COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1536-CR **Cir. Ct. No. 2005CF63**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT T. DAUL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Kurt Daul appeals a judgment convicting him on two counts of homicide by intoxicated use of a vehicle, and one count of causing injury by intoxicated use. He entered a no contest plea after the trial court denied his motion to suppress evidence. He contends that the trial court should have

suppressed inculpatory statements he gave to a police officer, and a blood sample that revealed a prohibited blood alcohol level. We affirm.

¶2 Daul triggered a three vehicle traffic accident that resulted in two fatalities and injuries to two others, including Daul. He was in a hospital bed and medicated, with two broken legs, when Deputy Sheriff David Huberty visited him approximately two hours after the accident. Huberty proceeded to question Daul, obtaining some inculpatory admissions, and Daul's consent to a blood alcohol test, which also proved inculpatory.

¶3 After the State charged Daul, he moved to suppress the statements he gave Huberty in the initial part of the interrogation because he made them before receiving his ***Miranda*** warning. He moved to suppress his subsequent statements because they were not the result of a voluntary waiver of his ***Miranda*** rights, once Huberty informed him of those rights. He also moved to preclude "the State from relying upon the presumptions of admissibility and accuracy of the blood test result at [Daul's] trial," on the grounds that Huberty did not inform him of all of the consequences of taking a blood test, although Huberty read him the Informing the Accused form required by WIS. STAT. § 343.305(4) (2007-08).[1]

¶4 After a hearing on the motions, the circuit court made the following undisputed findings about Huberty's encounter with Daul. Huberty first came to Daul's hospital room between 3:15 and 3:20 a.m. During the next thirty-five minutes or so, Huberty conducted a short interview with Daul, and Daul admitted to drinking alcohol. At 3:34 a.m. Huberty read Daul the Informing the Accused

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

form, which explained the consequences of taking or refusing a blood test. At 3:51 a.m. Daul submitted to a blood test. At 3:53 a.m. Huberty gave Daul his ***Miranda*** warnings. Huberty then continued to question Daul. During his time with Daul, Huberty observed signs of intoxication.

¶5 Daul never alleged that Huberty attempted to coerce him into his admissions or his waiver of rights. The circuit court ultimately denied the motion to suppress and the motion to remove presumptions concerning the blood test, and Daul entered his plea.

¶6 A suspect's statements made while in custody are inadmissible unless the defendant received the requisite warnings. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). A defendant is in custody when a "suspect's freedom of action is curtailed to a 'degree associated with [a] formal arrest.'" ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984) (quoting ***California v. Beheler***, 463 U.S. 1121, 1125 (1983) (per curiam)). The relevant inquiry is how a reasonable person in the suspect's situation would understand the situation. ***Berkemer***, 468 U.S. at 442. A suspect is not automatically considered in custody simply because interrogation occurs in a police station or other coercive environment, or because the individual is a suspect or the focus of a criminal investigation. ***United States v. Wyatt***, 179 F.3d 532, 535 (7th Cir. 1999). Rather, the totality of the circumstances determine whether Miranda warnings were required. ***Id.*** at 536.

¶7 Whether a person is "in custody" for ***Miranda*** purposes is a question of law, which we review de novo based on the facts as found by the circuit court. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). A ***Miranda*** waiver is voluntary if it is the result of a free and deliberate choice, and not the product of intimidation, coercion, or deception. ***State v. Hambly***, 2008 WI

10, ¶91, 307 Wis. 2d 98, 745 N.W.2d 48. We review de novo the voluntariness of a waiver, based on the trial court's findings of fact. ***Id.***, ¶92.

¶8 Daul was not in custody during the pre-***Miranda*** interrogation. Daul first contends that Huberty came to the hospital intending to arrest him, and that purpose is evidence that Daul was in custody from the outset. We disagree because the test of custody is objective, and Huberty's subjective purpose was therefore irrelevant. Daul next contends that he was in custody from the outset because there was already probable cause to arrest him when Huberty arrived at his room. However, the focus is not on what police officers believed, intended, or could have done, but on whether the officers communicated those beliefs or intentions in a way that would cause a reasonable person to believe that he or she was not free to leave. *See* ***State v. Farias-Mendoza***, 2006 WI App 134, ¶17, 294 Wis. 2d 726, 720 N.W.2d 489. In other words, "[a] seizure occurs only when an officer, by use of physical force or show of authority, restrains a person's liberty." ***Id.*** *See also* ***State v. Schambow***, 176 Wis. 2d 286, 293, 500 N.W.2d 362 (Ct. App. 1993) (conditions requiring ***Miranda*** warnings are those caused or created by the authorities). Here, there was no evidence that Huberty did anything more than talk quietly with Daul for a few minutes with medical personnel in the room. It was Daul's injuries, and not Huberty's actions, that restrained his liberty, no matter what Huberty's intentions were.

¶9 Daul's ***Miranda*** waiver was voluntary. The fact that he was seriously injured and receiving pain medication does not resolve the issue in his favor. *See* ***Schambow***, 176 Wis. 2d at 294. A determination that Daul involuntarily waived his ***Miranda*** rights required evidence of improper police conduct deliberately used to procure the waiver. ***Id.*** Here, there was no such evidence. Furthermore, the testimony shows that he was able to respond

appropriately and coherently to the questions asked of him, and there is no evidence that he was responding other than voluntarily and knowingly, even while affected by his pain medication.

¶10 Daul has not established his right to a remedy under the implied consent law. Before the blood draw, Huberty read Daul the statement required by WIS. STAT. § 343.305(4) concerning the consequences of either submitting to or refusing a chemical test for alcohol or drugs, including license revocation for a prohibited blood alcohol level. However, the fact that a positive test for controlled substances could also lead to license revocation is not included in the required § 343.305(4) statement, and Huberty did not inform Daul of that fact. In Daul's view, that omission was a violation of the informed consent law, entitling him to a remedy.

¶11 We disagree for two reasons. First, if a defendant receives erroneous information in addition to the information required by WIS. STAT. § 343.305(4), the defendant cannot obtain relief without making a prima facie showing that the erroneous information contributed to the defendant's decision regarding whether to submit to chemical testing. *See* ***Washburn County v. Smith***, 2008 WI 23, ¶¶56, 70-72, 308 Wis. 2d 65, 746 N.W.2d 243. We conclude that the same principle applies when the issue is missing information as opposed to erroneous information, and Daul made no showing that the missing information here contributed to his blood test decision. Second, Daul argues for the first time on appeal for the suppression of the blood test evidence. However, suppression is not a remedy for a violation of the implied consent law. *See* ***County of Eau Claire v. Resler***, 151 Wis. 2d 645, 652-53, 446 N.W.2d 72 (Ct. App. 1989). Daul therefore waived the issue when he entered his plea. With the exception of suppression issues appealable under WIS. STAT. § 971.31(10), a valid guilty or no contest plea

waives all nonjurisdictional defenses to a conviction, including constitutional violations. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983).

By the Court.—Judgment affirmed.

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