STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Case No. 2013AP000834CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRENTON JAMES DAWSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Milwaukee County Circuit Court,
the Honorable Rebecca F. Dallet, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Was Trenton Dawson "in custody" for ***Miranda***[1] purposes when questioned by police detectives in the back seat of a locked squad car regarding the shooting death of his friend?

The circuit court denied the motion to suppress this statement, finding that he was not in custody during the squad car interrogation.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Counsel welcomes oral argument if this Court would find it helpful for determination of this case. The issue of custody for purposes of ***Miranda*** is necessarily fact-specific, and therefore, publication is likely not warranted.

STATEMENT OF THE CASE AND FACTS

On a late summer evening, 22-year-old Trenton Dawson and his best friend, Kenneth Cunning, were hanging out in Dawson's apartment. (2:4, 32:11, 34:6). While the two friends were playing around with Dawson's guns, the gun Dawson held accidentally fired once and struck Cunning in the neck. (2:4; 34:7). Cunning looked at Dawson, said, "you shot me," and fell to the ground. (2:4). Dawson grabbed a towel, applied pressure to Cunning's neck, and yelled for help. (2:5).

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

When police arrived at the building, two men outside waved them down, yelling, "Hurry up, he's shot!" and led them to Dawson's third-floor apartment, where police observed Cunning sitting on the floor. (2:2). Dawson was next to him, holding a towel and bed sheets to Cunning's neck; both of them were covered in blood. (2:2). Police called for medical assistance, but Cunning ultimately died. (2:3). In the apartment, police observed baggies of crack cocaine and marijuana, as well as a digital scale and cash. (2:3-4). Officers took Dawson from his apartment to a squad car and placed him in the back seat. (32:9; App. 109). There, a detective interrogated him for 30 - 45 minutes about what had happened, without providing ***Miranda*** warnings. (32:18, 23; App. 118, 123). Dawson told the detective that Cunning had been depressed and said that he did not want to live, and that he then shot himself. (32:11-12; App. 111-12). Dawson told police that he (Dawson) had smoked four to five Marijuana "blunts" and taken an Ecstasy pill that day. (32:22; App. 122). Dawson was arrested and taken downtown to the police station for booking. (32:13; App. 113).

The following day, police administered ***Miranda*** warnings to Dawson for the first time, and questioned him again about the incident. (32:19, 29; App. 119, 129). At the station, Dawson first learned that Cunning had died from the gunshot wound. (32:49, 56; App. 149, 156). Dawson then admitted that Cunning did not shoot himself, and acknowledged that he had accidentally shot Cunning while they were playing with the guns. (2:4). Dawson initially told police that he hid the guns in a sewer after Cunning was shot, but he subsequently admitted to hiding the guns under a porch. (2:5). The guns were not recovered. (2:6).

The State charged Dawson with first-degree reckless homicide, keeping a drug house, possession with intent to

deliver cocaine, and possession with intent to deliver THC. (2, 4). Trial counsel filed a motion to suppress Dawson's statements, both in the squad car and at the police station. (8, 32:4). As to the squad car interrogation, counsel argued that Dawson was "in custody," and that his statement should be suppressed because detectives failed to give ***Miranda*** warnings prior to this interrogation. (32:59-60; App. 159-160).[2]

At the hearing on the suppression motions, Milwaukee Police Detective Dennis Devalkenaere testified that when he arrived at the scene at around 11:00 p.m., Dawson was already seated in the back of a police squad car, parked across the street from his apartment building. (32:9-10, 21; App. 109-10, 121). Other officers informed him that Dawson reported that Cunning shot himself in Dawson's apartment, and that Dawson was the only other person present. (32:8,13,18,21; App. 108, 113, 118, 121). Det. Devalkenaere was also informed by other officers that drugs and evidence of drug dealing had been found in the apartment. (32:13; App. 113).

Det. Devalkenaere got into the front seat of the squad car with his partner, and began questioning Dawson, who had already been placed in the back seat, through the open window partition. (32:10, 16; App. 110, 116). The car's windows were rolled up and the doors were locked. (32:14-15; App. 114-15). Det. Devalkenaere testified that Dawson was not handcuffed at that point. (32:10; App. 110).

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[2] The motion also alleged that the squad-car statement was involuntary because Dawson was under the influence of drugs. (8:3). This argument is not renewed on appeal. Dawson also does not challenge the circuit court's ruling denying suppression of his police station statements.

During the interrogation, Dawson said he was really hot and the detective complied with his request that the squad windows be opened. (32:15; App. 115). Det. Devalkenaere then opened the squad door at Dawson's request, but the detective stood in the doorway and continued to interview him. (32:15-16, 42; App. 115-16, 142). Det. Devalkenaere testified that he was probably wearing a long-sleeved shirt with no blazer, implying that his service revolver would have been visible. (32:15-16; App. 115-16). Det. Devalkenaere's partner left the squad and stood outside at one point, and several other officers were also nearby. (32:16-17; App. 116-17). Det. Devalkenaere testified that at the end of the 30-45 minute squad car interrogation, Dawson was placed under arrest and transported downtown. (32:13; App. 113). At no point before or during the interrogation was Dawson given ***Miranda*** warnings, and the interview was not recorded. (32:18, 20; App. 118, 120).

Dawson testified that he was handcuffed while in the squad car, and that he did not feel free to leave. (32:41-42, 50-51; App. 141-42, 150-51).

The circuit court denied all of the motions to suppress Dawson's statements. (32:62-70; App. 162-170). As to the squad car statement, the court found: that Det. Devalkenaere's testimony that Dawson was not handcuffed was credible (32:62; App. 162); that the questioning lasted 30-45 minutes (32:63; App. 163); that the windows and door of the car were opened at Dawson's request (32:63; App. 163); that Dawson was sad, but coherent (32:63; App. 163); and that he was not under arrest. (32:65; App. 165). The court concluded that Dawson was not "in custody" during the squad car interrogation. (32:65-66; App. 165-66).

Dawson subsequently pled guilty to first-degree reckless homicide and possession with intent to deliver cocaine, and the other two counts were dismissed and read-in. (10; 33). The court sentenced Dawson to 18 years initial confinement and 10 years extended supervision on the homicide, and to a consecutive term of 2 years initial confinement and 2 years extended supervision on the drug offense, for a total sentence of 20 years initial confinement and 12 years extended supervision. (34:37).

Additional facts as relevant are presented in the argument section below.

ARGUMENT

I. The Circuit Court Erred in Denying Suppression of the Squad Car Statement.

A. Legal principles and standard of review.

The prosecution is prohibited from using a defendant's statements produced during a custodial interrogation unless police provide warnings pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966). ***Miranda*** safeguards attach when "a suspect's freedom of action is curtailed to a degree associated with formal arrest." ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984). The determination of whether a person is "in custody" for ***Miranda*** purposes centers on how a reasonable person in the suspect's position would understand the situation. ***Id.*** at 442.

A formal arrest is not required for a suspect to be "in custody" for ***Miranda*** purposes; an individual subject to an investigative ***Terry*** stop may be considered "in custody" for Fifth Amendment purposes and entitled to ***Miranda*** warnings

before questioning. ***State v. Gruen***, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998).

In reviewing the circuit court's decision on a suppression motion, this court accepts findings of historical fact unless clearly erroneous. Whether a person is "in custody" for ***Miranda*** purposes, however, is a question of law which this court reviews *de novo*. ***State v. Mosher***, 221 Wis. 2d 203, 211, 583 N.W.2d 553 (Ct. App. 1998).

An order denying a motion to suppress evidence may be reviewed upon appeal from a final judgment or order despite a guilty plea. Wis. Stat. § 971.31(10). ***State v. Hampton***, 2010 WI App 169, ¶23, 330 Wis. 2d 531, 793 N.W.2d 901.

B. Dawson was "in custody" when interrogated by a police detective in the back of a squad car at the scene of a shooting death.

Whether a reasonable person would believe he was "in custody" for ***Miranda*** purposes requires consideration of the totality of the circumstances. Factors the court considers include: the defendant's freedom to leave, the purpose, place, and length of the interrogation, and the degree of restraint. ***Gruen***, 218 Wis. 2d at 594.

As to the degree of restraint, the court considers 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.*** at 594-96.

Considering the ***Gruen*** factors under the totality of the circumstances, Dawson was "in custody" during the squad car interrogation.

As to the purpose of the interrogation, Det. Devalkenaere was aware that drugs and evidence of drug dealing had been found in Dawson's apartment, and that Dawson was the only other person present when Cunning was shot. (32:13, 18; App. 113, 118). Det. Devalkenaere questioned Dawson regarding the shooting. (32:11; App. 111). While the detective claimed that Dawson "was not a suspect" (32:19; App. 119), police plainly believed he had some involvement in criminal activity, as they placed him in the back of a locked squad car, where detectives proceeded to interrogate him, and then placed him under arrest. (32:9, 13; App. 109, 113). Thus, the purpose of the detective's interrogation was clearly to investigate Dawson's involvement in criminal activity – either Cunning's death, drug dealing, or both.

The location and length of this interrogation also point to the custodial nature of Dawson's statement. Dawson was questioned in the back seat of a police squad car. (32:9; App. 109). The car was parked across the street from Dawson's third-floor residence. (32:10, 13; App. 110, 113). At the start of the interview, the car doors were locked and the windows were rolled up. (32:14-15; App. 114-15). The interview began after 11:00 pm and lasted 30-45 minutes. (32:23; App. 123). This period of time, while not excessively long, is not particularly short. And in ***State v. Morgan***, 2002 WI App 124, ¶17, 254 Wis. 2d 602, 648 N.W.2d 23, the court found a suspect to be "in custody" when questioned in the back seat of a squad car for only a "very short" time.

It is also apparent that Dawson was not free to leave the squad car during the interrogation. At the beginning of the interrogation, the windows of the squad car were rolled up and the doors were locked. (32:14-15; App. 114-15). When Dawson expressed that he was hot, the detective rolled down the window. (32:15; App. 115). Dawson continued to express discomfort, so the detective opened the door. (32:15; App. 115). He did not, however, allow Dawson to exit the vehicle. Instead, he stood in the doorway and continued to interrogate Dawson. (32:15-16, 42; App. 115-16, 142). Det. Devalkenaere testified that he was armed with his service revolver, and considering that it was summer, would not have been wearing a blazer—which suggests that his weapon was in fact visible to Dawson. (32:15-16; App. 115-16). Finally, there is no indication that police ever told Dawson he was free to leave or that he was not under arrest, and Dawson testified that he did not feel free to leave. (32:41-42; App. 141-42).

Finally, while the circuit court found that Dawson was not handcuffed during the interrogation, his movement was certainly restrained by his placement in a locked squad car's back seat. Dawson was already seated in the squad car when Det. Devalkenaere arrived, which reflects that he was moved to this location from his apartment by other officers at the scene. (32:9, 2:2; App. 109). Two police detectives sat with Dawson in the car, and several other officers were present near the car. (32:16; App. 116). And, while the windows were rolled down and a door was opened at Dawson's request, Det. Devalkenaere stood in the door while continuing to question him, thereby preventing Dawson's exit. (32:15-16, 42; App. 115-16, 142). Any reasonable person would find these circumstances restrictive of their movement.

The facts of this case are similar to ***Morgan***. There, the defendant was questioned by police during an investigation of drugs and guns found in his apartment. Morgan was alone in the squad car, was handcuffed and frisked, and four officers were on the scene. ***Morgan,*** 254 Wis. 2d 602, ¶¶17-18. While the court noted that the police questioning was "very short," it nonetheless concluded that Morgan was in custody during the squad car interrogation. ***Id.***

Here, as in ***Morgan***, police placed Dawson in the back of a squad car pursuant to a police investigation in which drugs were found. Numerous police officers were on the scene, and Dawson was alone in the squad car with two detectives. Moreover, police were also investigating a shooting death, to which Dawson was the only witness, and the interrogation lasted for 30 - 45 minutes, late at night.

Here, as in ***Morgan***, the circumstances were such that a reasonable person in the defendant's position would have believed he was in custody. Dawson was removed by police from his apartment, where his friend lay dying from a gunshot wound and evidence of drug dealing was present, to the back of a locked police squad car, where he was then questioned by police detectives for 30 - 45 minutes. Dawson was not permitted to leave the squad car and, when the squad car door was opened because Dawson was hot, the detective stood in the door, blocking his exit, and continued the interrogation.

Under these circumstances, Dawson was "in custody" during the squad car interrogation and therefore, ***Miranda*** warnings were required. Because police failed to provide Dawson with ***Miranda*** warnings, this statement, and any subsequent references to it, should have been suppressed. ***Morgan***, 254 Wis. 2d 602, ¶26.

C. The circuit court's error was not harmless

The harmless error analysis applies to appeals of a suppression issue following a guilty plea, under Wis. Stat. §971.31(10). ***State v. Rockette***, 2005 WI App 205, ¶26, 287 Wis. 2d 257, 704 N.W.2d 382. Constitutional error is harmless only if the State proves beyond a reasonable doubt that the error did not contribute to the result. ***Id.*** ¶26. Thus, the State is required to establish beyond a reasonable doubt that the defendant would have pled guilty even had the evidence been suppressed. ***Id.*** Relevant factors to consider in determining harmless error include the persuasiveness of the evidence in dispute, whether the improperly admitted evidence duplicates untainted evidence, the relative strength and weakness of the State's case and the defendant's case, the reasons, if any, expressed by the defendant for choosing to plead guilty, the benefits obtained by the defendant in exchange for the plea, and the thoroughness of the plea colloquy. ***Id.***

The court's failure to suppress the squad car statement was not harmless because the State's case for first-degree reckless homicide was not overwhelmingly strong, the squad car statement was highly relevant to the element of "utter disregard," and the statement was not duplicative of other, untainted evidence.

"Utter disregard for human life" is the sole element that distinguishes first-degree reckless homicide from the lesser offense of second-degree reckless homicide.[3] Second-degree reckless homicide carries a maximum penalty of 25 years (*see* Wis. Stat. §§940.06, 939.50(3)(d)), in contrast to the 60-year maximum Dawson faced for first-degree reckless homicide. *See* Wis. Stat. §§940.02, 939.50(3)(b).

Determination of whether the defendant's conduct showed "utter disregard for human life" is an objective analysis, under a reasonable person standard. ***State v. Jensen***, 2000 WI 84, ¶17, 236 Wis. 2d 521, 613 N.W.2d 170. Factors to consider in determining whether a defendant acted with "utter disregard" include:

> what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; whether the conduct showed any regard for life; and, all other facts and circumstances relating to the conduct.
>
> [c]onsider also the defendant's conduct after the death to the extent that it helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred.

WIS JI-CRIMINAL 1022.

The Wisconsin Supreme Court recently emphasized that a jury may consider a defendant's after-the-fact conduct

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[3] The other two elements, criminally reckless conduct and causation, are shared in common. Criminally reckless conduct means the conduct created a risk of death or great bodily harm to another person; and the risk of death or great bodily harm was unreasonable and substantial; and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm. WIS JI-CRIMINAL 1022.

equally with his behavior before and during the incident in determining whether he acted with "utter disregard." ***State v. Burris***, 2011 WI 32, ¶27, 333 Wis. 2d 87, 797 N.W.2d 430.

Here, Dawson's conduct surrounding Cunning's death was mixed, and the evidence of "utter disregard" for his friend's life was not particularly strong. While handling loaded guns in the presence of drugs was certainly reckless, Dawson and Cunning were close friends, and there was nothing to suggest that the discharge of Dawson's gun was anything other than accidental. Moreover, Dawson immediately came to his friend's aid, attempting to apply pressure to the wound and calling for help.

Had Dawson's squad car statement been properly suppressed, the State's case for "utter disregard" would have been significantly weakened. This statement, in which he failed to immediately take responsibility and told police that Cunning had shot himself, would likely have contributed to a finding of "utter disregard" by a jury. Indeed, both the State and the circuit court recognized this statement as an aggravating circumstance, with the court noting that, "it is disturbing that the initial reaction from Mr. Dawson was to lie, to tell the police that this was a suicide." (34:8, 34).

Dawson's squad car statement was highly relevant to the State's case for "utter disregard" and therefore, highly relevant to the charge of first-degree reckless homicide. Therefore, the court's failure to suppress the statement was not harmless.

CONCLUSION

Mr. Dawson was "in custody" when the police interrogated him in the back of the squad car without providing ***Miranda*** warnings. Therefore, Mr. Dawson respectfully requests that this court vacate the judgment of conviction, reverse the circuit court's decision, and order the statement to be suppressed.

Dated this _____ day of August, 2013.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,041 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of August, 2013.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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