COURT OF APPEALS
DECISION
DATED AND RELEASED

December 17, 1996

NOTICE

No. 96-1860-CR

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

State of Wisconsin,

Plaintiff-Respondent,

v.

Montell Green,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS COOPER, Judge. *Reversed*.

SCHUDSON, J.[1] Montell Green appeals from the judgment of conviction, following his guilty plea, for possession of marijuana. He argues that the trial court erred in denying his motion to suppress evidence. This court agrees and, therefore, reverses the judgment.

I. BACKGROUND

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

The facts relevant to resolution of this appeal are not in dispute. According to the testimony at the suppression hearing, Milwaukee Police Detective Dennis Gardner assisted in the execution of a search warrant of a house on the afternoon of July 20, 1995. The search warrant authorized a search for cocaine, weapons, and related items. The search warrant did not authorize the search of all persons on the premises, despite the fact that the search warrant application had requested such authority. The warrant did authorize the search of a described but unidentified man, but it is undisputed that Green did not match that description.

Detective Gardner explained that he was one of four or five officers assigned to the "containment" group, which remained outside the residence while numerous other officers entered the house. As Detective Gardner approached the house, he saw Green sitting on the front porch. Although Detective Gardner did not know whether Green was connected in any way to the suspected drug dealing, he immediately handcuffed him. Detective Gardner testified that Green was not free to leave.

Detective Gardner further testified that he then frisked Green for weapons and that during the frisk, without providing ***Miranda*** warnings, he asked Green if he had "anything on his person that he shouldn't have." Green responded, "Yes, I just have some herb on me." Knowing "herb" as a street term for marijuana, Detective Gardner then reached into Green's front pants pocket and retrieved what subsequently was identified as marijuana.

Green concedes that, under ***State v. Guy***, 172 Wis.2d 86, 492 N.W.2d 311 (1992), *cert. denied*, 509 U.S. 914 (1993), even though the search warrant did not authorize the search of persons on the premises, "[a] pat down frisk would have been reasonable under the circumstances." He argues, however, that: (1) when he was handcuffed, he was in custody; (2) Detective Gardner's question constituted a custodial interrogation for which ***Miranda*** warnings were required; and (3) the discovery of the marijuana derived from his response to Detective Gardner's question.

The State disputes that Green was in custody and also disputes that Detective Gardner's question constituted custodial interrogation. Significantly, however, the State does not argue that the discovery of the

marijuana did not derive from Green's response, or that the marijuana would have been discovered during the frisk regardless of Detective Gardner's question and Green's response. Therefore, this appeal focuses on whether Green was in custody and, if so, whether Detective Gardner's question constituted custodial interrogation.

For ***Miranda*** warnings to be required, a person must be in "custody" and under "interrogation" by the police. ***State v. Mitchell***, 167 Wis.2d 672, 686, 482 N.W.2d 364, 369 (1992). This court's review of a trial court's conclusions about whether certain undisputed facts establish "custody" and "interrogation" is *de novo*. *See* ***State v. Clappes***, 136 Wis.2d 222, 235, 401 N.W.2d 759, 765 (1987) (application of evidentiary or historical facts to constitutional principles presents questions of law independently reviewed on appeal).

II. CUSTODY

Denying Green's motion to suppress, the trial court concluded that although "[h]andcuffing him is getting close to that line," Detective Gardner's detention of Green did not cross the line of custody, given the special circumstances and dangers attendant at a search warrant scene. This court disagrees.

A person need not be under formal arrest to be in a custodial status requiring ***Miranda*** warnings. *See* ***State v. Pounds***, 76 Wis.2d 315, 322, 500 N.W.2d 373, 377 (Ct. App. 1993). To evaluate whether a person is in custody for Fifth Amendment ***Miranda*** purposes, courts must consider the totality of the circumstances and determine whether a "reasonable person in the defendant's position would have considered himself or herself to be 'in custody' given the degree of restraint." ***State v. Swanson***, 164 Wis.2d 437, 446-447, 475 N.W.2d 148, 152 (1991). The State points out that ***Swanson*** also states that in many jurisdictions handcuffing "does not necessarily transform an investigative stop into an arrest." ***Id.*** at 448, 475 N.W.2d at 153. The question here, however, is not whether Green was under *arrest*, but rather, whether a reasonable person, handcuffed, in Green's position, would have considered himself or herself in *custody*.

Under these circumstances—handcuffed, frisked and questioned by a police detective at a search warrant scene with numerous other officers—a reasonable person would have considered himself or herself to be in custody. As the Seventh Circuit Court of Appeals recently commented in a case concluding that Stewart, a man handcuffed and frisked near a suspected drug-dealing location, was in custody for ***Miranda*** purposes, "Stewart 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), *cert. denied*, 510 U.S. 1061 (1994). Similarly, this court concludes that Green was in "custody."

III. INTERROGATION

Interrogation is not only "express questioning, but also ... any words or actions ... that the police should know are reasonably likely to elicit an incriminating response ...." ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980); ***State v. Cunningham***, 144 Wis.2d 272, 277-278, 423 N.W.2d 862, 864 (1988). Obviously, as appellant argues on appeal, "[b]y asking Mr. Green if he had anything that he should not have, Detective Gardner was asking Mr. Green if he had any illegal objects or substances on his person." Here, clearly, not only were Detective Gardner's words "reasonably likely to elicit an incriminating response," they were "express questioning." Therefore, Detective Gardner's question was "interrogation."

IV. CONCLUSION

Because Green was subjected to a custodial interrogation, ***Miranda*** warnings were required. Because he did not receive the ***Miranda*** warnings, his statement and the evidence derived from his statement should have been suppressed.

By the Court. – Judgment reversed.

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