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STATE OF WISCONSIN
C O U R T O F A P P E A L S

DISTRICT III

Case No. 2018AP1863-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACI LYNN BUSHA,

Defendant-Appellant.

On Notice of Appeal from a Judgment
Entered in the Douglas County Circuit Court,
the Honorable Kelly J. Thimm, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	1
POSITION ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF THE CASE AND STATEMENT OF FACTS	2
ARGUMENT	5
I. Ms. Busha was in custody when the officer told her he didn't believe her and asked her to tell the truth; thus her confession to driving was inadmissible per <i>Miranda v. Arizona</i>	5
CONCLUSION	10

CASES CITED

<i>Miranda v. Arizona</i> 384 U.S. 436 (1966).....	1 passim
<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984).....	6, 8, 9
<i>Pennsylvania v. Mimms</i> , 434 U.S. 106 (1977).....	8

<i>State v. Morgan</i> , 2002 WI App 124, 254 Wis. 2d 602, 648 N.W.2d 23	5, 6
<i>Thompson v. Keohane</i> , 516 U.S. 99 (1995)	6
<i>United States v. Mendenhall</i> , 446 U.S. 544 (1980)	7
<i>United States v. Richardson</i> , 700 F. Supp. 2d 1040 (N.D. Ind. 2010), <i>aff'd</i> , 657 F.3d 521 (7th Cir. 2011)	9
<i>United States v. West</i> , 219 F.3d 1171 (10th Cir. 2000)	8

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Fourth Amendment	6, 7, 8
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Wisconsin Statutes

971.31(10)	2
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ISSUE PRESENTED

A police officer responded to a report of Ms. Busha's vehicle in the ditch on a rural road. He found Ms. Busha plainly intoxicated in the passenger seat, and she could not explain where "Scott," who she said had been driving, had gone. After 15 minutes of discussion and questioning the officer told her to get out of the car and stand in front of another officer's squad (there were at least three police vehicles on the scene). When she did so, he told her he did not believe her and said she should tell the truth about what happened. She admitted to driving. Was she, by this point, in custody, such that the *Miranda* warnings should have been given?

The circuit court held she was not in custody, determining the entire encounter was "consensual."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is merited, since this case involves only well-established law.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Ms. Busha moved to exclude statements she made to the officer who arrested her for operating while intoxicated, saying they were taken in violation of her *Miranda* rights. This is an appeal under Wis. Stat. § 971.31(10) of the denial of that motion.

The relevant evidence is the officer's testimony at the suppression hearing, as well as a video and audio recording made by his body camera. (46; App. 101-131; Video¹).

Just before 10:00 p.m., the officer was dispatched to investigate a vehicle in the ditch in an isolated area within, but near the boundary of, the city of Superior. (46:4,16; App. 104,116). The officer found the car "listing deeply in the ditch" with its passenger side on the lower side, away from the road. (46:4; App. 104). The officer testified that it looked like the tires had been spinning in a failed effort to get out of the ditch. (*Id.*)

On approaching the car, the officer saw that there was a single person inside: Ms. Busha, sitting on the passenger side. (46:4-5; App. 104-05). The

¹ The DVD video was sent to this court after Ms. Busha moved to supplement the record. Unlike the rest of the record on appeal, it does not appear to have been numbered; Ms. Busha will cite to particular portions by way of the time stamp in the lower right-hand corner.

officer opened the driver's side door and held it open; he testified had he not held it, it would have slammed shut due to the car's angle. (46:5; App. 105).

The officer asked Ms. Busha whether she'd been driving, and she said she had not; her boyfriend Scott had been. (46:5; App. 105). Scott was not there; Ms. Busha said he had left, though she could not give a clear explanation of where he'd gone or why. (46:6; App. 106; video at 22:01:15). The officer continued to speak with Ms. Busha and examined her driver's license and the car's insurance documents. (22:00:15-22:02:30).

The officer testified that Ms. Busha gave "odd and confusing statements as to how she got there and where Scott was"; and appeared to be trying to use her phone to communicate her location to Scott. (46:8; App. 108). Ms. Busha admitted to drinking, and the officer observed a beer can on the floor of the car. (22:02:30, 22:06:45).

The officer told Ms. Busha he would call a tow truck, and she agreed. (22:07:10). Shortly thereafter a second officer arrived at the scene and began also to question Ms. Busha. (22:08:00). This officer asked Ms. Busha if she would get out of the car, and she refused. (22:08:35).

The first officer then asked Ms. Busha "How do I know you're not fibbing to me?" (22:09:50). He requested that Ms. Busha call Scott. She did, and the officer briefly spoke with him before losing the connection. (22:11:50; 22:13:50). He told Ms. Busha

that he was having a hard time believing her story, though he told the second officer that, though Ms. Busha was “bombed,” he didn’t believe he could “put her behind the wheel.” (22:13:00-22:13:30).

A bit more than 15 minutes into the stop, the officer said to Ms. Busha “Okay Traci, time to climb out” and she complied. (22:14:44). The officer directed her to stand in front of the SUV of his supervisor (a third officer on the scene) and to turn and face him. (22:15:30; 46:10; App. 110). He then said:

Now, you know I’ve been really nice, I’ve been very patient and I’ve been trying to believe you, but you know what, I don’t believe you, so I think we need to start telling the truth. Do you agree with that? Okay. So. Why don’t we start from the top. What happened?

Ms. Busha responded “yeah” to the officer’s above assertions and questions. She began to talk about her relationship with Scott, at which point the officer interjected “So you wanted to come and see Scott, so you drove here from Eagle River, and you were consuming on the way here, and there was nobody else in the vehicle.” Ms. Busha confirmed this, and after field sobriety tests was eventually taken to the jail.

Ms. Busha moved to suppress her statements on the ground that the officer interrogated her while she was in custody without giving her the *Miranda* warnings. (22). The court took evidence at the above-described hearing. (46; App. 101-131). Ms. Busha

submitted a brief in support of her motion, and at the close of a second hearing with argument from the parties, the court denied the motion. (24; 47:6-9; App. 144-48,132-43). Ms. Busha eventually pleaded no contest and was sentenced to jail. (31). This appeal follows.

ARGUMENT

- I. Ms. Busha was in custody when the officer told her he didn't believe her and asked her to tell the truth; thus her confession to driving was inadmissible per *Miranda v. Arizona*.

Miranda v. Arizona requires law enforcement officers to provide a set of warnings before interrogating a person who is in custody. 384 U.S. 436, 444-45 (1966). The state has not disputed that the police officer interrogated Ms. Busha, and it's clear that he did—both before getting her out of the car, and, importantly here, after, when he said he didn't believe her and asked her to tell the truth about what happened.

The dispute between the parties is, instead, whether Ms. Busha was in custody when this interrogatory exchange happened. This question is a mixed one of fact and law, so this court defers to the trial court's findings of historical fact but applies the law to those facts *de novo*. *State v. Morgan*, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 648 N.W.2d 23.

Whether a person is in “custody” for *Miranda* purposes is not the same as whether that person has been “arrested” for Fourth Amendment purposes. The Fourth Amendment imposes a test of “reasonableness” of police tactics—if the police exceed the limits of restraint that are reasonable for a temporary investigative stop, they have arrested the person, which requires probable cause. *Morgan*, 254 Wis. 2d 602, ¶13 & n.8.

For *Miranda* custody, though, the question isn’t whether the police tactics were “reasonable”; it’s whether they indicated, objectively, a certain level of restriction of freedom: “whether a reasonable person in the defendant’s position would have considered himself or herself to be ‘in custody’ given the degree of restraint under the circumstances.” *Id.* (citing *Berkemer v. McCarty*, 468 U.S. 420, 441-42 (1984)). A person is in *Miranda* custody if, under the circumstances, a reasonable person would not have felt “at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). The “ultimate question” is whether there was either a formal arrest or a “restraint on freedom of movement of the degree associated with” formal arrest. *Id.*

Here, there was no “formal arrest” at the time Ms. Busha admitted driving. But the circuit court nevertheless erred when it determined she was not in custody. The court actually decided that she was not being detained in any way at all—that her interaction with the officer was a “consensual

encounter.” Though the distinction between a consensual interaction with police and an investigative detention is typically a Fourth Amendment concern, *see United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980), it’s a useful starting place to assess the restraints Ms. Busha was under here.

It’s true that Ms. Busha’s car was not stopped by law enforcement—she was stranded before police arrived. So when the officer approached her car, she hadn’t been detained. He was simply approaching her to talk, and perhaps she could have believed she was free to refuse his questions and leave on foot.

But, the interrogation at issue here didn’t happen when the officer first arrived at the car. It came 15 minutes later. In those 15 minutes, circumstances had changed. Two more squad cars had shown up, with their lights flashing. She had told the officer she’d been drinking. The officer had taken her driver’s license and, from the video, doesn’t appear to have returned it. After her earlier refusal to get out of the car, he had told her again to get out (with which she complied) and to stand by his supervisor’s squad (with which she also complied). And, after expressing some earlier skepticism about her story, he had made clear that he did not believe what she was telling him—the clear implication being that he thought she had been behind the wheel, and thus guilty of a crime.

A reasonable person in those circumstances—taken from her vehicle, surrounded by police, driver’s license withheld, and being accused of a crime—could not possibly believe she was free to walk away. *See, e.g., United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000) (roadside stop may be consensual “if the officer returns the license”). Ms. Busha was obviously being detained.

And while *Berkemer* held that a roadside detention is not *necessarily* custody for *Miranda* purposes, 468 U.S. at 439, it just as clearly says that one *can* be, *id.* at 440-41.

And here, Ms. Busha had reason to think she was not “at liberty to terminate the interrogation” by the police officer. She had been told, after earlier refusing to leave her vehicle, that it was “time to climb out.” While the Fourth Amendment permits police to direct a person in a stopped vehicle to get out for officer safety reasons, *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977), this does not mean that doing so cannot contribute to a reasonable belief that the person is in custody. In particular, in this case, no officer safety concerns were evident: Ms. Busha had been allowed to stay in the car for 15 minutes; the only reason the officer could articulate for having her get out was that it was time to “move to the next step here.” (46:8; App. 108).

What’s more, the officer had clearly communicated to Ms. Busha that he believed she was lying, and was in fact guilty of a crime. *See Berkemer*,

468 U.S. at 442 (the “*unarticulated* plan to arrest” doesn’t establish *Miranda* custody (emphasis added)). In *United States v. Richardson*, 700 F. Supp. 2d 1040, 1052 (N.D. Ind. 2010), *aff’d*, 657 F.3d 521 (7th Cir. 2011), the court held that *Miranda* custody commenced the moment that a roadside detainee was confronted with the drugs officers had found on him during a patdown for weapons. The relevant circumstances there were that

(1) Deputy Smythe had asked Mr. Richardson to get out of the Buick; (2) Deputy Smythe had told Mr. Richardson that the police dog was trained in the “odors of narcotics” and had alerted to the vehicle, (3) other police units were present, and (4) Deputy Smythe told Mr. Richardson that he had probable cause to search the vehicle. Further, Deputy Smythe didn’t ask Mr. Richardson what was in the bag until after he had pulled it out of Mr. Richardson’s pocket and knew that it was likely drugs.

Id.

Likewise, here, Ms. Busha had been asked to get out of her car, was surrounded by squad cars, and had been informed they believed she had committed a crime. No reasonable person in her position would believe she was not being arrested at that point. She was in custody.

CONCLUSION

Because Ms. Busha received no *Miranda* warnings before she was interrogated in police custody, she respectfully requests that this court reverse her conviction and sentence and remand to the circuit court with directions that her resulting statements be suppressed.

Dated this 17th day of December, 2018.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,941 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 17th day of December, 2018.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 17th day of December, 2018.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender

APPENDIX

**INDEX
TO
APPENDIX**

	Page
September 7, 2017, Transcript (R:46).....	101-131
October 10, 2017, Transcript (R:47).....	132-143
Defendant's Argument on Motion to Suppress (R:24)	144-148