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October 14, 2020

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

2019AP1119-CR State of Wisconsin v. Carlin C. Pillman (L.C. #2014CF413)

Before Neubauer, C.J., Reilly, P.J., and Davis, 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).

Carlin C. Pillman appeals from an amended judgment of conviction. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1).[1] We affirm.

Pillman was arrested and charged with three counts of possession of child pornography. The trial court denied Pillman's motion to suppress incriminating statements made to law enforcement just prior to his arrest. Pillman then pled guilty to one count of possession of child pornography and was sentenced to three years' initial confinement and three years' extended supervision. *See* WIS. STAT. § 948.12(1m), (3)(a). Pillman now appeals, arguing that the incriminating statements must be suppressed because he made them while he was in custody but before he was advised of his ***Miranda***[2] rights. Pillman requests that this court vacate his conviction and order those statements suppressed for use at trial.

The following evidence is from the ***Miranda-Goodchild***[3] hearing on Pillman's motion to suppress. On September 18, 2014, at approximately 9:00 a.m., law enforcement executed a search warrant for Pillman's residence in connection with a Wisconsin Department of Justice (DOJ) investigation into the downloading of child pornography from an IP address assigned to Pillman. Pillman was working in Illinois when law enforcement arrived, but his babysitter called him from the house and told him to come home. Pillman immediately drove home, arriving at approximately 10:30 a.m. When he arrived, he saw six police vehicles (some marked, some

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

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

[3] ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

unmarked) parked in his main and secondary driveways. An officer was standing in the middle of the road, directing Pillman to park across the street in the neighbor's yard.

Pillman parked as directed and was met by officers from the DOJ Division of Criminal Investigation (DCI) and the Walworth County Sheriff's Department (officers from the Town of Linn Police Department also were present at the scene). Although a total of twelve to fifteen officers executed the warrant, it is unclear how many initially interacted with Pillman. It is probable that at least three officers were present: two or more officers who told Pillman to put his hands up and patted him down for weapons; and DCI Agent Jeffrey Berkley, who was nearby. Some of the officers were in uniform and others wore plain clothes; all wore bulletproof vests. The officers had weapons, but none of the weapons were drawn.

Berkley introduced himself to Pillman, explained why officers were searching Pillman's house, and showed Pillman the search warrant. Berkley asked Pillman to speak with him in Berkley's vehicle; Pillman agreed and the two walked to Berkley's unmarked minivan. Pillman asked permission to enter the house but was told "not at this time." According to Pillman, he also asked if he could speak to his wife, and he received the same answer. Berkley later testified, however, that he "believe[d] [Pillman's] wife told us she didn't want to talk to him until we were done talking with him."

According to Pillman, as he walked to the minivan, three officers walked very close to him, effectively surrounding him. Berkley did not definitively contradict this assertion; however, he testified that he could not recall anyone walking with them to the minvan and that Pillman's description "seem[ed] highly unlikely." In any case, upon arriving at the minivan, Berkley told Pillman to sit in the front passenger seat, and Berkley sat in the driver's seat. A

third officer, DCI Agent Amy Lehmann, sat in the rear passenger seat behind Pillman. Berkley and Lehmann both wore plain clothes; they may have already taken off their bulletproof vests and DCI jackets, which they had been wearing earlier that morning.

Around this time, a DCI agent drove Pillman's car from the neighbor's lawn to Pillman's secondary driveway (it is not clear from the record how the agent received the keys or whether the agent returned the keys afterwards). At some point, a DCI vehicle was parked behind Pillman's car, blocking it in (that is, Pillman could not have driven his car until the DCI vehicle was first moved). Also around this time, and likely continuing throughout the interview, Pillman observed a number of officers carrying out tasks associated with the search warrant, such as guarding the door to Pillman's house, coming in and out of the house, walking near the minivan, and searching his car.

At the hearing, there were two main points of contention concerning the interview in the minivan. First, Berkley testified that before the interview started he told Pillman that Pillman "did not have to speak with us if he did not want to" and that Pillman "was not under arrest and was free to leave at any time he wanted to." According to Berkley, Pillman "said he understood that." In contrast, Pillman testified that no one ever told him that he was free to leave. Second, Berkley testified that throughout the interview, the minivan door on Pillman's side remained open; Pillman maintained that the door was closed, although not locked.

The interview lasted roughly two and one-half hours, from approximately 10:35 a.m. to 1:00 p.m. At some point Pillman asked to use the restroom. He was told, "No[t] at this time" but that the interview "should be done shortly." Pillman did, however, ask for and receive two cigarette breaks of less than five minutes each. Pillman freely exited the minivan for these

breaks and smoked in front of the vehicle; while he did so, at least one officer stood close to him. Berkley later testified, "We always have somebody with the person we are talking with" for "security purposes" and that Pillman "wasn't allowed to freely roam the property without being escorted." While Pillman took these breaks, Berkley conferred with a DCI computer forensic agent who had been examining Pillman's computer. Consequently, at some point during the interview, it is "possible" that Berkley was aware that agents had already identified potential child pornography on the computer.

When the interview began, Pillman denied knowing anything about child pornography accessed on his computer. As the interview progressed, Berkley "challenged" Pillman on "the excuses he was giving us" (for example, that the babysitter downloaded the pornography). Berkley, however, did not raise his voice with Pillman. Eventually, Pillman admitted to downloading and viewing child pornography. Pillman was arrested shortly thereafter, at which point he was advised of his ***Miranda*** rights.

After considering the above evidence, the trial court made an oral ruling as to "whether a reasonable person in the defendant's position would have believed he was in custody," such that Pillman should have received a ***Miranda*** warning sometime prior to making the incriminating statements. The court found "obvious differences in the testimony of … Pillman and … Berkley"—namely, whether Pillman was told he was free to leave and whether Pillman's minivan door remained open during the interview. The court "resolve[d] those differences in favor of [Berkley]," stating, "I find he's more credible based, in large part, on the bias associated with this defendant and the reasonableness of … Berkley's testimony." The court then summarized the relevant factual findings, including that: (1) Pillman "voluntarily arrived at his home, knowing police officers were present"; (2) Pillman agreed to speak with Berkley; (3)

Pillman was "specifically told that he was not under arrest; he was free to leave"; (4) the minivan door remained open during the interview; (5) Pillman was allowed two cigarette breaks during the interview; (6) Berkley and Lehmann were not in uniform, although both were armed; (7) Pillman was not handcuffed; (8) there were no guns drawn on Pillman; (9) the interview took place in a regular vehicle, not a police vehicle; and (10) two agents were directly involved in questioning Pillman. Under this view of the evidence, and based on the totality of the circumstances, the trial court held that Pillman was not in custody for ***Miranda*** purposes. Pillman challenges that finding on appeal.

The Wisconsin and United States Constitutions provide that no person shall be compelled in any criminal case to be a witness against him or herself. U.S. CONST. amend. V; WIS. CONST. art. I, § 8; *see also* ***Malloy v. Hogan***, 378 U.S. 1, 6 (1964) (the Fourteenth Amendment incorporates and thereby applies to states the privilege against self-incrimination). A procedural safeguard implementing this right is the ***Miranda*** warning: prior to custodial interrogation, an individual "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." ***Miranda***, 384 U.S. at 444; *see also* ***State v. Lonkoski***, 2013 WI 30, ¶23, 346 Wis. 2d 523, 828 N.W.2d 552. "Statements obtained via custodial interrogation without the ***Miranda*** warnings are inadmissible against the defendant at trial." ***State v. Ezell***, 2014 WI App 101, ¶8, 357 Wis. 2d 675, 855 N.W.2d 453.

The ***Miranda*** protections apply only when the individual is objectively "in custody,"[4] meaning subject to "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." ***State v. Quigley***, 2016 WI App 53, ¶32, 370 Wis. 2d 702, 883 N.W.2d 139 (citation omitted); *see also* ***Lonkoski***, 346 Wis. 2d 523, ¶¶23, 27. To determine whether a person is in custody for ***Miranda*** purposes, we begin by considering whether "a reasonable person would not feel free to terminate the interview and leave the scene"—that is, "whether a reasonable person in the suspect's position would have considered himself or herself to be in custody." ***Lonkoski***, 346 Wis. 2d 523, ¶27 (citations omitted). This "determination is made in the totality of the circumstances considering many factors." ***Id.***, ¶28. These factors include "the purpose, place, and length of the interrogation" and "what has been communicated by police officers." ***State v. Bartelt***, 2018 WI 16, ¶32, 379 Wis. 2d 588, 906 N.W.2d 684. Courts also consider "the degree of restraint" of the individual; for example, "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."[5] ***Id***. (citation omitted).

[4] The State apparently does not dispute that Pillman's questioning constituted an "interrogation." *See, e.g.*, ***State v. Armstrong***, 223 Wis. 2d 331, 357, 588 N.W.2d 606 (1999) ("[A]n 'interrogation' occurs when a person is 'subjected to either express questioning or its functional equivalent.'") (citing ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980)). The only issue on appeal is whether the interrogation was "custodial."

[5] If the court determines that the individual was not objectively free to leave, it next considers "the additional question [of] whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in ***Miranda***." ***Howes v. Fields***, 565 U.S. 499, 509 (2012); *see also* ***State v. Bartelt***, 2018 WI 16, ¶33, 379 Wis. 2d 588, 906 N.W.2d 684. ***Miranda*** violations are further subject to a harmless error analysis. ***State v. Martin***, 2012 WI 96, ¶44, 343 Wis. 2d 278, 816 N.W.2d 270. We do not reach either of these inquiries because, like the trial court, we find that Pillman was objectively free to leave.

Where a defendant seeks to suppress statements made to law enforcement on the claimed basis of a ***Miranda*** violation, the trial court should—as the trial court did here—conduct a ***Miranda-Goodchild*** evidentiary hearing, at which "the State must establish by a preponderance of the evidence whether a custodial interrogation took place." ***State v. Armstrong***, 223 Wis. 2d 331, 345, 588 N.W.2d 606 (1999); *see also* ***State v. Jiles***, 2003 WI 66, ¶¶25-26, 262 Wis. 2d 457, 663 N.W.2d 798. We review the trial court's findings of fact for clear error, but we determine de novo whether the State met its burden of showing that the defendant was not subject to custodial interrogation. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶21.

To begin, the trial court's findings of fact were not clearly erroneous, in that they were supported by the record and not "against the great weight and clear preponderance of the evidence." *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶¶11-12, 290 Wis. 2d 264, 714 N.W.2d 530. It was the trial court's role to weigh the testimony and assess witness credibility, and we will not disturb its conclusion that Berkley's version of events was "more credible." *See* ***State v. Hughes***, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621. Therefore, we analyze Pillman's arguments assuming that two disputed facts were established in the State's favor: Pillman was told he was free to leave, and the questioning took place while Pillman's minivan door was open. On the other hand, there were discrepancies between Berkley's and Pillman's testimony that the trial court did not directly resolve—most notably, whether Pillman was escorted by officers while he walked to the minivan. Because Pillman's custody status does not ultimately depend on these disputed facts (as the trial court implicitly found), we will assume for the purpose of this order that Pillman's version of events, as discussed below, is true.

Pillman asserts that, under all the circumstances, he was not free to leave. He points to the following facts: (1) there were up to fifteen law enforcement officials present, some in uniform and all armed; (2) he was frisked as soon as he got out of his vehicle; (3) he was taken to a DCI minivan instead of being interviewed in a neutral setting, such as his house or vehicle; (4) he was interrogated for two and one-half hours, with only two five-minute cigarette breaks; (5) his vehicle was moved so that it was blocked in the driveway; (6) he was told he could not see his wife; (7) he was told he could not use the restroom; (8) he was closely accompanied by officers on his walk to the police minivan and during his cigarette breaks; and (9) despite Pillman's repeated denials of any wrongdoing during the interview, Berkley "aggressively" challenged those denials.

We recognize that these circumstances may have been subjectively intimidating to Pillman. Nonetheless, considered as a whole, Pillman was objectively "free to leave."[6] First, "the purpose, place, and length of the interrogation" generally support a finding that Pillman was free to leave. As was the case in ***Lonkoski***, Pillman voluntarily came to the scene of the interview of his own volition and consented to speak with law enforcement. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶31; *see also* ***Bartelt***, 379 Wis. 2d 588, ¶36. The interrogation did not take place in a police interrogation room but in Berkley's unmarked minivan, with Pillman's door open.

[6] As discussed below, we acknowledge that Pillman was not free to roam about his property unsupervised, and he may have been limited in accessing the rooms in his house. Nonetheless, these proscriptions did not constitute a seizure of Pillman's *person*; instead, police were merely attempting to secure the *premises* and carry out the search warrant. *Cf.* ***Michigan v. Summers***, 452 U.S. 692, 705 (1981) ("[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."). That is, the proper inquiry is whether Pillman was objectively "free to terminate the interview and *leave the scene*," not whether Pillman was denied unfettered access to the premises. *See* ***State v. Lonkoski***, 2013 WI 30, ¶27, 346 Wis. 2d 523, 828 N.W.2d 552 (emphasis added; citation omitted).

Although the mere fact that this was a DCI minivan provides slight support for Pillman's position, it is reasonable to assume that Berkley used the minivan because there were few other places to conduct the interrogation. In any case, the front passenger seat of a standard (non-police) vehicle, parked in the suspect's own driveway, is distinct from a typical formal interrogation setting, such as a police station. Pillman also emphasizes the length of the interview—over two and one-half hours—but there is no hard-and-fast rule concerning appropriate interrogation length, and in any case, Pillman received two breaks.

We next consider "what has been communicated by police officers." Key to this inquiry is that Pillman was told (and acknowledged being told) that he was not under arrest and was free to leave. We have previously held that a "highly probative" factor weighing against custody is that the individual was told he or she was free to leave during questioning. ***State v. Quigley***, 370 Wis. 2d 702, ¶40. On the other hand, law enforcement cannot render a custodial situation otherwise merely by invoking the magic words that the suspect may leave. *See* ***United States v. Slaight***, 620 F.3d 816, 819-21 (7th Cir. 2010).[7] We must consider all of the circumstances bearing on how a reasonable person in the suspect's position would perceive the situation. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶27. We therefore turn to the third factor in this inquiry: "the degree of restraint" of Pillman.

[7] Pillman relies extensively on ***United States v. Slaight***, 620 F.3d 816, 820-21 (7th Cir. 2010), including for the proposition that custody is a "state of mind" and that the custody determination should be affected by the strength of the State's case against him. We note that our supreme court in ***Lonkoski*** appears to have largely rejected this latter factor as relevant to the custody determination, noting that it was inconsistent with existing United States Supreme Court precedent and that of other cases. *See* ***Lonkoski***, 346 Wis. 2d 523, ¶¶34-35 ("[A] suspect's belief that he or she is the main focus of an investigation is not determinative of custody."); *see also* ***Beckwith v. United States***, 425 U.S. 341, 345 (1976), ***United States v. Caiello***, 420 F.2d 471, 473 (2nd Cir. 1969).

We find that, on the whole, this factor also supports the State's position, even acknowledging the points in Pillman's favor. Those points include Pillman's assertion that one or more officers closely watched or followed him from the time he arrived on the scene, that his car was blocked in the driveway, and that he was told he could not immediately talk to his wife. No doubt these were intimidating circumstances, but they must be weighed against other facts.

Aside from an initial weapons pat-down, Pillman was not handcuffed or restrained—in fact, there is no evidence that he was physically touched in any respect. Although monitored by officers, he was interviewed in an unlocked vehicle with the door open, which he was told he could exit at will. It is true that he was not allowed to freely move about the premises, but a reasonable person could have concluded that this was because officers were executing a search warrant in and around the house. Weapons were never drawn on Pillman. He was questioned by only two officers in a standard (non-police) vehicle; although he may have preferred to be questioned in his home, again, a reasonable person could have concluded that the premises were temporarily off-limits. Pillman also claims he was denied permission to use the bathroom, but it is unclear when this request was made or if the request was denied because the interview was soon ending. Taken together, these facts demonstrate that Pillman, although obviously a person of interest in the investigation, was not put in a position in which a reasonable person would not have felt free to terminate the interrogation or depart from the premises.[8]

[8] Because we find that Pillman was not in custody, we do not reach the State's argument that in the alternative, Pillman was subject to a limited, noncustodial detention in connection with the execution of the search warrant. *See* ***State v. Goetz***, 2001 WI App 294, ¶12, 249 Wis. 2d 380, 638 N.W.2d 386; ***Summers***, 452 U.S. at 704-05.

This interrogation presents some aspects suggestive of custody, but under the totality of the circumstances, Pillman was not in custody when he made the incriminating statements. We affirm the judgment of conviction.

Therefore,

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