COURT OF APPEALS
DECISION
DATED AND FILED

December 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1197-CR **Cir. Ct. No. 2010CF281**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS J. RICHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed.*

¶1 CANE, THOMAS, Reserve Judge.[1] Douglas Richer appeals a judgment of conviction for operating while intoxicated, fourth offense. He asserts

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the circuit court erred by failing to grant his suppression motion after the police failed to timely provide ***Miranda***[2] warnings. We affirm.

BACKGROUND

¶2 The State charged Richer with operating while intoxicated, fourth offense, operating with a prohibited alcohol concentration, fourth offense, felony bail jumping, and disorderly conduct. Richer brought a motion to suppress, asserting "statements taken from him … were taken involuntarily and without ***Miranda*** warning[s]."

¶3 At the motion hearing, officer Eric Mathison testified that, on May 20, 2010, he was dispatched to respond to a fight in progress. When he arrived at the scene, a group of approximately ten people "flagg[ed him] down and told [him] that a black Blazer with a smashed out rear window just left the scene traveling westbound …." Mathison proceeded westbound on Grand Avenue. When he reached the intersection of Grand Avenue and Dewey Street, another individual told him that the vehicle and the person involved in the fight had turned north on Dewey. Mathison turned on Dewey and when he reached the next intersection, he "saw several people … and they waved to me and yelled that the vehicle had just turned … eastbound on Gibson Street[.]"

¶4 Gibson Street is a dead-end road that opens into a parking lot. Mathison traveled down Gibson and into the parking lot. There, he observed a "black GMC Jimmy with a smashed out rear window pulling into a parking spot."

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

¶5 Mathison pulled behind the vehicle and observed a male, subsequently identified as Richer, standing next to the driver's side door. Richer told Mathison the vehicle belonged to him and "he had driven [the] vehicle to that location approximately 20 to 30 minutes earlier and then walked up the hill through the woods and then had just returned …." Mathison explained he touched the vehicle's hood and behind the wheel well and noted they were very hot, which was consistent with just having been driven. He also observed Richer's "eyes were glassy and his speech was somewhat slurred." Richer told Mathison "he had been fishing earlier in the day and that he had consumed four to five beers."

¶6 While Mathison was interacting with Richer, three more officers arrived at the scene. Mathison asked Richer to move away from his vehicle so that he could participate in field sobriety tests. Mathison was unsure when the other officers arrived, but stated that at least one other officer was present when he asked Richer to perform the field sobriety tests. Mathison explained that Richer refused to admit he had recently driven, and that another officer "very well could have" asked Richer whether he was driving but Mathison did not know for sure.

¶7 Mathison had Richer perform field sobriety tests, administered a preliminary breath test, and subsequently arrested him for operating while intoxicated. Richer was taken to the hospital for a blood draw and transported to the Eau Claire County jail. Mathison gave Richer his ***Miranda*** warnings at the jail.

¶8 Richer testified that he was standing next to his vehicle when Mathison approached him "and asked if he could talk to me. He asked me if I had some identification and I gave him my driver's license." Mathison then "asked [Richer] to step away from his vehicle." Richer explained the other officers

arrived when Mathison started questioning him, and Mathison and one of the other officers asked him questions for two to three minutes. Richer testified there was a "circle [of officers] around [him]." Finally, Richer denied driving the vehicle, explaining he assumed the vehicle ended up in the parking lot because one of his friends drove it there.

¶9 Richer argued he was "in custody" for purposes of ***Miranda*** within a few minutes of Mathison's arrival because Mathison "took his license and proceed[ed] … to ask Mr. Richer follow-up questions." He also argued Mathison either "directed him or asked him" to move away from his vehicle and he was questioned by a total of "two officers and there [were] two other officers standing by." He contended "he was not free to go anywhere at this time" and "his vehicle was boxed in."

¶10 The court found Richer was not in custody for purposes of ***Miranda***—Mathison was merely discharging his investigative duties. It determined that any statements Richer made to Mathison were voluntary. Richer pled no contest to operating while intoxicated, and the remaining charges were dismissed and read in.

DISCUSSION

¶11 On appeal, Richer argues the court should have granted his suppression motion because Mathison failed to timely provide ***Miranda*** warnings.[3] When we review a suppression motion, we defer to the circuit court's

[3] On appeal, Richer abandons his argument that the statements were involuntary. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the trial court, but not raised on appeal, is deemed abandoned.).

factual determinations unless they are clearly erroneous. ***State v. Torkelson***, 2007 WI App 272, ¶11, 306 Wis. 2d 673, 743 N.W.2d 511 (2007). However, we independently determine whether the facts establish a ***Miranda*** violation. ***Id.***

¶12 Pursuant to ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), an officer may not interrogate a suspect in custody without first advising the suspect of his or her constitutional rights. Statements made in violation of ***Miranda*** must be suppressed. ***Id.***

¶13 An individual temporarily detained pursuant to a ***Terry***[4] stop or a traffic stop is normally not considered "in custody" for purposes of ***Miranda***. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 439-40 (1984) (citation omitted). These temporary detentions do not normally "exert[] upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." ***Id.*** at 437. However, "the safeguards prescribed by ***Miranda*** become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" ***Id.*** at 440 (citation omitted); *see also* ***Torkelson***, 306 Wis. 2d 673, ¶¶16-17.

¶14 In determining whether a suspect's freedom of action is restricted to a degree associated with formal arrest, the court considers "the suspect's freedom to leave; the purpose, place, and length of interaction; and the degree of restraint." ***Torkelson***, 306 Wis. 2d 673, ¶17. The degree of restraint includes: "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

[4] ***Terry v. Ohio***, 392 U.S. 1 (1968).

another location, whether questioning took place in a police vehicle, and the number of officers involved." ***Id.*** The court evaluates these factors from the standpoint "of a reasonable person in the suspect's position." ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. If the court determines that the "circumstances present a risk that police may 'coerce or trick captive suspects into confessing,' or show that a suspect is subject to 'compelling pressures generated by the custodial setting itself,'" then the ***Miranda*** safeguards are necessary. ***Torkelson***, 306 Wis. 2d 673, ¶18 (citing ***Berkemer***, 468 U.S. at 433).

¶15 Here, Richer's argument focuses only on the time period before Mathison placed him under arrest for operating while intoxicated. He lists several factors he contends show he was "in custody" for purposes of ***Miranda***. Specifically, he asserts he was in custody because he "was surrounded by three police vehicles and four officers, had his[] driver's license taken away, [was] directed to stand in a specific location, was asked accusatorial questions,[5] had his[] vehicle blocked in, [and] was in an isolated, dead-end parking lot."

¶16 We reject Richer's characterization of the evidence and conclude Richer was not in custody during Mathison's initial investigation. First, Mathison's actions in parking his vehicle behind Richer, asking Richer for his driver's license, asking him certain questions about whether he was drinking and driving, and asking him to move away from his vehicle to perform field sobriety tests do not rise to the functional equivalent of a formal arrest. Moreover, that

[5] The record citation Richer provides in support of the "accusatorial" questions is his testimony that Mathison and one other officer repeatedly asked him to admit he was the driver.

three other officers were present during Mathison's interaction with Richer does not show he was subject to restraints comparable to those of a formal arrest. Only one of the other officers had some, if any, interaction with Richer. Richer was not handcuffed, frisked, physically restrained, or moved to another location. No officer drew a weapon or made any show of force. He remained in a public place throughout the entire interaction. A reasonable person in Richer's position would not believe his freedom was restricted to a degree associated with a formal arrest.

By the Court.—Judgment affirmed.

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