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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,
Plaintiff-Respondent,

Case No. 2019AP2061-CR

v.

BRIAN V. ROTOLO,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON NOTICE OF APPEAL FROM AN ORDER DENYING
SUPPRESSION AND A JUDGMENT OF CONVICTION ENTERED IN
THE WINNEBAGO COUNTY CIRCUIT COURT

The Honorable Barbara H. Key, Presiding

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STATEMENT OF ISSUE PRESENTED

Whether Mr. Rotolo was in custody for purposes of *Miranda*¹ at the time officers detained him and spoke with him inside the McDonald's play area lobby.

The trial court decided that Mr. Rotolo was temporarily detained and was not in custody for purposes of triggering *Miranda* rights.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State is requesting neither oral argument nor publication as this matter involves application of well-settled law to the facts of this case.

STATEMENT OF THE CASE

The State finds Mr. Rotolo's recitation of the procedural history of the case to be accurate. However, the State notes that in finding that Mr. Rotolo was merely temporarily detained and not in custody, the trial court also indicated that this case presented a situation that was much the same in *State v. Gruen*. The State also finds it necessary to provide additional case facts for this appeal to be appropriately considered.

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

On November 27, 2018, officers were dispatched to McDonald's, 705 South Green Bay Road, in the City of Neenah, for a drug complaint. (R. 30 (record):6-7 (page).) The McDonald's manager reported that one of her employees, later identified as Mr. Rotolo, had been using or bragging about using drugs in his vehicle during his lunch break earlier that day and had been attempting to sell drugs to employees under the age of 18. (R. 30:7-8.) The manager further told officers that she wanted to terminate the Defendant's employment and that she wanted officers on scene to stand by during that termination. (R. 30:14, 21.)

During this incident, Officer Douglas made contact with the Defendant, who was still working behind the McDonald's counter, and asked the Defendant to step into the lobby to speak with him. (R. 30:9.) Officer Douglas spoke with the Defendant in the McDonald's play area, a side room off the main lobby. During this conversation, three officers were present. (R. 30:10, Exh. 1 (exhibit) at 8:20-11:00.) Officer Douglas engaged the Defendant in a general conversation about the drug complaint police received, including information that the Defendant had been attempting to sell drugs to other employees. (R. 30:10.) The Defendant did not outright deny that statement but rather indicated that he was merely joking with the

other employees. (R. 30:Exh. 1 at 5:40-5:59, 8:13-8:22.) When asked what he told other people he used in his vehicle, the Defendant stated “I say I smoked, but....” (R. 30:Exh. 1 at 6:20-6:30.) He indicated he doesn’t use meth but occasionally smoked a joint. (R. 30:Exh. 1 at 6:25-6:34.) The Defendant denied having any controlled substances on him. (R. 30:11.) He also denied consent to search his vehicle, when asked. (R. 30:12.) At this point, the Defendant was told that he was being detained and a dog was being sought to come and sniff the Defendant’s vehicle. (R. 30:12.) The Defendant asked if he could leave and was told by one of the officers that he was being detained pending the investigation. (R. 30:12.)

While the K9 unit was en route, officers continued to speak with the Defendant. (R. 30:Exh. 1 at 7:58-10:50.) Ultimately, the Defendant did admit there would be marijuana in the vehicle and did provide consent to search his vehicle. (R. 30: Exh. 1 at 8:55-9:45.) Officers then searched the Defendant’s vehicle and located illegal controlled substances.

ARGUMENT

I. MR. ROTOLO WAS TEMPORARILY DETAINED BY OFFICERS AND WAS NOT IN CUSTODY SO AS TO TRIGGER THE NECESSITY OF *MIRANDA* WARNINGS AND ANY INCRIMINATING STATEMENTS MADE, INCLUDING STATEMENTS PROVIDING CONSENT TO SEARCH, ARE ADMISSIBLE

Law enforcement officers have the right to temporarily detain and question a suspect in a public place if those officers believe that the suspect is committing, is about to commit, or has committed a crime. Wis. Stat. § 968.24; *Terry v. Ohio*, 392 U.S. 1 (1968). The adequacy of information to justify detention is judged on an objective standard, and on the totality of the circumstances, while taking into account specific, articulable facts along with reasonable inferences. *Terry*, 392 U.S. 1; *State v. Williams*, 2001 WI 21, ¶¶22-23, 241 Wis. 2d 631, 623 N.W.2d 106; *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). An investigative detention is reasonable if the investigation is conducted in a manner to quickly confirm or dispel suspicions. *US v. Sharpe*, 470 U.S. 675, 686 (1985). A suspect is “seized” only when by means of force or show of authority his freedom of movement is restrained. *State v. Washington*, 2005 WI App 123, ¶¶13-14, 284 Wis. 2d 456, 700 N.W.2d 305.

While it is less likely that an individual subject to a *Terry* stop is deemed to be in custody so as to trigger the right to *Miranda* warnings, the *Terry* stop decision is not automatically dispositive to the determination of whether the individual is in custody. *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Wis. Ct. App. 1998). That determination must be made based on the totality of the circumstances and whether a reasonable person would consider himself to be in custody given the degree of restraint under the circumstances. *Id.* Relevant factors in that determination include: (1) the individual's freedom to leave the scene; (2) the purpose, place, and length of interrogation; and (3) the degree of restraint. *Id.*

In this case, officers had adequate information to temporarily detain Mr. Rotolo pursuant to a *Terry* stop. Officers received information that Mr. Rotolo told minors he had been using drugs in his vehicle earlier that day. (R. 30:7-8.) They received information that Mr. Rotolo may have been attempting to sell drugs to those minors. (R. 30:7, 10.) Officers did detain and question Mr. Rotolo in a public place, specifically, a multi-windowed public play area in an open, operational McDonald's. (*See* R.30:Exh. 1 at 5:30-11:00.) This area was attached to the main lobby of the restaurant and was in the same vicinity of where police made contact with him. (*See* R.

30:10, Ex. 1); see *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (holding that moving the defendant one mile from his home to a scene of the accident was still within the vicinity for the purposes of investigative detention). The restaurant was still open, and other customers and employees were still at the restaurant. (See R. 30:9, Exh. 1 at 2:20-4:30, 5:15-5:30.)

During this temporary detention, officers also moved to quickly confirm or dispel suspicions of the drug complaint they were investigating. That the Defendant denied possessing any drugs and denied trying to sell to minors is not the end of the officer inquiry. In this case, the quickest route to confirming or dispelling the suspicions raised was to seek corroborating information or consent from Mr. Rotolo to search his vehicle. That route was attempted and consent was denied. Therefore, the next quickest manner to confirm or dispel drug suspicion was to call for a K9 unit. Officers did exactly that and a K9 was called and was en route to their location. (R. 30:12-13.) Arguably, it was then during this wait time that officers attempted to move in an even quicker manner to confirm or dispel suspicions by again seeking consent from Mr. Rotolo to search his vehicle without waiting for the K9.

The duration of this investigative detention was brief and the entire officer interaction with Mr. Rotolo, from the moment Officer Douglas made contact with him up until the moment Mr. Rotolo provided consent to search his vehicle, lasted no longer than five minutes and ten seconds. Officer Douglas made contact with Mr. Rotolo behind the work counter and introduced himself, (R. 30:Exh. 1 at 5:23), and began speaking with Mr. Rotolo in the play area, (R. 30:Exh. 1 at 5:40.) Within two minutes of discussing the drug complaint, Officer Douglas asked Mr. Rotolo for consent to search his vehicle and Mr. Rotolo stated no. (R.30:Exh. 1 at 6:38-7:02.) Officer Douglas immediately told Mr. Rotolo they would then be calling for a drug dog and he called for that dog less than a minute later. (R. 30:Exh. 1 at 7:04-7:58.) At this point, after only approximately two minutes and twenty-five seconds had elapsed, Mr. Rotolo asked if he was free to leave and an officer told him he was being detained. (R. 30:Exh. 1 at 8:05-8:12.) Officers continued to talk to Mr. Rotolo about what might be in his car and further mentioned that if he was worried about a little bit of weed that it was a municipal citation. (R. 30:Exh. 1 at 8:55-9:45.) At this time, Mr. Rotolo admitted he had a little bit of weed, approximately a bowl's worth, and a pipe in his car. (*Id.*) Officers again asked if Mr. Rotolo would consent to a search

of his car or if a dog was necessary, and Mr. Rotolo consented to a search. (R. 30:Exh. 1 at 9:45-10:50.) In total, detaining Mr. Rotolo for just over five minutes was not unreasonable given the officers' investigation and the information provided by witnesses and Mr. Rotolo.

These same facts used to determine the appropriateness of the *Terry* stop can then be applied to determine if Mr. Rotolo was in custody so as to trigger the right to *Miranda* warnings. As articulated in *Gruen*, a determination of whether an individual is in custody is based on the totality of the circumstances and focuses on a reasonable person standard. *Gruen*, 218 Wis. 2d at 594. Relevant factors include an individual's freedom to leave the scene, the purpose, place and length of interrogation, and degree of restraint. *Id.*

In this case, as to the freedom to leave, the State agrees that Mr. Rotolo was not free to leave the scene as he was being detained for an active drug investigation. However, the State notes that being temporarily detained pursuant to a *Terry* stop is also not dispositive as to a custody analysis. At one point in his argument, Mr. Rotolo conflates the restriction of movement during a *Terry* stop with that of a custodial and coercive situation contemplated by *Miranda*. This rationale—that someone is “in custody” any

time he is told that he is detained and not free to leave—would swallow whole the very purpose and rationale of a *Terry* stop and convert every detention, however brief, into a custodial situation requiring *Miranda* warnings.

Specifically, the Defendant seems to suggest that not being “free to leave” automatically transforms the incident into a custodial situation. However, while a detained individual may not be free to leave, that individual is not necessarily nor automatically in custody for the purposes of *Miranda*. See *Berkemer v. McCarty*, 468 U.S. 420 (1984) (holding that detainment and questioning of an individual during a routine traffic stop did not constitute custodial interrogation for the purposes of *Miranda*); see *U.S. v. Burns*, 37 F.3d 276 (7th Cir. 1997) (holding that the defendant was not in custody for *Miranda* purposes despite asking to leave her hotel room during execution of a search warrant); see *Quartana*, 213 Wis. 2d 440 (reasoning that defendant was only detained and not in custody when the officer kept his driver’s license and drove the defendant one mile back to the scene of the accident). The situation that unfolded at McDonald’s—in its brevity and in a noncoercive environment—more closely resembles the situations in which

courts have found an individual to be merely detained and not in custody for *Miranda* purposes.

Second, as to the purpose, place, and length of police questioning, those factors also weigh in favor of this situation being non-custodial and not requiring of *Miranda* warnings. The purpose of the investigation was to determine if there were drugs in Mr. Rotolo's vehicle after minors indicated he had offered them drugs. (R. 30: 7.) Questioning occurred in an open, operational restaurant and in an adjacent, window-filled room from where Mr. Rotolo had been working when police contact was made. (See 30:10, Exh. 1 at 5:30-11:00.) The entire interaction lasted just over five minutes before Mr. Rotolo provided consent to search his vehicle. Overall, the purpose, place, and length of police questioning was familiar and brief, and these factors weigh in favor of the situation being non-custodial.

Mr. Rotolo argues that questioning took place at his place of employment while he was on the clock working and that therefore a reasonable person would not feel free to leave. However, this argument completely ignores that Mr. Rotolo's employer, McDonald's, is not a state-actor. As such, any argument suggesting that Mr. Rotolo would not feel free

to leave based on pressure from his employer is inappropriate and should not be considered as a factor here.

Third, regarding the degree of restraint during police questioning, Mr. Rotolo was not restrained in such a way so as to deem him in custody. In its analysis, the court should use the same relevant factors identified in *Gruen*, including: (1) whether the individual was handcuffed; (2) whether a gun was drawn on the individual; (3) whether a *Terry* frisk was performed; (4) the manner in which the individual was restrained; (5) whether the individual was moved to another location; (6) whether questioning occurred in a police vehicle; and (7) the number of officers involved. *Gruen*, 218 Wis. 2d at 594-95. Mr. Rotolo chooses a handful of these factors when arguing that he was in custody for the purposes of *Miranda*. However, in this case, Mr. Rotolo was not handcuffed. (R. 30:11.) A gun was not drawn or brandished during questioning. (*Id.*) Mr. Rotolo was not physically restrained and there was no other show of force or show of authority to significantly curtail Mr. Rotolo's freedom. Officers did not yell at Mr. Rotolo and the back-and-forth conversation was calm and conversational. (R. 30:10.) No promises or threats were made to force Mr. Rotolo to consent to a vehicle search. (R.30:Exh. 1

at 5:40-10:50.)² The brief conversation that unfolded while Mr. Rotolo was detained in the open McDonald's play area is a far cry from the coercive situations that *Miranda* and its progeny were designed to protect against.

Despite Mr. Rotolo's contention that he was removed from the line during work and seemingly suggesting that this "removal" constitutes being moved to another location, this "removal" is not the relocation the courts have discussed when moving an individual to a completely different building, scene, or police station. *See Quartana*, 213 Wis. 2d 440. Further, Mr. Rotolo is correct that some factors—including the fact that a *Terry* frisk was performed and that three officers were present—may lean in favor of a determination that Mr. Rotolo was in custody. However, given the totality of factors, including those ignored in Mr. Rotolo's argument, the degree of restraint was not such so as to convert the situation into a custodial interrogation for the purposes of *Miranda*.

Finally, Mr. Rotolo argues that officer questioning in this case was of a coercive nature and presented the same coercive pressures at issue in

² At the evidentiary hearing, the trial court questioned the officer as to whether Mr. Rotolo was subsequently arrested, and Officer Douglas indicated that Mr. Rotolo was arrested later that evening. (R. 30:27.) Officer Douglas further explained that Mr. Rotolo originally was issued a municipal citation for possession of marijuana. However, upon further investigation, officers did take Mr. Rotolo into custody for a different charge. (R. 30:27-28.)

Miranda. The State notes that this case is about a police officer approaching Mr. Rotolo at work and asking him to step away from his coworkers so that they might speak to him. Police spoke with Mr. Rotolo for just over five minutes in a multi-window room, at his place of employment, in a McDonald's play area lobby while the restaurant was open. These facts do not present the shock value or longing for release that Mr. Rotolo suggests when attempting to paint a picture of police coercion and overreach. Rather, these facts demonstrate the level of discretion expected when an individual was to be approached about such a sensitive matter at work. As such, questioning in this environment was not coercive and Mr. Rotolo should not be deemed in custody due to that questioning.

CONCLUSION

For the reasons set forth above, Mr. Rotolo was temporarily detained by officers when he was asked to speak with them inside the McDonald's play area lobby. Based on the totality of the circumstances, Mr. Rotolo was not in custody so as to trigger the necessity of providing him his *Miranda* warnings. Therefore, any incriminating statements he made and any consent provided to search his vehicle are admissible.

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,770 words.

I further certify pursuant to Wis. Stat. § 809.19(b)(12)(f) that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

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.

I further certify that on the date of signature I routed the enclosed briefs to our office station for first class US Mail Postage to be affixed and mailed to:

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