COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2769-CR **Cir. Ct. No. 2005CF455**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. MILKIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Thomas M. Milkie appeals from a judgment of conviction for misdemeanor battery and false imprisonment and from an order denying his motion for postconviction relief. He contends that the circuit court

erred when it concluded that he was not in custody and therefore not entitled to the ***Miranda***[1] warnings when he was questioned just prior to his arrest. He argues that his statements should have been suppressed and that failure to do so contributed to his conviction. We disagree that suppression was required and affirm the judgment and order of the court.

FACTS AND PROCEDURAL BACKGROUND

¶2 The State charged Milkie with false imprisonment, sexual assault and misdemeanor battery based on events that occurred during the night of April 13-14, 2005. The victim, Terry, claimed that she was physically and sexually assaulted by Milkie in her room at the Bluebird Motel. Terry testified that around 2:00 a.m., Milkie went to sleep. She waited until Milkie was snoring heavily and then she got dressed, took her cell phone, and went to a nearby shed to call 911. She remained in the shed until help arrived.

¶3 Kenosha County Deputy Sheriff Allen Morris arrived and spoke to Terry, who told him that she had been battered and sexually assaulted by Milkie. She told Morris that Milkie was upstairs asleep and she gave Morris her consent to search along with a key to the room. Morris then went to the room, found the door cracked slightly open and entered. He observed Milkie asleep on the bed.

¶4 A second officer had joined Morris and the two entered the room together, Morris with his gun drawn. When Morris ascertained that there were no weapons around, he holstered his gun. Morris yelled at Milkie and had to shake him to wake him up. When Milkie roused, Morris turned on the lights and asked

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

Milkie what had happened between him and Terry that night. He asked whether the two had had a physical confrontation, and Milkie said no. He also asked whether there had been consensual sexual contact between the two, and Milkie said no. Morris testified the Milkie first responded that "nothing had transpired" and later said that they had "a verbal argument."

¶5 After talking to Milkie, Morris told him to get dressed. Morris then learned from dispatch that Milkie had a warrant outstanding. Morris took Milkie to his squad car, and placed him under arrest.

¶6 The State charged Milkie, as a repeater, with false imprisonment, sexual assault, and misdemeanor battery.[2] Prior to trial, the circuit court held a ***Miranda/Goodchild***[3] hearing to address the admissibility of the statements obtained from Milkie before he was advised of his ***Miranda*** rights. The court held that the police acted properly and the statements obtained could be introduced at trial. A jury trial ensued and at closing argument, the prosecutor restated the victim's allegations of assault and battery, emphasizing the brutality and violence described by the victim and comparing it to Milkie's characterization of the events as "nothing more than a verbal argument."

¶7 The jury found Milkie guilty of false imprisonment and misdemeanor battery, and found him not guilty of sexual assault. Milkie filed a motion for postconviction relief seeking a new trial and suppression of his pre-

[2] The State also charged Milkie with disorderly conduct. This charge was dismissed at the start of the trial.

[3] ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

Miranda statements. The circuit court held a motion hearing and ultimately denied the motion. Milkie appeals.

DISCUSSION

¶8 ***Miranda*** requires that, before questioning a suspect in custody, the officers must inform the person of four things: (1) the right to remain silent, (2) the fact that statements made may be used at trial, (3) the right to the presence of an attorney during questioning, and (4) that an attorney will be appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966). These warnings are required only when the person is in custody. *See* ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. Milkie asserts on appeal that, in accordance with ***Miranda***, his statements should have been suppressed because he was in custody when the officers entered the room, woke him, and questioned him while he was still in bed. Whether a person is in custody for purposes of ***Miranda***, is determined by considering the totality of the circumstances. ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App 1998).

¶9 On review, we accept the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). Whether the facts demonstrate "custody" for ***Miranda*** purposes is a question of law that we review de novo. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 345, 352-353, 588 N.W.2d 606 (1999). To determine whether a suspect is in custody for ***Miranda*** purposes, we ask whether the suspect was formally arrested or "suffered a restraint on freedom of movement of the degree associated with a formal arrest." ***State v. Goetz***, 2001 WI App 294, ¶11, 249 Wis. 2d 380, 638 N.W.2d 386. We employ an objective test, inquiring

how a reasonable person in the suspect's position would have understood the situation. ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984); ***Morgan***, 254 Wis. 2d 602, ¶10. Our analysis takes into account the words and actions of the police officers, Milkie's freedom to leave, and "the purpose, place, and length of the interrogation." *See* ***Morgan***, 254 Wis. 2d 602, ¶12.

¶10 The historical facts as found by the circuit court are based on the hearing testimony of Morris and are supported in the record. In short, it found that Morris and his colleague had permission to enter the room. It found that when Morris entered with his handgun drawn, he was using standard procedure to protect himself. The court noted that Morris holstered his gun once he ascertained there were no weapons on the premises. The court found that Morris did not deprive Milkie of anything, did not promise him anything, did not place him under arrest, did not threaten him, and did not tell him he could not leave. It determined that the questions were investigative in nature and that "nothing illegal" occurred.

¶11 Other relevant facts came to light during the trial.[4] We observe that Milkie was not handcuffed during questioning and that he was in no way physically restrained by the officers. However, he was in bed and was not dressed when questioning ensued. We also note that Morris asked Milkie the same questions four or five times regarding whether there had been any physical confrontation and whether there had been any sexual contact.

[4] When reviewing an order denying suppression of evidence, we are not limited to the suppression hearing record; rather, we may also consider other evidence of record, including facts presented at trial. *See* ***State v. Gaines***, 197 Wis. 2d 102, 106-07 n.1, 539 N.W.2d 723 (Ct. App. 1995).

¶12 Milkie characterizes the situation as a "sudden display of law enforcement authority" that a reasonable person would interpret as a restraint on his or her freedom to leave. He directs us to ***Orozco v. Texas***, 394 U.S. 324, 326 (1969), for the principle that custody for ***Miranda*** purposes can extend beyond the stationhouse. Indeed, in ***Orozco*** the State argued that "since [Orozco] was interrogated on his own bed, in familiar surroundings, [the] ***Miranda*** holding should not apply." ***Id.*** The court rejected that argument, stating that the ***Miranda*** warnings were required "when the person being interrogated was 'in custody at the station *or otherwise deprived of his freedom of action in any significant way*.'" ***Orozco***, 394 U.S. at 327 (quoting ***Miranda***, 384 U.S. at 477). Observing that the officer told Orozco he was "under arrest and not free to leave when he was questioned," the court held that Orozco's statements should be suppressed. ***Orozco***, 394 U.S. at 327. We agree with Milkie that custody can occur in a person's home and while a person is in his or her own bedroom; however, we do not agree that ***Orozco*** settles the question of custody under the circumstances of Milkie's case because Milkie was not told he was under arrest or that he could not leave. ***Orozco*** does not assist us here.

¶13 Milkie also draws from cases from several other jurisdictions to support his argument. He emphasizes the court's analysis in ***Bond v. State***, 788 A.2d 705, 713 (Md. Ct. Spec. App. 2002), where the court held that Bond's incriminating statements should have been suppressed. There the court noted:

> [T]he officers entered [Bond's] bedroom, the highly private location of the interrogation, the late hour, [Bond's] state of undress, the number of officers present, and the accusatory nature of the questioning were such that an ordinary person in the circumstances would be intimidated, and would not think he could end the encounter merely by telling the officers to leave.

Id.

¶14 Milkie also relies on ***Commonwealth v. Zogby***, 689 A.2d 280, 283 (Pa. Super. Ct. 1997), which stated that the bedroom is "one of the areas of greatest privacy," and that where an officer roused Zogby from a sound sleep and told him to get dressed and go outside, the officer's actions were "highly intrusive" and suggested "a will on the part of the police officer that would not be denied." ***Id.*** The court concluded that Zogby was in custody during questioning. ***Id.***

¶15 The proposition that questioning conducted in one's own home does not preclude a finding of custody is also recognized in ***United States v. Griffin***, 922 F.2d 1343, 1355 n.15 (8th Cir. 1990), where the court observed that "it is not difficult to envision that a suspect's sense of captivity can actually be intensified … when agents of the law take control of a person's private residence." There, the agents did not place Griffin under arrest, but told him that he was to stay in the agents' view at all times. ***Id.*** at 1354.

¶16 All of these cases, though at first blush quite similar to Milkie's, are distinguishable. The ***Bond*** and ***Zogby*** courts employed a legal standard for custody that is broader than the Wisconsin standard. The Maryland court in ***Bond*** measured custody based on whether a suspect is "led to believe, as a reasonable person, that he is being deprived or restricted of his freedom of action or movement under pressures of official authority." ***Bond***, 788 A.2d at 710. The Pennsylvania court in ***Zogby*** stated that a "person is deemed in custodial interrogation if he is placed in a situation in which he reasonably believes that his freedom of action is restricted by the interrogation." ***Zogby***, 689 A.2d at 282. In contrast, Wisconsin courts ask whether the suspect was formally arrested or

"suffered a restraint of freedom on movement of the degree associated with a formal arrest." ***Goetz***, 249 Wis. 2d 380, ¶11; *accord* ***Yarborough v. Alvarado***, 541 U.S. 652, 663 (2004) (custody occurs with formal arrest or restraint of freedom of the degree associated with formal arrest). Interestingly, the ***Zogby*** court noted that its standard "does not qualify the restriction of freedom to be to a degree generally associated with a formal arrest," and acknowledged that while its conclusion was supported by Pennsylvania state law, it was unclear whether U.S. Supreme Court case law would compel the same result. ***Zogby***, 689 A.2d at 282 n.2. Consequently, neither ***Bond*** nor ***Zogby*** lend assistance here.

¶17 ***Griffin*** must also be distinguished. There, the agents told Griffin to remain in their view at all times. That fact was significant to the federal circuit court's conclusion that Griffin's freedom of movement was restricted to a degree associated with formal arrest. *See* ***Griffin***, 922 F.2d at 1354. Griffin was subject to that restriction for two hours of questioning. ***Id.*** at 1346. That degree of restraint was not imposed on Milkie during questioning; therefore, a key element relied upon by the ***Griffin*** court is missing here. We further observe that the Eighth Circuit has subsequently held that interrogations in a person's home generally do not entail the type of coercive setting associated with formal arrest, and characterized ***Griffin*** as that circuit's "one brief suggestion to the contrary." ***United States v. Czichray***, 378 F.3d 822, 826-27 (8th Cir. 2004).

¶18 The State directs us to ***United States v. Burns***, 37 F.3d 276 (7th Cir. 1994), and to ***Goetz*** to demonstrate that Milkie was not in custody during pre-arrest questioning. Both of these cases involved suspects that were questioned during the execution of a valid search warrant. In ***Burns***, the law enforcement agents entered a hotel room with a warrant and, during the search, an agent questioned Burns. ***Burns***, 37 F.3d at 277-78. Burns asked to leave but the agents

told her she could not leave until the search was completed. ***Id.*** at 278. The Seventh Circuit Court of Appeals held that Burns was not in custody for ***Miranda*** purposes when she was questioned during the search. ***Burns***, 37 F.3d at 281. The court stated that detention during the execution of a search warrant was not restraint to a degree associated with formal arrest. ***Id.***

¶19 Likewise, in ***Goetz***, questioning took place during a valid search. The law enforcement officer told Goetz to sit at the table where he questioned her while other officers searched the home. ***Goetz***, 249 Wis. 2d 380, ¶¶3-4, 13. During questioning, Goetz told the officer that he might find drug paraphernalia in her home and she led the officer to her bedroom to retrieve it. ***Id.*** ¶13. The officer then told Goetz to sit on the couch until the search was complete. ***Id.*** On appeal, we concluded that notwithstanding the fact that Goetz "was being lawfully detained while the warrant was being executed," she was not in custody for ***Miranda*** purposes when she made her statements to the officer. ***Goetz***, 249 Wis. 2d 380, ¶17.

¶20 Both ***Burns*** and ***Goetz*** make clear that detention during the execution of a search warrant is not a restraint on freedom to the degree associated with formal arrest. Indeed, we would expect that a suspect would reasonably understand that their detention was a temporary restraint on their liberty to preserve the integrity of the search rather than for purposes of interrogation. Thus, the question resolved in ***Burns*** and ***Goetz*** is not the same as the question presented here.

¶21 Custody has been called the "essential predicate" of the ***Miranda*** decision, and the element of compulsion is key. *See* Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and Miranda's*

Concept of Custody, 1993 U. ILL. L. REV. 379, 387 (1993). "The Fifth Amendment does not prohibit the police … from asking questions, nor does it prohibit a suspect from volunteering an incriminating statement. What the Fifth Amendment does prohibit is the use of any practice or tactic that *compels* a person to incriminate himself or herself." ***Id.*** at 387-88 (emphasis added). We must determine, therefore, whether Morris's questioning of Milkie smacked of such compulsory tactics.

¶22 Our inquiry into the totality of the circumstances requires us to ask whether Milkie was free to leave the scene, and to consider the purpose, place and length of the questioning along with the degree of restraint imposed by the officers. *See* ***Gruen***, 218 Wis. 2d 581 at 594. The degree of restraint imposed is measured by whether the officers used handcuffs, drew weapons, frisked the suspect, moved the suspect to another location, or otherwise physically restrained the suspect. ***Morgan***, 254 Wis. 2d 602, ¶12. We also consider the location of the detention and the number of officers involved. ***Id.***

¶23 Having considered the totality of the circumstances here and the context surrounding Morris' questioning of Milkie, we conclude the facts narrowly favor the State. The most coercive aspects of Milkie's detention include the abruptness of his awakening to find police officers in the bedroom, and his relatively vulnerable position of being questioned while undressed and in bed. We did not take these factors lightly; however, on balance we conclude that they are outweighed by others. Here, Milkie was confronted by only two officers, neither of whom had weapons drawn when Milkie awoke. He was not handcuffed or otherwise physically restrained by the officers. He was not told that he was under arrest or advised that he could not leave. He was in a familiar place, the stated

purpose of the questions was to find out his version of what happened that night, and the length of the questioning appears to have been relatively brief.[5]

¶24 If a person is not in custody when questioned, the procedural safeguards of ***Miranda*** do not apply. The facts here demonstrate that Morris questioned Milkie in a noncustodial context. Accordingly, Morris' failure to advise Milkie of his ***Miranda*** rights prior to questioning him did not require suppression of Milkie's statements. Because we conclude that no error occurred, we need not engage in a harmless error analysis.[6]

[5] The record does not indicate precisely how long Morris questioned Milkie before arresting him on the outstanding warrant. The State suggests it was "brief," and Milkie does not contest this characterization. Milkie offers that the questioning did not go longer because Morris "realized he was not going to get the answers he wanted."

[6] Though we do not reach the question of harmless error, we add this caveat. The State argued in its brief that "[a]ny error in admitting Milkie's statements in this case was harmless because nothing in those statements was the least bit incriminating." During closing argument, the prosecutor relied heavily on Milkie's pre-***Miranda*** statements, mentioning them no less than eight times to convince the jury Milkie was not credible. When addressing the jury's duty to assess the credibility of witnesses, the prosecutor argued:

> [W]here does [Officer Morris] find [the victim]? He finds her hiding, cowering with her hands up, scared, crying, saying consistently what she said in court … that Thomas Milkie, her boyfriend, raped her and assaulted her for the last seven hours. But the defendant says nothing happened, only a verbal altercation.
>
> ….
>
> Then what do you look for? You look for is there some outside information, is there some outside proof that's going to tell me that what they're telling me is true or not true. Well, there is. There's photographs. There's photographs of [the victim's] face and injured left eye. But nothing happened, just a verbal altercation.

(continued)

CONCLUSION

¶25 We conclude that Milkie was not in custody for ***Miranda*** purposes when he was questioned by Morris at the Bluebird Motel. Though some facts indicate that Milkie's freedom of movement was restrained while he was questioned, the totality of the circumstances convinces us that his detention was not of the degree associated with formal arrest. The circuit court's determination that Milkie's pre-arrest statements were admissible at trial was proper. We therefore affirm the judgment and order of the court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

> There's photographs of both arms showing bruising, fingerprint bruising, which Deputy Morris told you was caused when someone is held down. But nothing happened, just a verbal altercation.
>
> You have a bruise on a shin. Nothing happened. Verbal altercation.
>
> And you have a scratch on the right ribs. Nothing happened. Verbal altercation.

Though the statement "nothing happened" appears exculpatory on its face, the State fashioned it into an indictment of Milkie's credibility. Had we resolved the close question of custody in Milkie's favor, the resulting error would not have been harmless beyond a reasonable doubt.

¶26 ANDERSON, P.J. (*dissenting*). I conclude that reasonable people in Milkie's position would have believed they were in custody. I therefore would reverse.

¶27 When determining the moment of arrest for Fifth Amendment purposes, a court asks whether a reasonable person in Milkie's position would have considered himself or herself to be in custody given the degree of restraint. ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991), *abrogated on other grounds*, ***State v. Sykes***, 2005 WI 48, ¶27, 279 Wis. 2d 742, 695 N.W.2d 277. The totality of the circumstances, including what the police officers communicate by their words or actions, controls the outcome under the test. ***Id.*** at 447. "A person is in custody for purposes of ***Miranda v. Arizona***, 384 U.S. 436 (1966), if the person is either formally arrested or has suffered a restraint on freedom of movement of the degree associated with a formal arrest." ***State v. Goetz***, 2001 WI App 294, ¶11, 249 Wis. 2d 380, 638 N.W.2d 386.

¶28 Sometime after 2:00 a.m., on April 14, 2005, Milkie was nude and asleep in what he believed was a locked room at the Bluebird Motel. Suddenly he is shaken awake. When he opens his eyes, the room is dark and he sees two uniformed police officers standing by the bed, one with a flashlight. Milkie is intoxicated and, before he can comprehend what is happening, a police officer starts to ask him what had transpired between him and Terry. In rapid succession, the officer asks Milkie four or five times whether he had a physical confrontation with Terry and whether there had been consensual sexual contact. Only after

Milkie has denied anything happened between him and Terry, except a verbal argument, are the lights turned on and Milkie permitted to get dressed.

¶29 There is a world of difference between a person being questioned at her dining room table after being told she was not under arrest (such as in ***Goetz***), and a person being shaken awake and questioned late at night, in bed, in a dark room, undressed, by two officers standing at the foot of the bed. Moreover, unlike the routine traffic stop, which is a "known quantity" to most people, the unusual nature of the interrogation in this case was such that Milkie would have had no way of gauging how long the questioning was going to continue, considering the officer asked the same questions four or five times. The atmosphere in which the interrogation in this case was conducted was one of pressure, accusation, and uncertainty that would lead a reasonable person to believe that silence was not an option.

¶30 I would conclude that a reasonable person in Milkie's position would only presume that he or she was in custody for purposes of ***Miranda*** when two officers deprive that person of freedom of action in a significant way. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 353, 588 N.W.2d 606 (1999). I therefore respectfully dissent.