COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1760-CR **Cir. Ct. No. 2003CF365**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

FRED V. VOGELSBERG,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Reversed.*

Before Dykman, Vergeront and Deininger, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals the trial court's suppression order in its pending felony prosecution of Fred Vogelsberg. The

suppressed evidence is Vogelsberg's inculpatory statement to a police officer. Vogelsberg made the statement without receiving ***Miranda*** warnings.[1] The issues are whether the trial court properly determined that: (1) Vogelsberg reasonably believed that he was in custody at the time of his statement, such that ***Miranda*** warnings were necessary, and (2) the statement was involuntary under the circumstances. Based on the trial court's findings of fact, we conclude that Vogelsberg could not have reasonably believed himself to be in custody. We also conclude that his statement was voluntary. We therefore reverse.

¶2 On September 26, 2003, a twenty-year-old woman reported to police that Vogelsberg had sexually assaulted her between 1993 and 1997, when she was a child. On September 30, 2003, Palmyra Police Chief Scott Neubauer went to Vogelsberg's place of work and asked to speak with him at lunch. The trial court described what then followed:

> Chief Neubauer went to the defendant's work place, clearly seeking incriminating statements from the defendant and apparently urgently seeking them, rather than to arrange for an interview of the defendant at an—or at—or at a time and place more opportune than while the defendant was on his lunch break at work.
>
> Mr. Vogelsberg knew that Chief Neubauer was the Village of Palmyra chief of police. Chief Neubauer said to the defendant he needed to or wanted to speak with him, and in effect directed the defendant to Chief Neubauer's car by simply going there after telling the defendant he, Chief Neubauer, wanted to speak to the defendant. And the defendant followed the chief and got in the chief's car.
>
> Chief Neubauer's interview of Mr. Vogelsberg took place then in Chief Neubauer's car. There's no question this was an official interview of the defendant.

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

> The defendant initially denied improper touching of [the child]. Officer Neubauer then reminded the defendant that he had failed a lie detector test in 1993 concerning another [child]. Chief Neubauer told the defendant that the defendant's former wife, Susan G[.], said the defendant admitted to her sexual assaults of [the child]. Chief Neubauer spoke of the damage to children from sexual assault, and that if the defendant continued to deny the sexual touching of [the child], [she] could be accused of lying and would be angry.
>
> Chief Neubauer then said he had enough information to arrest Mr. Vogelsberg at that time, but would not do so. Chief Neubauer told Mr. Vogelsberg that it would be better to be truthful and remorseful, instead of stonewalling.
>
> Mr. Vogelsberg then admitted improper touching of [the child] and agreed to another interview. This interview at Mr. Vogelsberg's workplace lasted 20 to 35 minutes.

From those facts, the trial court concluded that a reasonable person in Vogelsberg's position would have believed himself or herself in custody. In particular, the court noted that shortly into the interview, Vogelsberg asked to postpone it, but Neubauer insisted that the interview continue.

¶3 The trial court also concluded that Vogelsberg's statement was involuntary. The court stated:

> The Court . . . concludes that the totality of the circumstances, that is, no single one but when they are viewed together, indicates to the Court that Chief Neubauer was applying more pressure on Mr. Vogelsberg to make admissions than Mr. Vogelsberg could resist. Pressures such as telling Mr. Vogelsberg that Chief Neubauer had enough evidence to arrest Mr. Vogelsberg already, pressure from telling the defendant he had failed a lie detector in the past, that he had admitted the sexual assaults in statements to his former wife, that [the child] would be accused of lying, and the pressure of not being able to postpone the interview because Officer Neubauer wanted it to continue.

¶4 The State may not use a defendant's statements made during a custodial interrogation unless the defendant received ***Miranda*** warnings before making the statement. ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). The determining question is whether a reasonable person in the suspect's situation would have understood himself or herself to be in custody. ***Morgan***, 254 Wis. 2d 602, ¶10.

¶5 In addressing the issue of custody, we accept the trial court's findings of fact unless they are clearly erroneous. ***Id.***, ¶11. Whether a person is in custody, given the findings of fact, is a question of law this court reviews *de novo*. ***Id.*** In deciding that question, we consider the totality of the circumstances, including the defendant's freedom to leave, the purpose, place and length of the interrogation, and the degree of restraint exercised by the police. ***Id.***, ¶12. Because we apply the reasonable person standard, Vogelsberg's subjective belief is not relevant. *See* ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998).

¶6 Based on the trial court's findings and the undisputed facts, we conclude Vogelsberg could not have reasonably believed himself in Neubauer's custody. At no time was he subject to any physical control or restraint. He entered Neubauer's car voluntarily, briefly left the car during the interview, and then once more voluntarily entered it. Neubauer did not tell Vogelsberg that he could not leave, and in fact expressly told him he was not under arrest. At one point Neubauer suggested that they wrap up the interview so Vogelsberg could return to work. The interview lasted no more than thirty-five minutes, and

possibly less. None of these circumstances support a conclusion that Vogelsberg was in custody. A reasonable person in his position would have felt free to terminate the interview and leave.

¶7 We also conclude Vogelsberg's inculpatory statements were voluntary. The question of voluntariness is also one of law, based on historical facts. ***State v. Agnello***, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594. In resolving it, we examine the suspect's susceptibility to pressure, and the nature of the police tactics used to overcome the suspect's ability to resist. ***Id.***, ¶9. Here, Vogelsberg was nervous, but not excessively so. Apart from that, there is no evidence that his age, education, intelligence, mental and physical condition, or prior police contacts made him more vulnerable to pressure than any person suspected of serious crimes.

¶8 Additionally, nothing about Neubauer's tactics during the interrogation made it coercive. The trial court made no finding that he threatened Vogelsberg, nor attempted to trick him with untruthful statements. Neubauer assured Vogelsberg that he was not under arrest. Although Neubauer refused Vogelsberg's request to postpone the interview, Vogelsberg cannot contend that Neubauer's refusal coerced him into incriminating himself. The option of remaining silent remained. Also, Neubauer did not extend the interrogation for an unreasonable length of time, and he did not conduct it in a police station or other potentially coercive place. In short, the circumstances did not remove Vogelsberg's freedom to choose between silence or self-incrimination.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).