COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP275 **Cir. Ct. No. 2008JV54**

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

IN THE INTEREST OF ZACHARY J. S., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ZACHARY J. S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Reversed and cause remanded with directions.*

¶1 ANDERSON, P.J.[1] Zachary J. S. claims that he was in custody when he was interrogated in the rear of a locked squad car and entitled to ***Miranda***[2] warnings prior to his interrogation. He asserts the circuit court erred in refusing to suppress his inculpatory responses to questions. The totality of the circumstances leads us to conclude that a reasonable person in the same situation would believe that he was in custody. Therefore, we reverse and remand with directions.

¶2 Zachary was a backseat passenger in a car stopped for speeding. He was removed from the car, identified, and searched. All four passengers and the driver were removed from the car because when Fond du Lac Sheriff's Deputy Aaron Rauls approached the car, he immediately noticed the strong smell of marijuana. While the driver was put through field sobriety tests, Zachary and the three other passengers were in the rear of Rauls' squad car; they could not exit the squad while Rauls administered the tests.

¶3 While Rauls conducted the tests, Sergeant Renee Schuster searched the car and found quantities of marijuana and other controlled substances that she placed on the trunk of the car. Schuster then removed three people from the rear of Rauls' squad car and began to interview Zachary. Schuster did not give Zachary his ***Miranda*** rights because she did not consider him under arrest. During the interview, Zachary admitted to smoking marijuana earlier in the day and that Xanax found in the area where he had been sitting was his, and he did not have a

[1] This appeal was decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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

prescription for the pills. After the interview was concluded, Zachary was taken from Rauls' squad car and placed in the rear of a third squad car on the scene. Schuster then told him he was under arrest for possession of Xanax and having a prescription drug without a valid prescription.

¶4 A delinquency petition under WIS. STAT. ch. 938 was subsequently filed, charging Zachary with possession of Xanax. Zachary filed a motion to suppress any statements he made, claiming that he was in custody at the time he made incriminating statements to Schuster and had not been advised of his ***Miranda*** rights. The circuit court denied the motion, holding that the questions were not asked during a custodial interrogation; rather, they were asked to ascertain if criminal activity was afoot. The juvenile later changed his plea to no contest and was placed on formal supervision to the Fond du Lac Department of Social Services for one year.

¶5 Zachary appeals the denial of his motion to suppress.

¶6 In reviewing the circuit court's denial of Zachary's motion to suppress his statements, we accept the court's findings of historical fact unless they are clearly erroneous. *See* ***State v. Morgan***, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 648 N.W.2d 23. Whether Zachary was "in custody" for ***Miranda*** purposes is a question of law that we review de novo. *See* ***Morgan***, 254 Wis. 2d 602, ¶11.

¶7 ***Morgan*** not only provides our standard of review but it provides our disposition because it is factually indistinguishable from this case. When Morgan ran from an apartment police officers were searching, an officer gave chase and caught up with him as he tried to get into the driver's seat of a car. ***Id.***, ¶4. Morgan was handcuffed, with his hands behind him. ***Id.*** Morgan was searched

and ultimately placed in the rear of a squad car with another suspect. ***Id.***, ¶5. In this case, Zachary was removed from the car, searched and placed in the rear of a squad car along with other suspects.

¶8 While in the rear of the squad car, Morgan was asked about drugs found in the car he was removed from. ***Id.***, ¶6. Morgan was not given his ***Miranda*** rights before he was questioned because the officer doing the interrogation did not consider Morgan under arrest. ***Morgan***, 254 Wis. 2d 602, ¶6. Zachary was interrogated by Schuster while he remained in the back of the squad car. Schuster asked Zachary about drugs found in the car, particularly Xanax found at his location in the car. Schuster did not consider Zachary under arrest and did not give him his ***Miranda*** rights. While Morgan was in the squad, he could not go anywhere. ***Morgan***, 254 Wis. 2d 602, ¶6. Rauls and Schuster testified that when Zachary was in the rear of the squad car, he could not go anywhere.

¶9 The only factual difference between this case and ***Morgan*** is that here the record is unclear if Zachary was ever handcuffed.

¶10 In ***Morgan***, we concluded that Morgan was in custody when questioned by the officer and ordered his statement suppressed. ***Id.***, ¶1. In reaching that conclusion we wrote, "[T]he relevant inquiry is how a reasonable person in the suspect's situation would understand the situation." ***Id.***, ¶10. When we employ the reasonable person standard:

> 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. 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., ¶12 (citations omitted).

¶11 We consider the totality of the circumstances—all of the relevant factors as they bear on the suspect. In ***Morgan***, we reasoned:

> Thus, when we inquire whether a person is in custody for ***Miranda*** purposes, we do not focus only on the reasonableness of the police officer's conduct: that is relevant insofar as it has a bearing on how a reasonable person in the suspect's situation would perceive his or her situation, but it is not dispositive. Officers may act reasonably in detaining and restraining suspects, but, when the challenge is that a ***Miranda*** warning should have been given, the issue is whether those acts give rise to a custodial situation. For this reason the relevant factors—as we articulated them in [***State v.***] ***Gruen***, 218 Wis. 2d [581, 582 N.W.2d 728 (Ct. App. 1998)], and have listed them in ¶12 of this decision—are directed to the duration and the degree of restraint. For this reason, too, we have recognized that even during a valid ***Terry*** stop a defendant may be considered "in custody" for Fifth Amendment purposes and entitled to ***Miranda*** warnings before questioning. The fact that a defendant is detained pursuant to a ***Terry*** stop does not dispel the need for ***Miranda*** warnings, but is simply one of the factors to consider as part of the totality of the circumstances to determine whether a reasonable person in the defendant's position would have considered himself or herself "in custody" given the degree of restraint.
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> Applying the factors we articulated in ***Gruen***, we conclude that a reasonable person in Morgan's situation would have considered himself or herself in custody given the degree of restraint. The court found that the time between when he was handcuffed and when he was asked the question about the blunt was "very short" and, while there is no direct testimony on that time span, it is reasonable to infer from the record that the duration was not such as to weigh in favor of a conclusion of "in custody." However, we conclude that other factors would lead a reasonable person in Morgan's situation to believe he or she was in custody. Morgan was handcuffed; he was frisked; he was put handcuffed in a squad car with another

> suspect and then, upon the arrival of another squad car, the other suspect was put in that squad car so that Morgan was alone; and there were four officers on the scene at the time of questioning, plus Smith. Although no gun was drawn on Morgan in the squad car, Officer Whyte and Smith had both drawn their guns on Morgan when he entered the apartment. The questioning of Morgan took place in a squad car, which, based on Officer Whyte's own testimony, Morgan could not leave. Only a single question is involved in this appeal, but the question directly asks about Morgan's connection to contraband found in the car Morgan was entering.

Morgan, 254 Wis. 2d 602, ¶¶16-17 (citations omitted).

¶12 In ***Morgan***, we noted that there was no direct testimony about the duration of the questioning, but "the duration was not such as to weigh in favor of a conclusion of 'in custody.'" ***Id.***, ¶17. In this case, the record establishes that Zachary, the other passengers and three police officers were on the roadside for almost two hours. Rauls stopped the speeding vehicle at 1:26 p.m., and Schuster did not return to the sheriff's department with Zachary until after 3:30 p.m. Plainly, this is not the short time in ***Morgan***, and we will include it in the totality of the circumstances equation.

¶13 Also included in that equation is that Zachary was removed from the car and searched before being put in the rear of a squad car with three other individuals. When the third deputy arrived, the three individuals were transferred to the third squad car and Zachary was left alone in the first squad car. When Zachary was interrogated, he was alone in the rear of a squad car he could not leave. After the interrogation, Zachary was transferred to the third squad car, another squad car he could not leave. While no deputies drew their weapon, three deputies were involved in the investigation. As we noted earlier, the record is unclear if Zachary was handcuffed.

¶14 Zachary was moved from the rear of the speeding vehicle to a spot in front of Rauls' squad car; to the rear seat of Rauls' squad car; and after interrogation, to the rear seat of the third squad car. When we analyzed how the suspect was handled in ***Morgan***, we quoted from ***United States v. Smith***, 3 F.3d 1088, 1097 (7th Cir. 1993), "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."

¶15 We conclude that under the totality of the circumstances, Zachary was in custody when he was questioned by Schuster, and therefore ***Miranda*** warnings were required to safeguard his privilege against self-incrimination. Because Zachary did not receive ***Miranda*** warnings prior to responding to Schuster's questions, his statement must be suppressed. Because it was not suppressed, we reverse and remand for proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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