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OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT II
Case No. 2019AP2061 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN V. ROTOLO,

Defendant-Appellant.

On Appeal from an Order Denying Suppression
and a Judgment of Conviction Entered
in the Winnebago County Circuit Court,
the Honorable Barbara H. Key Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State Conflates Fourth and Fifth Amendment Analysis, Confusing the Issues on Appeal.

Despite the fact that state devotes a considerable portion of its brief to the appropriateness of the Mr. Rotolo's investigative detention (State's Br. 7-11), Mr. Rotolo has not and does not argue that his temporary detention was unconstitutional or that he was under arrest for purposes of the Fourth Amendment. (Brief-in-Chief 10). Nor does Mr. Rotolo argue, as the state asserts, that he was in custody simply by virtue of his temporary detention. (State's Br. 11-12). Rather, Mr. Rotolo contends that he was in custody because under the totality of the circumstances, including his lack of freedom to leave the scene, the purpose, place and length of the interrogation, and the degree of restraint, "a reasonable person in [his] position would have considered himself or herself to be 'in custody.'" See *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728, 733 (Ct. App. 1998) (quoted source omitted).

The state's assertion, without citation, that "the[] 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" is an incorrect application of the facts to the law. (State's Br. 11). The Fifth Amendment standards and analysis for

*Miranda*¹ purposes are separate and distinct from the Fourth Amendment, necessarily requiring an analysis of different (albeit related) facts. *State v. Morgan*, 2002 WI App 124, ¶¶14-16, 254 Wis. 2d 602, 648 N.W.2d 23 (explaining the Fourth Amendment *Terry*² inquiry focuses the reasonableness of the police action whereas the Fifth Amendment *Miranda* inquiry focuses on how a person feels under the totality of the circumstances).

II. Under the Totality of the Circumstances, a Reasonable Person in Mr. Rotolo's Shoes Would Have Considered Himself or Herself to Be in Custody.

Contrary to the state's assertion, Mr. Rotolo does not argue that every *Terry* stop (or other lawful detention) is automatically a custodial situation for purposes of the Fifth Amendment. Rather, when considering the key factors that would lead a reasonable person to consider him/herself in custody—(1) the defendant's freedom to leave; (2) the purpose, place, and length of the interrogation; and (3) the degree of restraint—it is clear Mr. Rotolo was in custody. *Gruen*, 218 Wis. 2d at 594.

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

² *Terry v. Ohio*, 392 U.S. 1 (1968).

A. The defendant's freedom to leave.

The state concedes the first factor, that Mr. Rotolo was not free to leave. (State's Br. 11). The fact that the first point is uncontroverted weighs heavily in favor of a finding that Mr. Rotolo was in custody.

The state cites *State v. Quartana*, 213 Wis. 2d 440, 570 N.W.2d 618 (Ct. App. 1997), *Berkemer v. McCarty*, 468 U.S. 420 (1984) and *United States v. Burns*, 37 F.3d 276 (7th Cir. 1994) to refute what it characterizes as a "suggest[ion] that not being 'free to leave' automatically transforms the incident into a custodial situation." (State's Br. 12). But Mr. Rotolo is not arguing that not being free to leave automatically transforms an incident into a custodial situation. Rather, Mr. Rotolo argues that under the totality of the circumstances, the fact that he was not free to leave and that a person in Mr. Rotolo's shoes would not have felt free to leave, weighs strongly in favor of this being a custodial situation.

Further, the cases the state cites are inapposite. *Quartana* is a Fourth Amendment case that makes no mention of *Miranda* or the Fifth Amendment. As discussed above, the reasonableness of the detention under the Fourth Amendment may have little to do with how a reasonable person would consider the detention under the Fifth Amendment.

Although both *Berkemer* and *Burns* are illustrative of cases where the detained individual was not entitled to *Miranda* warnings, neither is applicable to Mr. Rotolo's situation. In *Berkemer*, the

U.S. Supreme Court considered whether individuals must be given a Miranda warning during all traffic stops. *Berkemer*, 468 U.S. at 435. The Court declined to establish such a bright-line rule, reasoning that most individuals understand that during a traffic stop, the detention will be short and they will likely be allowed to continue on their way. *Id.* at 437. In Mr. Rotolo's case, we are not dealing with a traffic stop, but a situation in which Mr. Rotolo was sequestered at his workplace and could have no reasonable expectation that he would be released until he gave police what they were looking for.

Burns is also inapposite. In *Burns*, sheriff's deputies did not allow Burns to leave when they executed a search warrant in her hotel room. *Burns*, 37 F.3d at 277-78. The deputies only asked Burns a couple of basic questions, including her name and what she was doing in Milwaukee. *Id.* Mr. Rotolo, on the other hand, was not detained during the execution of a search warrant. He was questioned in relation to a criminal investigation, and was asked the same questions more than once after being told he was not free to leave. (30:10; App. 114; 30: Exh. 1 at 7:17-8:45). These facts make it far more likely that Mr. Rotolo, like any reasonable person, would have considered himself in custody.

B. The purpose, place, and length of the interrogation.

An analysis of the purpose, place and length of the questioning weighs in favor—and at the very least does not weigh against—this situation being custodial. The purpose of the interrogation was a criminal investigation into whether Mr. Rotolo possessed drugs and whether he had been attempting to sell drugs to minors at work. (30:10; App. 114). Although Mr. Rotolo's detention was relatively brief, and did not occur at the police station, these facts do not necessarily make the interrogation non-custodial under the Fifth Amendment. For example, many courts have held that an individual is in custody during an interrogation in the individual's home or workplace. *See, e.g., Orozco v. Texas*, 394 U.S. 324, 325-26 (1969); *Sprosty v. Buchler*, 79 F.3d 635, 641 (7th Cir. 1996); *United States v. Kim*, 292 F.3d 969, 977 (9th Cir. 2002). In *Sprosty*, the court reasoned that “more important than the familiarity of the surroundings where [an individual] was being held is the degree to which the police dominated the scene.” *Sprosty*, 79 F.3d at 641.

Despite the brevity of the interrogation in this case, Mr. Rotolo knew that he was the subject of a criminal investigation (30:10; App. 114), he was not allowed to leave (30:12; App. 116), and police officers dominated the McDonald's play area in which he was detained (30:10; App. 114; *see generally*, 30:Exh. 1). As discussed in the opening brief, the fact that interrogation took place at his workplace would have made Mr. Rotolo feel less free to leave. (Brief-in-Chief

12). It is does not matter that McDonald's is not a state actor—again the focus is not on the conduct of the officers but rather whether a reasonable person would consider himself in custody. Furthermore, the police presence at McDonald's was at the employer's request.

Mr. Rotolo was frisked for weapons and officers searched his person for drugs. (30:Exh. 1 at 7:15-8:01). He asked to leave the scene and was told he could not go. (30:12; App. 116; 30:Exh. 1 at 8:03-8:10). Police officers separated him from his property and his coworkers. (30:9-10; App. 113-14). He was outnumbered by officers who stood between him and the door. (30:10; App. 114; *see generally*, 30:Exh. 1). Officers repeatedly asked him questions he had already answered regarding his manager's drug complaint. (30:10-11, 13; App. 114-15, 117). Under the totality of the circumstances, considering the purpose, place and length of the detention, a reasonable person would not have felt free to terminate the interview and leave the scene. *See State v. Martin*, 2012 WI 96, ¶33, 343 Wis. 2d 278, 816 N.W.2d 270 (“Law enforcement has custody over a suspect within the meaning of *Miranda* where a reasonable person would not feel free to terminate the interview and leave the scene.”).

C. The degree of restraint.

As to the degree of restraint, Mr. Rotolo concedes that he was not in handcuffed or in a police vehicle and no guns were drawn. As explained in the opening brief, however the other four *Gruen* factors³ that determine the degree of restraint were present and weigh in favor of the interrogation being a custodial situation.

The state argues that the police officers made no “show of force or show of authority to significantly curtail Mr. Rotolo’s freedom.” (State’s Br. 14). This assertion is not supported by the record. The body camera video clearly shows an officer frisking Mr. Rotolo, searching him for drugs, and telling him he could not go. (30:Exh. 1 at 7:17-8:10). It also shows that three officers were present during the interrogation, and at least one officer stood between Mr. Rotolo and the door at all times, clearly guarding him. (*See generally*, 30:Exh. 1). The record therefore demonstrates that the officers used a show of authority to stop Mr. Rotolo from leaving, which significantly curtailed his freedom.

³ In determining the degree of restraint, the following factors are relevant: (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a *Terry* frisk was performed; (4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning took place in a police vehicle; and (7) the number of police officers involved. *State v. Gruen*, 218 Wis. 2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998).

The state's contention that no promises or threats were made to force Mr. Rotolo to consent to a search of his vehicle also misrepresents the facts in the record. (State's Br. 14). The officers induced Mr. Rotolo to make incriminating statements and consent to a search of his vehicle by promising that he would only get a municipal citation for a little bit of weed. (R. 30:Exh. 1 at 8:55-9:45). Mr. Rotolo only made incriminating statements and consented to a search of his vehicle after the officers made this promise.

The state's cite to *Quartana* in relation to Mr. Rotolo being moved to another location once again conflates the Fourth Amendment and Fifth Amendment analyses. The fact that it was reasonable for officers to transport Quartana one mile back to the accident scene to conduct field sobriety tests under the Fourth Amendment does not answer the question of how a reasonable person in Quartana's shoes would have felt and whether *Miranda* warnings were warranted. *See Quartana*, 213 Wis. 2d at 446-47 (explaining that "the law permits the police, if they have reasonable grounds for doing so, to move a suspect in the general vicinity of the stop without converting what would otherwise be a *temporary seizure into an arrest*," and concluding that the accident scene was within the general vicinity of where police first made contact with Quartana (emphasis added)).

For a Fifth Amendment custodial inquiry, whether the individual was moved to another location is relevant, regardless of the distance.

See Gruen. 218 Wis. 2d at 594; *State v. Morgan*, 2002 WI App 124, ¶18, 254 Wis. 2d 602, 648 N.W.2d 23. When police move an individual, it is an exhibition of police force making it more likely that the suspect believes he or she is subject to a custodial interrogation.

In *Morgan*, this court underscored that when police move a suspect about a scene, it is significant to a *Miranda* custody analysis. 254 Wis. 2d 602, ¶18. In that case, the circuit court erred when it did not place enough weight on the fact that Morgan was moved about the scene as opposed to being removed from the scene. *Id.* The movement is significant when, as happened here, an individual is moved from one place to another, when it results in his separation from his property and his associates, is told to remain in one location, and is outnumbered by police officers. *See id.* (citing *United States v. Smith*, 3 F.3d 1088, 1097 (1993)). Thus,

In sum, under the totality of the circumstances, including his freedom to leave the scene, the purpose, place and length of the interrogation, and the degree of restraint, “a reasonable person in Mr. Rotolo’s position would have considered himself or herself to be in custody. The officers’ actions resulted in the kind of shock that accompanies arrest and that Mr. Rotolo was lured into speaking by a promise of prompt release. As such, the officers knowingly violated Mr. Rotolo’s constitutional rights when they told him he was not free to go and promised him he

would not be charged criminally, and then failed to give him his *Miranda* warnings. The evidence should therefore be suppressed.

CONCLUSION

For the forgoing reasons, Mr. Rotolo respectfully requests that this court conclude he was in custody when he made incriminating statements and consented to a search of his vehicle and that those statements and the evidence stemming therefrom should be suppressed.

Dated this 17th day of March, 2020.

Respectfully submitted,

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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 proportional serif font. The length of this brief is 2,182 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 17 day of March, 2020.

Signed:

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