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STATE OF WISCONSIN
COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2018AP1863-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRACI LYNN BUSHA,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM THE JUDGMENT
OF CONVICTION ENTERED IN THE
CIRCUIT COURT FOR DOUGLAS COUNTY,
THE HONORABLE KELLY J. THIMM, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

ISSUE PRESENTED.....	1
STATEMENT ON PUBLICATION AND ORAL ARGUMENT.....	1
STATEMENT OF THE CASE AND STATEMENT OF FACTS.....	1
ARGUMENT.....	4
I. THE TRIAL COURT PROPERLY DENIED BUSHA’S MOTION TO SUPPRESS BECAUSE HER STATEMENTS WERE ADMISSIBLE.	4
A. Busha’s statements during her encounter with police responding to reports of a car in a ditch were admissible under Miranda because she was not in custody at the time she made them.	4
1. Standard of appellate review and controlling legal standards.....	5
2. Applying the law to the undisputed facts, Busha’s statements were admissible because she was not in custody under Miranda.....	6
3. Richardson is inapplicable in this case because Busha was not in Miranda custody.	7
CONCLUSION.....	8

TABLE OF AUTHORITIES

CASES

<u>Miranda v. Arizona,</u>	
384 US 436 (1966)	4, 6
<u>State v. Armstrong,</u>	
223 Wis. 2d 331, 588 N.W.2d 606, (1999)	5
<u>State v. Goetz,</u>	
2001 WI App 294, 249 Wis. 2d 380,	
638 N.W.2d 386	5, 6
<u>State v. Lonkoski,</u>	
2013 WI 30, 346 Wis. 2d 523,	
828 N.W.2d 552	5, 6
<u>State v. Martin,</u>	
2012 WI 96, 343 Wis.2d 278, 816 N.W.2d 270...	5, 6

STATUTES

Wis. Stat. § 971.31(10)	4
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ISSUE PRESENTED

1. Did the circuit court correctly deny Traci Lynn Busha's motion to suppress evidence from the May 6, 2016 encounter with police responding to reports of a car in a ditch?

The circuit court denied Busha's suppression motion because she was not under arrest or in custody at the time the officer responded to a call about a car in a ditch. (46:7-9, R-App. 138-140.) This could should reach the same conclusion.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The state does not request oral arguments or publication. The briefs adequately present applicable facts and precedent. The resolution of this appeal requires only the application of well-established principles to the facts of this case.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On May 6, 2016, Officer Gary Gothner responded to the area of 42nd Avenue East between East 18th Street and Woodlawn Road, in the City of Superior, Douglas County, Wisconsin based on a report of a vehicle in the ditch. (46: 4, R-App. 104). He testified that he vehicle was

"listing pretty sharply, roughly about a 45-degree angle; it looked like the tires had been spinning in an effort to get out." (Id. at 11. 20-24.)

Officer Gothner testified that, due to angle the vehicle was at in the ditch, he had to hold the driver's side door of the vehicle open to speak with and identify the sole occupant, Traci Busha. (46:5, R-App. 105.) Before exiting the vehicle, Busha called her boyfriend Scott and allowed Officer Gothner to speak with Scott. (46:6-7, R-App. 106-7.)

Officer Gothner testified that he told Busha to get out of the car and helped her, as it would have been difficult to do without assistance. (46:8, R-App. 108.) He testified "Eventually - couldn't leave the car where it was. Eventually, she's got to get out, so let's move on to the next step heer. Let's at least make progress to get her out of the car." (Id. 11. 13-16.) At this point Busha had been allowed to call her boyfriend, Scott, and Officer Gothner believed had provided him with her location. (46:18-19, R-App. 118-9.) Scott later arrived on the scene in another vehicle. (Id. at 23, 123.)

Busha then, for safety, stood on a public street near one of the responding officers' vehicles that was blocking the lane. (Id. 11. 23-24; 46:20 11. 4-6, R-App 120.)

Officer Gothner described the stretch of road as "desolate" and noted Busha was not wearing shoes and was drunk.

(46:16 ll. 15, 24, R-App. 116.) She was not handcuffed or placed in any of the vehicles. (46:10, R-App. 110.) After exiting the vehicle, Officer Gothner conduct field sobriety tests with Busha. (46: 9, R-App. 109.) Busha admitted to driving and to having consumed alcohol that night. (46: 14, ll. 1-6; R-App. 114.) Busha was then arrested. (46: 9, R-App. 109.)

Eventually, a wrecker was required to remove the vehicle from the ditch. (46: 17, R-App. 117.) Officers Gothner testified this would have been required regardless of whether the vehicle had been occupied. (46: 18, R-App. 118.)

Busha moved to suppress her statements to Officer Gothner during the encounter. (24; R-App. 144-8.) Officer Gothner testified at the suppression hearing and his body cam footage from the encounter was admitted as evidence. (46; App. 101-131; Video.)

The court found that Busha's predicament - being in a car in the ditch and unable to get out on its own, in a rural area - was not one that she could have gotten out of by herself. (47: 6-7, R-App. 137-8.) The court found it

to be an emergency situation that required a wrecker. (47: 7, R-App. 138.)

In ruling on the motion to suppress, the court found that "a reasonable person, under all those circumstances, wouldn't feel like they were in custody" and that "the flavor was this consensual encounter type thing." (47: 8, 11. 5-7 & 18 R-App. 139.) The court also found the encounter was not a stop by Officer Gothner. (Id. at 20-21.)

Busha eventually pleaded no contest and was sentenced to jail (31). She appeals the court's denial of her motion to suppress. Wis. Stat. § 971.31(10).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED BUSHA'S MOTION TO SUPPRESS BECAUSE HER STATEMENTS WERE ADMISIBLE.

A. Busha's statements during her encounter with police responding to reports of a car in a ditch were admissible under Miranda¹ because she was not in custody at the time she made them.

¹ Miranda v. Arizona, 384 US 436 (1966).

1. Standard of appellate review and
controlling legal standards.

The State has the burden to establish, by a preponderance of the evidence, whether challenged statements were made during a custodial interrogation. State v. Armstrong, 223 Wis. 2d 331, 345, 588 N.W.2d 606, 612(1999).

The custody analysis on appeal is a question of law reviewed *de novo*. State v. Goetz, 2001 WI App 294, ¶ 7, 249 Wis. 2d 380, 383, 638 N.W.2d 386, 388. The trial court's findings of fact are taken as undisputed unless found to be clearly erroneous. Id. Busha makes no claims that any finding of fact by the trial court is clearly erroneous.

Custody is determined, for Miranda purposes, by a totality of the circumstances analysis of whether "a reasonable person would feel free to terminate the interview and leave the scene." State v. Lonkoski, 2013 WI 30, ¶ 6, 346 Wis. 2d 523, 528, 828 N.W.2d 552, 554, *quoting State v. Martin*, 2012 WI 96, ¶ 33, 343 Wis.2d 278, 816 N.W.2d 270. "Several factors have been considered relevant in the totality of the circumstances such as the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint."

Id. quoting Martin, 343 Wis.2d 278, ¶ 35, 816 N.W.2d 270 (internal quotation marks omitted).

2. Applying the law to the undisputed facts, Busha's statements were admissible because she was not in custody under Miranda.

Following an encounter with police responding to reports of her car in a ditch, Busha was charged with Operating While Intoxicated as a 3rd Offense contrary to Wis. Stat. § 346.63(1)(a) and § 346.65(2)(am)(3). Busha asks this court preform the same Miranda custody analysis she requested of the trial court.

The trial court properly found that Busha's interactions with police were part of a consensual encounter, during which a reasonable person would have felt free to leave. (47: 8 & 20-21.) There was no stop and so Miranda did not apply. (47:9 ll. 2-6.) Busha had put herself in a predicament that required assistance from law enforcement and a wrecker. (47: 6-7, R-App. 137-8.)

This court does not review the trial court's finding that the encounter was consensual unless it is alleged to be clearly erroneous. Goetz at ¶ 7. Busha makes no such claims. Miranda is inapplicable when there is no custody. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

3. Richardson is inapplicable in this case because Busha was not in Miranda custody.

Busha asks this court to apply Richardson, a case dealing with statements made over the course of a lengthy traffic stop when the suspect was almost immediately placed in custody. United States v. Richardson, 700 F. Supp. 2d 1040, 1052 (N.D. Ind. 2010), aff'd, 657 F.3d 521 (7th Cir. 2011). This case is easily distinguished by its facts. Richardson had been stopped by officers for speeding. Busha was already in the ditch when officers arrived. Before being asked to exit the car, a K-9 officer performed a free-air sniff around Richardson's vehicle and alerted on possible narcotics. Busha was allowed to call her boyfriend, who later arrived on-scene, prior to being helped out of her vehicle. A pointed question following a pat-down search and removal of an object from Richardson's pocket rendered the situation non-consensual. No such shift in circumstances occurred for Busha; a wrecker was still en-route as was Busha's boyfriend.

The undisputed facts of this case distinguish it from Richardson. This court does not over-turn the trial court's factual finding of a consensual encounter unless it

is alleged to be clearly erroneous. Richardson does not provide this court a way to reinterpret the facts of this case in a manner that renders the questioning custodial.

CONCLUSION

The State asks this court to affirm the trial court's order denying Busha's motion to suppress her statements to officers.

Dated this 15th day of January, 2019.

Respectfully submitted,

Electronically signed by Anne Terrien

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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 monospaced font.

The length of this brief is 10 pages.

Date: January 15, 2019.

Electronically signed by Anne Terrien
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief 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.

Date: January 15, 2019.

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