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September 4, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1833-CR State of Wisconsin v. Jonathan M. Simmons (L.C. #2015CF268)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jonathan Simmons appeals from his judgment of conviction, following a jury trial, for using a computer to facilitate a child sex crime. He argues the circuit court erred in denying his motion to suppress an incriminating statement he made to police. He further argues that certain incriminating cell phone evidence, which was used against him at trial along with the

incriminating statement, also should have been suppressed because it derived from the statement. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Because we conclude the court did not err, we affirm.

Background

Prior to trial, the circuit court held an evidentiary hearing on Simmons' motion to suppress. The following relevant evidence was presented at that hearing.

Through electronic communications, Simmons proposed performing oral sex on a person representing himself as a fifteen-year-old boy named "Dustin," but who was really an undercover police detective. Simmons and "Dustin" arranged to meet at the Waukesha Public Library.

Simmons went to the library. Another detective and a police sergeant, both wearing civilian clothes but with police identification visible,[2] approached Simmons while he was sitting on a bench in the atrium of the library. The detective identified himself as a police officer, sat next to Simmons on the bench, and spoke with him for about twenty minutes. During that conversation, Simmons admitted he was there to meet "Dustin" and confirmed that he had brought up to "Dustin" the possibility of performing oral sex on him. During most of the conversation, the sergeant stood near Simmons and the detective. At some point during the conversation, the detective requested Simmons' cell phone and Simmons handed it to him. At

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The detective wore "a vest that had police on it" and the sergeant also "had something that said police on it."

the end of the conversation, a uniformed police officer entered the library, arrested Simmons, and transported him to the police station.

At the station, the detective informed Simmons of his ***Miranda***[3] rights and then questioned him in an interview room. The detective told Simmons they were continuing the conversation they had begun at the library, and Simmons provided a written statement, again acknowledging that he had gone to the library to meet "Dustin" "with the possibility of having oral sex." During this interrogation at the police station, Simmons consented to a search of his cell phone.

Simmons moved to suppress the statement he made at the library as well as at the police station. Following the evidentiary hearing, the circuit court granted the motion as to the statement at the library but denied it as to the statement at the station. Simmons was subsequently convicted following a trial and now appeals.

Discussion

"The review of a circuit court's order granting or denying a suppression motion presents a question of constitutional fact. We will uphold the court's factual findings unless they are clearly erroneous, but we independently apply constitutional principles to those facts." ***State v. Coffee***, 2019 WI App 25, ¶6, 387 Wis. 2d 673, 929 N.W.2d 245 (citations omitted).

Simmons' entire appeal rests on his position that the incriminating statement he made to the detective at the library was unlawfully procured because it was the result of a custodial

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

interrogation before which he was not ***Mirandized***. While the circuit court suppressed that statement, Simmons claims the court erred in not also suppressing the similarly incriminating statement he made at the police station, which followed proper ***Miranda*** warnings, as well as evidence on his cell phone, all of which evidence derived from his statement at the library. All of this evidence must be suppressed, he claims, because his incriminating statement at the police station was "an illegal extension of the unwarned statement he made to officers at the library."

In support of his position, Simmons heavily relies on ***Missouri v. Seibert***, 542 U.S. 600, 605-06 (2004). In ***Seibert***, officers had admitted to using a police tactic of deliberately interrogating the suspect/defendant while she was in custody at the police station but without giving her ***Miranda*** warnings and then, after procuring an inadmissible admission from her, giving her the warnings and securing a subsequent confession minutes later. ***Seibert***, 542 U.S. 605-06. As the State correctly notes, however, "***Seibert*** does not apply where, as here, a suspect was not in custody when he gave an initial un***Mirandized*** statement." *See* ***State v. Schloegel***, 2009 WI App 85, ¶12 & n.2, 319 Wis. 2d 741, 769 N.W.2d 130 (recognizing that a "***Seibert*** analysis" is not appropriate where the defendant had not been in custody during the incriminating statement and thus "no violation of ***Miranda*** occurred"); ***United States v. Thompson***, 496 F.3d 807, 811 (7th Cir. 2007) (***Seibert*** "does not apply" if "***Miranda*** warnings before the first confession were not required because [the suspect's] first interview was not custodial.").

If Simmons was not in custody during his incriminating conversation with the detective at the library, then his statement procured there was lawfully procured despite the detective's failure to give him ***Miranda*** warnings. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 686, 482 N.W.2d 364 (1992) ("[B]efore [***Miranda***] warnings need be given, it must be established that the defendant was both 'in custody,' and under 'interrogation' by police."); ***State v. Goetz***, 2001 WI

App 294, ¶10, 249 Wis. 2d 380, 638 N.W.2d 386 ("[A] suspect must be in custody in order to trigger the ***Miranda*** requirements."). In this case, we conclude Simmons was not in custody during the interview at the library; therefore, his statement during that interview was lawfully procured and in no way undermines the lawfulness and admissibility of Simmons' similar subsequent statement at the police station following ***Miranda*** warnings.

Just last year, our state supreme court provided an in-depth explanation of "what 'in custody' means":

> The test to determine whether a person is in custody under ***Miranda*** is an objective test. The inquiry is "whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." Looking at the totality of the circumstances, courts will consider whether "a reasonable person would not feel free to terminate the interview and leave the scene."
>
> We consider a variety of factors to determine whether under the totality of the circumstances a reasonable person would feel at liberty to terminate an interview and leave. Such factors include: the degree of restraint; the purpose, place, and length of the interrogation; and what has been communicated by police officers. "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."
>
> If we determine that a suspect's freedom of movement is curtailed such that a reasonable person would not feel free to leave, we must then consider whether "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in ***Miranda***." In other words, we must consider whether the specific circumstances presented a serious danger of coercion, because the "freedom-of-movement test identifies only a necessary and not a sufficient condition for ***Miranda*** custody." Importantly, a noncustodial situation is not converted to one in which ***Miranda*** applies simply because the environment in which the questioning took place was coercive. "Any interview of one suspected of a crime by a police officer will have coercive aspects to it ... [b]ut police officers are not required to administer ***Miranda*** warnings to everyone whom they question." Therefore, "***Miranda*** warnings are not required 'simply

> because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'" And finally, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."

State v. Bartelt, 2018 WI 16, ¶¶31-33, 379 Wis. 2d 588, 906 N.W.2d 684 (footnote omitted; citations omitted).

Here, under the totality of the circumstances, Simmons was not in custody until he was formally placed under arrest by the uniformed police officer at the conclusion of the interview in the library atrium. Until that time, Simmons was not told he was under arrest, handcuffed, or otherwise physically restrained in his freedom of movement to a degree associated with a formal arrest. He was not frisked or moved to a different location, no weapons were drawn, no commands were given, and other than the sergeant standing nearby Simmons and the detective, no actions were taken that could be considered a show of force. The interview itself took place in the atrium of a public library—as opposed to the back of a squad car or a police department interrogation room—where, as a video entered into evidence at the suppression hearing shows, numerous people entered and exited during the approximately twenty-minute interview. *See* ***id.***, ¶38 (indicating that a thirty or thirty-five minute interview length indicates a lack of custody). The officers were not decked out in full police uniform, but wore civilian clothes with visible police identification. The detective was the only person to interview Simmons, thus he was not "tag-teamed." While the officers were at times in close proximity to Simmons, a reasonable person would completely understand that the nature of the sensitive discussion taking place in this public forum would have called for such close proximity. Because we conclude Simmons was not in custody prior to formal arrest following the interview in the library atrium, the detective and sergeant did not err in not ***Mirandizing*** him prior to that conversation.

Simmons also argues that incriminating cell phone evidence also should have been suppressed. Relying on our state supreme court's decision in ***State v. Knapp***, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, he states that the court concluded in that case "that physical evidence obtained as a result of [an] intentional ***Miranda*** violation should be suppressed." Because we conclude no ***Miranda*** violation occurred either at the library (because Simmons was not in custody when he made his incriminating statement) or at the police station (because officers ***Mirandized*** Simmons before he made his incriminating statement), Simmons' contention that the cell phone evidence should have been suppressed falls away.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals