STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP834-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRENTON JAMES DAWSON,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING SUPPRESSION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE REBECCA F. DALLET PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not request oral argument or publication. The case can be resolved by applying well-established legal principles to the facts of the case.

SUPPLEMENTAL STATEMENT OF THE CASE

As the plaintiff-respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED THE MOTION TO SUPPRESS.

A. The standard of review.

Upon review of a denial of a motion to suppress, findings of historical fact are upheld unless found to be clearly erroneous. Wis. Stat. § 805.17(2); *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277 (citing *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829). The application of constitutional principles to those facts is reviewed *de novo*. *Sykes*, 279 Wis. 2d 742, ¶ 12.

B. The legal standards concerning custodial interrogations.

The government "may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). *Miranda* warnings must be administered prior to the onset of a custodial interrogation. *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004); *see also State v. Armstrong*, 223 Wis. 2d 331, 351-52, 588 N.W.2d 606 (1999). Therefore, in order to trigger the requirement of *Miranda* warnings the individual must be in custody and must be subject to interrogation. *State v. Buck*, 210 Wis. 2d 115, 123, 565 N.W.2d 168 (Ct. App. 1997).

On-the-scene questioning does not require *Miranda* warnings in all cases. *State v. Leprich*, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991) (citing *Gelhaar v. State*, 58 Wis. 2d 547, 555, 207 N.W.2d 88 (1973)). "When general on-the-scene questions are investigatory rather than accusatory in nature, the *Miranda* rule does not apply." *Leprich*, 160 Wis. 2d at 477 (citing *State v. Boggess*, 110 Wis. 2d 309, 317, 328 N.W.2d 878 (Ct. App. 1982), *aff'd*, 115 Wis. 2d 443, 340 N.W.2d 516 (1983)).

A person is "in custody" for purposes of *Miranda* if the person is either formally arrested, or restrained in freedom of movement to the degree associated with a formal arrest. *State v. Goetz*, 2001 WI App 294, ¶ 11, 249 Wis. 2d 380, 638 N.W.2d 386; *see also Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). The test for *Miranda* custody is an objective one, determined from the perspective of a reasonable person in that position, *State v. Torkelson*, 2007 WI App 272, ¶ 13, 306 Wis. 2d 673, 743 N.W.2d 511, and is not dependent on the subjective views of the interrogating officer. *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998).

The courts have identified numerous factors that should be considered in determining whether a person is in custody. *Torkelson*, 306 Wis. 2d 673, ¶ 17. The factors include "the purpose, place and length of the interrogation and the degree of restraint." *Mosher*, 221 Wis. 2d at 211. Within the degree of restraint factor, various sub-factors exist including:

> whether the [person] [was] handcuffed, whether a weapon [was] drawn, whether a frisk [was] performed, the manner in which the [person] was restrained, whether the [person] [was] moved to another location, whether questioning took place in a police vehicle, and the number of officers involved.

Id. The court examines the totality of the circumstances to determine if the suspect was in custody, and there is no single factor that is determinative. *See, e.g., State v.*

Gruen, 218 Wis. 2d 581, 593, 582 N.W.2d 728 (Ct. App. 1998); *State v. Morgan*, 2002 WI App 124, ¶ 12, 254 Wis. 2d 602, 648 N.W.2d 23; *State v. Schloegel*, 2009 WI App 85, ¶ 7, 319 Wis. 2d 741, 769 N.W.2d 130.

The court also examines whether the circumstances presented a risk of coercion or trickery, or show that the defendant was subjected to compelling pressures generated by the alleged custodial setting. *Torkelson*, 306 Wis. 2d 673, ¶ 18. The law is clear that it is not the mere number of factors added up on each side that dictates the custody determination. *Id*. Rather, the factors are reference points that help determine whether *Miranda* safeguards were necessary. *Id*.

C. The circuit court's findings of fact are undisputed.

The circuit court made the following factual findings relating to Dawson's squad car interview:

- The testimony of Detective Devalkenaere (the interviewer) was credible (32:62).
- Dawson was not handcuffed during the interview (*id*.).
- Initially Dawson was in the back of the squad car with Detective Devalkenaere in the front of the squad car (32:62-63).
- The windows were opened during the interview (32:63).
- The back door of the squad car was opened during the interview (*id*.).
- The interview occurred within an hour of Detective Devalkenaere being called to the scene (*id*.).

- Detective Devalkenaere believed he was investigating a suicide during the course of the interview (*id*.).

- Dawson was not a suspect, and gave a statement consistent with a finding of suicide (*id*.).

- The interview lasted approximately 45 minutes (*id*.).

Based on these findings the circuit court correctly concluded that Dawson was not in custody when he was interviewed by Detective Devalkenaere in the back of a squad car at the scene (32:65-66).

D. The circuit court correctly found that Dawson was not in custody.

A person is "in custody" for purposes of *Miranda* if the person is either formally arrested, or restrained in freedom of movement of the degree associated with a formal arrest. *Goetz*, 249 Wis. 2d 380, ¶ 11. The test is not whether the individual would feel free to leave, but whether a reasonable person would consider himself to be in custody. *Gruen*, 218 Wis. 2d at 593. Here, while Dawson was placed in the back of a squad car, the level of restraint is not of the degree associated with arrest that would lead a reasonable person to believe he was in custody.

A reasonable person in Dawson's position would not believe he was in custody simply because he was placed in a squad car, especially since it was evident that law enforcement was trying to secure the scene (32:17-18). The gun involved in the apparent suicide had not been recovered and all witnesses were placed in squad cars and other citizens removed from the scene (32:17-18, 20-21). Moreover, the squad car was parked outside the apartment and Dawson was not placed in handcuffs

(32:10, 62), so Dawson was not moved any significant distance away or otherwise restrained in movement.

Dawson had no reason to think that he was being viewed as a criminal suspect, and was, in fact, not viewed as a suspect in the shooting (32:9-10, 63). Dawson had already spoken briefly to the responding officer inside the apartment and said nothing to implicate that he had a role in the victim's death (27:11). The squad car interview was not accusatory (32:11-12), and the interviewing detective opened the windows and the squad car door to make Dawson more comfortable (32:15, 63). No officer made any threats or promises to Dawson or told Dawson that he was under arrest before or during the interview (32:6-24). While the interviewing detective's side arm may have been visible, it was never drawn (32:15-16). The interview lasted approximately 30 to 45 minutes (32:23, 63), presumably lengthened by the fact that law enforcement was still trying to secure the scene (32:17-18). There is no evidence that the circumstances presented a risk of coercion or trickery and there is no evidence that Dawson was subjected to any compelling pressures.

The present case is easily distinguished from *Morgan* which Dawson relies on heavily (Dawson's Br. at 9). In *Morgan*, police were investigating a drug complaint at an apartment. 254 Wis. 2d 602, ¶¶ 3-6, 17. The officers drew their guns on the defendant, chased him down when he fled, and handcuffed him all before placing him in the back of a squad car. *Id*. The facts of *Morgan* are so remote to the facts of this case that any reliance on *Morgan* is misplaced. Here, Dawson was not handcuffed; the squad car was located in a public and familiar setting; and the interview was non-accusatory, and conducted by one detective (the detective's partner was present but not involved in the interview) (32:6-16). In a case such as this one, other courts have found that the defendant was not in custody. *See, e.g.,United States v. Manbeck*, 744 F.2d 360, 378-79 (4th Cir. 1984), *cert. denied*, 469 U.S. 1217

(1985); U*nited States v. Murray*, 89 F.3d 459, 462 (7th Cir. 1996).

The objective "reasonable person" test presupposes an innocent person, s*ee Florida v. Bostick*, 501 U.S. 429, 438 (1991), and here, while a reasonable person would not feel free to leave, he would not reasonably believe he was in custody. Therefore, the circuit court correctly denied Dawson's suppression motion.

II. ANY ERROR IN DENYING THE MOTION TO SUPPRESS WAS HARMLESS.

A. The legal standards applicable to a harmless error analysis.

The State maintains that the circuit court properly denied Dawson's motion to suppress; however, if this court finds error, the error was harmless. "Wisconsin's harmless error rule is codified in Wis. Stat. § 805.18 and is made applicable to criminal proceedings by Wis. Stat. § 972.11(1)." *State v. Sherman*, 2008 WI App 57, ¶ 8, 310 Wis. 2d 248, 750 N.W.2d 500 (citing *State v. Harvey*, 2002 WI 93, ¶ 39, 254 Wis. 2d 442, 647 N.W.2d 189) (footnote omitted).

The harmless error test applies to claims that the circuit court erroneously denied a motion to suppress. *State v. Rockette*, 2005 WI App 205, ¶ 25, 287 Wis. 2d 257, 704 N.W.2d 382. In the case of a plea, harmless error analysis centers on the incentives the defendant had to plea rather than proceed to trial. *Id.* ¶¶ 25-27.

B. The result in this case would have been the same even if the circuit court granted the suppression motion.

Dawson makes a stretch of an argument that not suppressing the statements he made during the squad car interview cannot be found harmless (Dawson's Br. at 10-

12). The State frankly classifies this argument as absurd since Dawson is not challenging essentially the same statements made when he was interviewed at the police station. While interviewed in the squad car, Dawson gave statements that the victim shot himself (32:11-12). Dawson initially gave a similar statement when questioned at the police station (27:21). He then changed his story (27:21-22). So it is unknown to the State how suppressing the squad car statements would affect Dawson's decision to plead. Contrary to Dawson's assertion, suppressing the squad car statement would not significantly weaken the State's case. The fact that Dawson initially denied involvement and told police that the victim shot himself could have been presented to a jury regardless of whether the squad car statements were suppressed.

Additionally, the circuit court's mention of Dawson's failure to initially take responsibility for the crime is not evidence that the error was not harmless. Not taking responsibility for a crime is an appropriate sentencing factor and could have been taken into account by the sentencing court regardless of whether it was used at trial. *Harris v. State*, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977).

Finally not accepting responsibility for the crime is not highly relevant to a showing of utter disregard for human life as Dawson asserts (Dawson's Br. at 12). In determining utter disregard for human life, courts consider:

> the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries and the degree of force that was required to cause those injuries. . . . the type of victim, the victim's age,

> vulnerability, fragility, and relationship to the perpetrator . . . . [and] whether the totality of the circumstances showed any regard for the victim's life.

State v. Edmunds, 229 Wis. 2d 67, 77, 598 N.W.2d 290 (Ct. App. 1999) (citing *Seidler v. State*, 64 Wis. 2d 456, 465, 219 N.W.2d 320 (1974)). Dawson fails to establish how taking responsibility would have mitigated his actions in pointing and firing a loaded weapon at his friend. "After-the-fact regard for human life does not negate 'utter disregard' otherwise established by the circumstances before and during the crime." *State v. Jensen*, 2000 WI 84, ¶ 32, 236 Wis. 2d 521, 613 N.W.2d 170.

The statements made during the squad car interview were not incriminating and were substantially similar to the statements initially made by Dawson during his interview at the police station. Therefore any error in denying the suppression motion was harmless.

CONCLUSION

For the reasons above, this court should affirm the decision and order denying the suppression motion and the judgment of conviction.

Dated this 5th day of September, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,125 words.

Dated this 5th day of September, 2013.

_____
Tiffany M. Winter
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 5th day of September, 2013.

_____
Tiffany M. Winter
Assistant Attorney General