

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 25, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP573-CR

Cir. Ct. No. 2006CF589

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL K. LAND,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michael K. Land has appealed from judgments convicting him of armed robbery and obstructing an officer and from an order denying postconviction relief. The sole issue on appeal is whether the trial court erred in denying Land's motion to suppress statements made by him to the police

on June 7, 2006. Land moved to suppress his statements on the ground that he was in custody at the time he made the statements, but was not given *Miranda*¹ warnings. We conclude that the trial court properly denied Land's motion to suppress. We therefore affirm the judgments and order.

¶2 Law enforcement officers are required to give *Miranda* warnings to a person only when that person is subjected to custodial interrogation. *State v. Fischer*, 2003 WI App 5, ¶22, 259 Wis. 2d 799, 656 N.W.2d 503. Custodial interrogation is questioning by law enforcement officers after a person has been taken into custody or when the person's freedom of action has been curtailed to a degree associated with an arrest. *State v. Morgan*, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. In determining whether a person was in custody for purposes of *Miranda* warnings, courts must consider the totality of the circumstances. *State v. Mosher*, 221 Wis. 2d 203, 210-11, 584 N.W.2d 553 (Ct. App. 1998). The test is whether a reasonable person in the position of the suspect would have considered himself or herself to be in custody, given the degree of restraint under the circumstances. *Id.* at 211. The determination depends upon the objective circumstances, not on the subjective views of the person being questioned or the interrogating officers. *Id.*

¶3 The relevant factors in determining whether a person is in custody for purposes of *Miranda* warnings include the person's freedom to leave the scene; the purpose, place, and length of the interrogation; and the degree of restraint. *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). When considering the degree of restraint, courts consider whether the person was

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

handcuffed, whether a weapon was drawn, whether a frisk was performed, the manner in which the defendant was restrained, whether the person was moved to another location, whether questioning took place in a police vehicle, and the number of officers involved. *Mosher*, 221 Wis. 2d at 211.

¶4 At the hearing to determine whether a custodial interrogation occurred, the burden is on the State to prove by a preponderance of the evidence that the defendant was not in custody. *State v. Armstrong*, 223 Wis. 2d 331, 351, 588 N.W.2d 606 (1999). The court must determine the circumstances surrounding the interrogation and whether, given those circumstances, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In reviewing an order denying a motion to suppress evidence, this court upholds the trial court's findings of fact unless they are clearly erroneous. *Mosher*, 221 Wis. 2d at 211. However, whether a person is in custody for *Miranda* purposes presents a question of law, which we review de novo. *Mosher*, 221 Wis. 2d at 211.

¶5 Based on the largely undisputed testimony at the suppression hearing and the trial court's findings of fact, we conclude that Land was not in custody at the time he made the challenged statements. The testimony indicated that five city and county law enforcement officers went to Land's residence on June 7, 2006, shortly after the armed robbery of a pharmacy. One of the robbery victims had provided police with the license number of a white vehicle that the victim observed driving away from the scene. Officers determined that the vehicle was registered to Land.

¶6 The officers arrived at Land's residence in four squad cars. After obtaining a telephone number for the residence, Sergeant Cynthia Fredericksen

dialed the number. When a man answered, Fredericksen identified herself and asked the man if he was Michael Land. After Land confirmed that it was him, Fredericksen asked Land to come outside and talk to the officers. She also told him to have nothing in his hands.

¶7 The testimony indicated that Land agreed to come out and emerged from the house about two minutes later. Because he had something in his hand that the officers initially could not identify, three officers drew their handguns, with Fredericksen and a second officer, Willie Hamilton, approaching Land in “combat” posture and ordering him to drop the item. However, before they reached Land, Fredericksen and Hamilton realized that it was a portable telephone in Land’s hand. The testimony indicated that the officers therefore reholstered their weapons before Fredericksen and Hamilton reached Land.

¶8 Fredericksen testified that upon reaching Land, she told him that they were there to investigate an armed robbery at the Larsen pharmacy and that they were waiting for a detective to arrive. Fredericksen testified that Hamilton did a quick pat-down of Land on the outside of his clothing for purposes of officer safety. She testified that she told Land that he was not under arrest and that Land was cooperative. Fredericksen further testified that it was very hot outside and that Land was placed in the back seat of Officer Felicia Labatore’s squad car, which was parked on the side of the road. The testimony indicated that although the back doors of the squad car could not be opened from inside the vehicle, the officers did not lock the vehicle from the outside and kept the window between the front and back seats open to allow the air conditioning to flow into the back seat.

¶9 The testimony was undisputed that Land was not handcuffed and walked over to the squad car with Fredericksen and Hamilton. Labatore also

testified that when a person was arrested and placed in a squad car, the window between the front and back seats was never left open.²

¶10 Fredericksen testified that before Land entered the squad car, she and Hamilton asked him if it would be okay to search his car and home, and he consented. Fredericksen further testified that Land was in the squad car for forty-five minutes to one hour before Detective Gregory Ollila arrived and that at one point she opened the door to ask him if he was okay and told him again that they were waiting for the detective.

¶11 The testimony indicated that when Ollila arrived, he suggested that written consent to search the home be obtained from Land, and it was. Ollila testified that he then walked over to the squad car in which Land had been sitting. Ollila testified that Land was now standing outside the vehicle. Ollila testified that he introduced himself, told Land he was investigating the armed robbery at the pharmacy, and told Land that he wished to talk to him in his squad car, an unmarked vehicle. Ollila testified that he told Land that he was not under arrest or in custody, and that Land stated that he understood. Ollila testified that Land agreed to talk with him, and he and Land walked together to Ollila's vehicle.

¶12 Ollila testified that he asked Land to get in the front passenger seat, which Land did. Ollila testified that he then pulled the car into the driveway to get it off the road. Ollila testified that the vehicle was unlocked while he and Land were in it and that, unlike marked squad cars, the doors in his vehicle could be

² This testimony was consistent with the testimony of Detective Gregory Ollila, who testified that when a person is arrested and moved from place to place, the person would be handcuffed and transported in a vehicle with a shield between the person and the officer.

opened from the inside. Ollila testified that Land talked and answered questions for twenty to thirty minutes, that he made no threats or promises to Land, and that Land seemed to want to cooperate in the investigation. However, Ollila testified that when Land's wife arrived home, Land's attitude changed and he indicated that he wanted to get out of the car. Ollila testified that he told Land that he still wanted to talk to him because he was not done interviewing him, but Land jumped out of the vehicle. Ollila testified that he did not tell Land that he could not get out when Land expressed a wish to do so.

¶13 Ollila testified that upon getting out of the car, Land told his wife that he was being accused of robbery and wanted her to call his lawyer. Ollila testified that Land then said that he was leaving and began to walk away. Ollila testified that at that point, he stopped Land and placed him under arrest. Land was then handcuffed.

¶14 Based upon this record, we agree with the trial court that no reasonable person in the position of Land would have considered himself to be in custody prior to the time Ollila placed him under arrest and he was handcuffed. As set forth above, the encounter was initiated when the police called Land and asked him to come outside to talk to them. Land's agreement to come outside to talk to the officers, like his subsequent consent to the search of his house and vehicle, reflected a voluntary decision to cooperate with the police, not a lack of freedom to leave. Land's freedom to leave was further demonstrated by the evidence that he was told by both Fredericksen and Ollila that he was not under arrest or in custody, and the evidence that Land told Ollila he understood.

¶15 The purpose, place, and length of the interrogation also support a conclusion that the interrogation was not custodial. While Land had to wait forty-

five minutes to one hour for Ollila to arrive, nothing in the record indicates that he objected to doing so and was told that he had to wait despite his objection. Ollila's questioning of Land was relatively brief, only twenty to thirty minutes. Land was not moved to the custodial atmosphere of a police station or sheriff's department. Instead, the questioning took place in Land's driveway in the unlocked front seat of Ollila's car. As already noted, Ollila made no threats or promises to Land with respect to his cooperation, and Land expressed to Ollila that he understood he was not under arrest or in custody. Under these circumstances, we conclude that a reasonable person in Land's position would have believed that he was free to decline to speak to Ollila and to leave.

¶16 Consideration of the degree of restraint involved also supports the conclusion that Land was not in custody when questioned. Although multiple officers were at the scene and weapons were drawn when Land exited his home, the evidence is undisputed that the officers reholstered their weapons as soon as they ascertained that Land was holding a telephone, not a weapon, and before the officers actually reached him. While a brief pat-down was performed, Land was not handcuffed during questioning and then only after Ollila placed him under arrest. As already noted, Land was also questioned on his own property in the front seat of the detective's unlocked car and never moved any farther than the road in front of his house, where he waited for Ollila in an air-conditioned squad car.

¶17 Land emphasizes the fact that the back doors of the squad car in which he waited for Ollila could not be opened by a person inside of the vehicle.³ However, the evidence indicated that, unlike the situation where a person is arrested, the window between the front and back seats was left open. In addition, the officers did not lock the vehicle from the outside, nor was there any evidence that Land even knew that the back doors could not be opened from the inside. *See Gruen*, 218 Wis. 2d at 597 (the fact that a person who is placed in the back seat of a police vehicle does not know that the back door cannot be opened from the inside makes it less likely that he could be deemed to be in custody). Most significantly, Land was also unrestrained when he walked from the squad car where he waited for Ollila to Ollila's vehicle and was questioned in the front seat of Ollila's vehicle, which was not locked. His unrestrained movement to Ollila's vehicle, combined with the fact that he was not restrained in that vehicle, supports the conclusion that he was not in custody prior to or during the questioning. *See id.* Moreover, Ollila testified that while he asked Land to continue the interview when Land's wife arrived home, he did not tell Land that he could not get out of the vehicle. Land then chose to get out, indicating that he was not restrained from doing so.

¶18 Under the totality of the circumstances, we agree with the trial court that the record reflects that Land chose to cooperate with law enforcement authorities with regard to questioning and was not in custody prior to or during the

³ Although the subjective views harbored by the officers are not pertinent in determining whether a reasonable person in the position of Land would have believed he was in custody, *see State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998), we note that the trial court found that the officers placed Land in the back of the squad car for convenience and to provide a safe and comfortable location for him to wait, not to prevent him from leaving.

questioning. Based on the totality of the circumstances, a reasonable person in the position of Land would not have believed that he was in custody and unable to terminate questioning or leave. Land's motion to suppress therefore was properly denied.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

