed the garage door and got into the BMW. Schlachter testified that Triggs was handcuffed somewhere between five and ten minutes before officers

removed the handcuffs and Triggs opened the garage. Schlachter acknowledged that Triggs was not free to leave at this time, but stated that Triggs was being detained for officer safety and was not under arrest. It is undisputed that Triggs was not *Mirandized* during this time.

¶7 Molina testified that when he approached Triggs's car, Schlachter had a hold on Triggs's hands. Molina testified that he and Schlachter removed Triggs from the car and that Triggs was very upset and distraught. Molina testified that he "had control of [Triggs's] body" while officers searched Triggs's vehicle and that Triggs was handcuffed during the entire vehicle search. The handcuffs were removed when Triggs opened the garage for the officers.

¶8 Fatima Adams testified that she was a passenger in Triggs's car and witnessed all of Triggs's interactions with police on the evening in question. Adams testified that the BMW was not illegally parked, but that two or three police officers approached the car anyway. She stated that Triggs offered his concealed carry permit to officers and was compliant with all of the officers' orders. She stated that the officers blocked the BMW with a detective car, two squad cars, and a truck. She also stated that officers removed Triggs from the car, handcuffed him, and repeatedly asked for consent to search the garage. Triggs ultimately consented, at which point the handcuffs were removed.

¶9 The circuit court denied Triggs's motion to suppress evidence, finding that Triggs was not in custody at the time he was handcuffed or during the garage search. Rather, the court found that that "[t]here's a reasonable explanation as to why the defendant was initially handcuffed," and "[t]here's a reasonable explanation as to why the defendant was un-handcuffed." The court also found that Triggs's consent to search the garage was voluntary.

¶10 Triggs pled guilty to an amended charge of possessing marijuana as a second or subsequent offense. This appeal follows.

DISCUSSION

¶11 When reviewing a circuit court's ruling on a motion to suppress evidence on Fourth Amendment grounds, we will uphold the circuit court's factual findings unless clearly erroneous. *See State v. Knight*, 2000 WI App 16, ¶10, 232 Wis. 2d 305, 606 N.W.2d 291. However, whether a search is reasonable under the Fourth Amendment is a question of law that we review *de novo*. *See id.*

I. Triggs was in custody

¶12 The State contends that police did not restrain Triggs to the degree “associated with a formal arrest,” rather, Triggs “was subject to an investigatory stop.” The State contends that under the totality of the circumstances, including Triggs's possession of a handgun, his agitated behavior, and the fact that the police drew no weapons and did not “take Triggs to the ground,” Triggs was not in custody for *Miranda* purposes. We disagree. Our focus is not on what the police *did not* do, but rather, what the police *did* do.

¶13 “In determining whether an individual is ‘in custody’ for purposes of *Miranda* warnings, we consider the totality of the circumstances, including such factors as: the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint.” *State v. Morgan*, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23. “When considering the degree of restraint, we consider: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place

in a police vehicle, and the number of officers involved.” *Id.* If the suspect has been placed under formal arrest, we need not examine any other factors, because formal arrest always equals “custody.” See *State v. Martin*, 2012 WI 96, ¶¶33, 35, 343 Wis. 2d 278, 816 N.W.2d 270. In the absence of a formal arrest, however, we must consider all of the relevant circumstances, including the purpose of the interrogation, where it takes place, whether the suspect is free to leave, and the degree and nature of any restraint. See *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). A two-part standard of review applies: we uphold the circuit court’s findings of historical fact unless clearly erroneous, but we review *de novo* the ultimate legal question of whether under the circumstances the suspect was subject to custodial interrogation. See *id.*

¶14 As the United States Court of Appeals for the Seventh Circuit stated when discussing a defendant who was removed from a taxi cab, handcuffed, and frisked while surrounded by multiple officers near a drug-dealing location, “[the defendant] was not free to go anywhere. His movement was curtailed as if he were handcuffed to a chair in a detective’s office or placed in a holding pen in a station house or put behind bars.” *United States v. Smith*, 3 F.3d 1088, 1097 (7th Cir. 1993).

¶15 Case law both from the United States Supreme Court and Wisconsin compels the conclusion that Triggs was in custody from the moment he was forcibly removed from the car. See *New York v. Quarles*, 467 U.S. 649 (1984) (suspect was in custody for purposes of *Miranda* when he was surrounded by at least four police officers and was handcuffed when the questioning took place. The Court observed that, during the questioning, there was nothing to suggest that the officers were concerned for their physical safety); *Martin*, 343 Wis. 2d 278 (where officer witnessed defendant retrieve object from defendant’s jacket pocket

while walking towards parked car and officer proceeded to immediately handcuff, frisk, and arrest defendant as other officers arrived on the scene, defendant was in custody for *Miranda* purposes); *Morgan*, 254 Wis. 2d 602 (where officers handcuffed and frisked defendant outside of defendant's car, while surrounding defendant with four officers and two squad cars, and then placed defendant in the back of a squad car, defendant was in custody for *Miranda* purposes); *State v. Uhlenberg*, 2013 WI App 59, 348 Wis. 2d 44, 831 N.W.2d 799 (location and degree of restraint are relevant to custody determination even if defendant is told he is not under arrest).

¶16 Under the totality of the circumstances, we conclude that the degree of restraint the police used against Triggs created a situation in which a reasonable person in Triggs's position would not feel free to leave. Indeed, Schlachter even admitted that once the officers removed Triggs from his car, Triggs was not free to leave the premises. The testimony also indicates that at least three police officers removed Triggs from the car, that Triggs was handcuffed within seconds of his removal, that Triggs was handcuffed between five and ten minutes, and that three police cars surrounded his BMW. The dashcam video confirms those portions of the officers' testimony. We conclude, based on the dashcam video and the officers' testimony, that the degree of restraint and the manner in which officers interacted with Triggs was an exercise of dominion over Triggs and an assertion of custody over him from the time he was removed from his car.

¶17 Accordingly, any questioning that took place after Triggs was surrounded by officers and removed from his car constituted a violation of Triggs’s constitutional rights under *Miranda*.³

II. Triggs did not voluntarily consent to a search of the garage

¶18 Triggs contends that under the totality of the circumstances, his consent to search the garage was not voluntary. We agree.

¶19 Whether a party voluntarily consents to a search is a mixed question of fact and law based upon an evaluation of “the totality of all the surrounding circumstances.” *State v. Artic*, 2010 WI 83, ¶32, 327 Wis. 2d 392, 786 N.W.2d 430 (citation omitted). “Consent is not voluntary if the state proves ‘no more than acquiescence to a claim of lawful authority.’” *Id.* (citation omitted). The State bears the burden of proving that consent was given freely and voluntarily. *Id.*

¶20 “In considering the totality of the circumstances, we look at the circumstances surrounding the consent and the characteristics of the defendant; no single factor controls.” *Id.*, ¶33. We consider multiple non-exclusive factors to determine whether consent was given voluntarily: (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or “punished” him by the deprivation of something like

³ On appeal, Triggs does not discuss the “fruit of the poisonous tree” argument he raised in his motion to suppress regarding his admission to Molina about his intent to sell marijuana to pay for a family funeral. It is undisputed that Triggs had been *Mirandized* when he made those statements. However, because we conclude that Triggs was in custody from the time he was removed from his car and not merely from the time he was formally *Mirandized*, we must also conclude that Triggs’s statements to Molina are indeed “fruit of the poisonous tree.” See *Brown v. Illinois*, 422 U.S. 590, 602 (1975) (subsequent *Miranda* warnings do not attenuate the taint of an initial unlawful custodial interrogation).

food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent. *See id.*

¶21 We conclude, based on the *Artic* factors, that the State failed to meet its burden to prove that Triggs voluntarily consented to a search of the garage. Our conclusion is based upon an evaluation of the totality of the undisputed circumstances. It is undisputed that Triggs was in handcuffs and surrounded by officers. It is undisputed that Triggs was physically unable to leave the premises while officers asked multiple times for consent to search the garage. Triggs had been handcuffed for approximately eight minutes, but was not formally arrested until *after* the officers searched the garage—about a half hour after the initial stop. It is undisputed that immediately after officers removed Triggs’s handcuffs, Triggs—still surrounded by officers and still unable to move his car out of the alley—opened the garage. Opening the garage was not voluntary, but was a condition of handcuff removal imposed by the police. The conditions created by the police were far from “congenial, non-threatening, and cooperative.” *See id.* Rather, the police created an intimidating environment by immediately surrounding Triggs with five officers, restricting Triggs’s movements, and blocking Triggs’s car in the alley. Before they knew anything beyond having observed a car parked in the alley and seeing a man quickly move from a garage to the car, officers made it impossible for that man to move, either personally or in his vehicle. This overwhelming show of force occurred without officers even seeing Triggs violate any laws.

¶22 The State did not produce any evidence to suggest that Triggs knew he had the option to leave the scene or to withhold consent to the search. Indeed, all the evidence supports the opposite conclusion—the police made it impossible for Triggs to leave or have the handcuffs removed until he let them search the garage. Under the circumstances here, Triggs’s acquiescence in the search of the garage was not a voluntary act; rather, it was a yielding to the officers’ overwhelming show of power and authority. The law requires suppression of all the evidence seized as a result of the search. We reverse and remand for further proceedings consistent with this opinion.

By the Court.— Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

