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SUPREME COURT

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2019AP2061 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN V. ROTOLO,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

LAURA M. FORCE
Assistant State Public Defender
State Bar No. 1095655

FRANCES REYNOLDS COLBERT
Assistant State Public Defender
State Bar No. 1050435

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440
forcel@opd.wi.gov

Attorneys for Defendant-Appellant-Petitioner

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ISSUE PRESENTED

This Court recently clarified that the Fourth Amendment inquiry, which determines the validity of a *Terry*[1] stop, is distinct from the Fifth Amendment inquiry of whether an individual is in custody for *Miranda*[2] purposes. *State v. Dobbs*, 2020 WI 64, ¶¶56-58, ___ Wis. 2d ___, ___ N.W.2d ___. Yet, in *State v. Lonkoski*, 2013 WI 30, 346 Wis. 2d 523, 828 N.W.2d 552, this Court held the test for Fifth Amendment *Miranda* custody is whether "a reasonable person would not feel free to terminate the interview and leave the scene." *Id.*, ¶6. Thus, under *Dobbs* and *Lonkoski,* nearly every individual who is legally detained under *Terry*—and therefore not free to terminate the interview and leave the scene—would be in custody for *Miranda* purposes as a result.

1. Does the *Lonkoski* standard for whether an individual is "in custody" for purposes of *Miranda* apply in all Fifth Amendment inquiries, or does a different test apply when the person is detained pursuant to a *Terry* stop?

The circuit court appears to have mixed the Fourth Amendment and Fifth Amendment analyses, and concluded that Mr. Rotolo was not in custody for purposes of *Miranda* because he was not under arrest, nor was it a situation in which he would have

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[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

believed himself to be under arrest. (29:7; App. 114). The court of appeals held that the *Lonkoski* "freedom to terminate the interview and leave" test is not the ultimate inquiry, but rather only a factor to be considered within the totality of the circumstances. *Rotolo*, slip op. at ¶¶17-19.

CRITERIA FOR REVIEW

Although this Court recently clarified the distinction between the Fourth Amendment and Fifth Amendment analyses in *Dobbs*, the question of how a legal *Terry* detention impacts the custody test for purposes of *Miranda* remains unclear. In *Dobbs*, this Court stated that the Fourth Amendment and Fifth Amendment inquiries are completely separate. *Dobbs,* 2020 WI 64, ¶¶56-58. Yet, in practice whether the individual is detained pursuant *Terry* impacts a court's analyses, and even changes the formulation of the Fifth Amendment *Miranda* test.

The difference in how the Fifth Amendment custody test is formulated depending on whether the case involves a *Terry* stop is apparent when contrasting *Dobbs* and *Lonkoski*. In *Dobbs*, a case involving a *Terry* stop, this Court described the ultimate Fifth Amendment inquiry as follows: "A person is in custody for *Miranda* purposes if there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." *Dobbs*, 2020 WI 64, ¶53 (internal quotation omitted). However, in *Lonkoski*, a case that did not involve a *Terry* stop, the court held *Miranda* custody is present

when "under the totality of the circumstances, a reasonable person would not feel free to terminate the interview and leave the scene." *Lonkoski*, 346 Wis. 2d 523, ¶6 (internal quotation omitted).

If there is a legal *Terry* stop, a reasonable person would not feel free to leave—often because, as is the case here, the individual is affirmatively told he or she cannot leave. Therefore, in *Terry* stop cases, regardless of the degree of restraint, a reasonable person would not feel free to terminate the interview and leave the scene. In holding that the *Terry* analysis had nothing to do with the *Miranda* analysis, *Dobbs* ignores that the subject objectively does not feel free to leave because he or she has been detained due to a legal *Terry* stop.

This Court should grant review and clarify either (1) that the language about feeling free to leave is not relevant for purposes of determining *Miranda* custody when there is a *Terry* stop and therefore is not the ultimate question guiding the *Miranda* custody inquiry, despite language to the contrary in *Lonkoski*; or (2) that the language about feeling free to leave *is* relevant to the *Miranda* custody analysis, even in *Terry* stop cases, and a subject is in *Miranda* custody when there is a legal police detention. Review is therefore warranted under Wis. Stat. § 809.62(1r)(a)(b) and (c).

STATEMENT OF FACTS

The state charged Brian Rotolo with possession of tetrahydrocannabinols (THC) and possession of drug paraphernalia. (1:1). The complaint alleged that Mr. Rotolo's manager at McDonald's made a report to law enforcement that Mr. Rotolo tried to sell drugs to another employee and told another employee he had used drugs and had them in his vehicle. (1:2). According to the complaint, law enforcement officers spoke to Mr. Rotolo, and although reluctant at first, Mr. Rotolo ultimately admitted there was marijuana and drug paraphernalia in his vehicle and allowed officers to search the vehicle. (1:2).

Mr. Rotolo moved to suppress his statements, arguing they were obtained in violation of the rights guaranteed to him under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and article I, sections 1, 2, 7, 8, 9 and 11 of the Wisconsin Constitution, and moved to suppress any derivative evidence and fruit of the poisonous tree. (6:1-2).

The circuit court held a hearing on Mr. Rotolo's motion on February 7, 2019. (30:1; App. 115). Officer Eric Douglas, the officer who initiated contact with Mr. Rotolo, was the sole witness at the suppression hearing. (30:3, 9-10; App. 117, 123-24). Both the state and Mr. Rotolo also played portions of Officer Douglas's body camera video from the incident. (30:16-20, 23-24; App. 130-34, 137-38).

Officer Douglas testified that he made contact with Mr. Rotolo at a McDonald's at around 3 a.m., after receiving a report from the manager that Mr. Rotolo "had been using [drugs] during his lunch break in his vehicle." (30:6-8; App. 120-22). When Officer Douglas arrived at the McDonald's, Mr. Rotolo was working on the line. (30:9; App. 123). Officer Douglas went to the kitchen, removed Mr. Rotolo from his duties and took him to another area of the restaurant, which he described as "a side room to the lobby in kind of the play area." (30:9-10; App. 123-24).

Officer Douglas testified that once in the play area, he questioned Mr. Rotolo "in regards to whether or not he had drugs on his person or in his vehicle and whether or not he had been attempting to sell those to other employees." (30:10; App. 124). There were two other officers in full uniform present in the play area when Officer Douglas questioned Mr. Rotolo. (30:10; App. 124). Officer Douglas testified that the demeanor of the conversation was "calm." (30:10; App. 124). He also testified that neither he nor the other officers present brandished a weapon at Mr. Rotolo, placed Mr. Rotolo in handcuffs or yelled at Mr. Rotolo. (30:10-11; App. 124-25).

Officer Douglas testified that Mr. Rotolo initially denied having any drugs. (30:11; App. 125). When asked if the police officers could search his vehicle, Mr. Rotolo said no. (30:11-12; App. 125-26). One of the other officers "patted [Mr. Rotolo] down" to search for weapons. (30:24-25; App. 138-39). The body

camera video shows the officer asking Mr. Rotolo if he had any weapons and informing him, "I'm just gonna pat you down 'cause we're talking to you." (30:Ex. 1 at 7:17-7:24).[3] Then, as he approached Mr. Rotolo to pat him down, the officer asked, "you don't have any drugs on you at all?" (30:Ex. 1 at 7:24-7:26). The officer proceeded to pat Mr. Rotolo down again asking about drugs: "you don't have anything—drugs here?" and "you don't have anything in here?" (30:Ex. 1 at 7:26-7:34). After locating and removing Mr. Rotolo's pocket knife, the officer continued to search Mr. Rotolo. (30:Ex. 1 at 7:35-7:39). He then asked "what's that right there?" and pulled what appeared to be a small packet from Mr. Rotolo's front pants pocket. (30:Ex. 1 at 7:39-7:50). Mr. Rotolo explained that it was his house key, which he had gotten that day. (30:Ex. 1 at 7:39-7:50). While the officer was still patting Mr. Rotolo down, Officer Douglas radioed to request a dog. (30:Ex. 1 at 7:57-8:01).

Mr. Rotolo then "asked if he could leave," and the officers did not allow Mr. Rotolo to leave. (30:12; App. 126). Specifically, Officer Douglas testified that they "advised Mr. Rotolo that he was being detained during this investigation due to the complaint that

[3] Both the State and Mr. Rotolo introduced and played portions of the same video; the recording from Officer Douglas's body camera. (30:17, 23; App. 131, 137). The record distinguishes between the state's exhibit 1 and the defendant's exhibit 1, however for ease of citing, this brief will simply cite to exhibit 1.

the manager had made and that we would be having a dog come over to sniff the vehicle." (30:12; App. 126). Officer Douglas testified that he called for a K9, but that it did not arrive on the scene. (30:12; App. 126). He explained: "While the K9 was en route to our location, we spoke further with Mr. Rotolo and he ended up giving us permission to enter his vehicle." (30:13; App. 127).

The body camera video shows that as the officer was completing the search, Mr. Rotolo asked if he was "stuck" or if he could leave on his "own will." (30:Ex. 1 at 8:03-8:08). The officer who searched Mr. Rotolo responded, "yeah, we're detaining you." (30:Ex. 1 at 8:08-8:10). The officer then said that Mr. Rotolo had "admitted to talking to people about smoking weed, offered some kids some weed," and went over the allegations against Mr. Rotolo again, questioning him as to those allegations for a second time. (30:Ex. 1 at 8:12-8:45). Next, that officer and Officer Douglas told Mr. Rotolo that if he had "weed" in his car, that "it's a municipal citation—it's like a speeding ticket." (30:Ex. 1 at 8:50-9:01). Officer Douglas went on, stating: "It's not a criminal record thing. So if, if you're worried about a little bit of weed that's in your vehicle, its..." (30:Ex. 1 at 9:01-9:10). Mr. Rotolo then told the officers that he had "a little bit of weed" in his car. (30:Ex. 1 at 9:11-9:30).

At no point during their interaction with Mr. Rotolo at the McDonald's did the officers give him a *Miranda* warning. (30:25-26; App. 139-40).

At the end of the motion hearing, the circuit court ordered briefing. (30:28-30; App. 142-44). While Mr. Rotolo's motion raised a number of challenges, the post-hearing briefing focused on a Fifth Amendment challenge. (*See* 6; 9; 10). The state's brief argued that the officers had properly conducted a *Terry* stop and because the officers had reasonable suspicion to detain Mr. Rotolo pursuant to *Terry*, Mr. Rotolo was not in custody for purposes of *Miranda*. (9:1-5). Mr. Rotolo's brief argued only that he was in custody for purposes of *Miranda* when he was told that he was not free to leave and officers continued to question him, and that therefore his statements and the search must be suppressed. (10:1-7).

After the parties briefed the *Miranda* issue, the court issued an oral ruling in which it concluded that Mr. Rotolo was not in custody for *Miranda* purposes during his interrogation by Officer Douglas. (29:7; App. 114). The court reasoned that Mr. Rotolo was not "in custody [like] someone who's being arrested," and that it "does not see this [situation] as one in which he would feel that he was in custody for purposes of an arrest or one in which he was not free to go." (29:7; App. 114).

Following the denial of his motion to suppress, Mr. Rotolo pleaded no contest to both counts charged. (28:3-4). The circuit court sentenced Mr. Rotolo to 90 days in jail on count 1 and 30 days on count 2, concurrent to each other. (28:9-10; 17:1, App. 111). The court then stayed both sentences and imposed

18 months of probation on count 1 and 12 months of probation on count two, concurrent to each other. (28:9-10; 17:1; App. 111).

Mr. Rotolo appealed. The court of appeals decision contrasted "investigatory *Terry* stop[s]" with "a formal arrest for purposes of the Fifth Amendment, which requires *Miranda* warnings." *State v. Rotolo,* 2019AP2061-CR, slip op. at ¶¶15-17. The court then weighed the relevant factors pursuant to *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998), and concluded that Mr. Rotolo was not in custody for purposes of *Miranda* because the detention was not an arrest or its functional equivalent. *Rotolo*, slip op. at ¶¶19-24. Although the court of appeals cited *Lonkoski*¸ it did not address the language that *Miranda* custody is present when "a reasonable person would not feel free to terminate the interview and leave the scene." *See Lonkoski,* 346 Wis. 2d 523, ¶6.

Mr. Rotolo now seeks review in this Court.

ARGUMENT

The law is unclear as to which formulation of the *Miranda* custody test courts should use to determine whether Mr. Rotolo was in custody for purposes of *Miranda*.

A. Introduction, legal principles, and standard of review.

In this case, law enforcement obtained incriminating statements from Mr. Rotolo without *Miranda* warnings after informing him that he was being detained and was not free to go. Under the totality of the circumstances, including the fact that law enforcement came to his place of employment, removed him from his work duties, took him to a separate room, questioned him in the presence of three uniformed officers, promised him he would not be charged criminally and explicitly told him he was not free to leave, Mr. Rotolo was in custody as custody has been defined under the Fifth Amendment jurisprudence. As such, Mr. Rotolo's statements were obtained in violation of his Fifth Amendment rights.

When reviewing a circuit court's decision on a motion to suppress, appellate courts will uphold the circuit court's findings of fact unless clearly erroneous. *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998). Whether a person is in custody for *Miranda* purposes is a question of law, which appellate courts review de novo. *Id.*

The test to determine whether an individual is in custody for *Miranda* purposes is an objective one. *Lonkoski*, 346 Wis. 2d 523, ¶27. Courts have formulated the test a number of different ways, including "whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." *Id.* (citing *State v. Leprich*, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991)). *Lonkoski* explained that another way to state the test is: "if a reasonable person would not feel free to terminate the interview and leave the scene, then that person is in custody for *Miranda* purposes." 346 Wis. 2d 523, ¶27 (internal quotation omitted). These different formulations—the "degree of restraint test" and "the freedom to leave test"—mean very different things when subject is being legally detained and is not free to leave as a result of a *Terry* stop. Indeed, if the latter formulation is the guiding principle in the Fifth Amendment analysis, it would mean that the subject is effectively in *Miranda* custody when he or she is stopped pursuant to *Terry*.

Several factors contribute to the analysis of whether a subject is in custody. *Lonkoski,* 346 Wis. 2d 523, ¶¶6, 43. The factors informing the custody inquiry include "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint." *Gruen*, 218 Wis. 2d at 594. In determining the degree of restraint, courts have considered as 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. *Id.* at 594-96.

B. A reasonable person would not feel free to terminate the interrogation and leave the scene under the totality of the circumstances present during Mr. Rotolo's interrogation.

A reasonable person in Mr. Rotolo's shoes would not have felt free to terminate the interrogation and leave the scene. It is undisputed that Mr. Rotolo was not free to leave. (*See* 9:1, 3). After answering Officer Douglas's initial questions, Mr. Rotolo asked if he could leave and was told that he could not to leave. (30:12; App. 126). This Court should take review to clarify whether this inquiry is relevant at all when there is a *Terry* stop, much less the guiding principle.

Second, courts must consider the purpose, place, and length of the interrogation. *See Gruen*, 218 Wis. 2d at 594. The officers interrogated Mr. Rotolo for the purpose of discovering whether he possessed any illegal drugs or had been attempting to sell drugs to his minor coworkers, which while "legitimate" and "necessary" under the Fourth Amendment, it does not necessarily follow that a person in Mr. Rotolo's shoes would have felt free to leave under the Fifth Amendment analysis simply

because the interrogation was not nefarious. *Rotolo*, slip op. at ¶21. (30:12; App. 126). Although the interrogation did not occur at a police station and was relatively short (it appears to have been about six minutes long, although Mr. Rotolo was detained for at least an additional fifteen to twenty minutes), the fact that it took place at his place of employment while Mr. Rotolo was on the clock, and in a side room that was dominated by police and where he was isolated from his coworkers would have made him, or any reasonable person, feel he was not free to leave. (30:9-10; App. 123-24; 30:Ex. 1 at 5:00-11:00, 27:20).

Third, courts must consider the degree of restraint used by the officers. *Gruen*, 218 Wis. 2d at 594. Again, the fact that Mr. Rotolo was seized at work and was removed from the line while he was in the midst of performing his job duties demonstrates a high degree of officer control. Further, the fact that he was then frisked for drugs and questioned in the presence of three uniformed, armed officers heightened the degree of restraint. (30:10-11; App. 124-25; *see* 30:Ex. 1 at 10:39-10:58, 15:25-16:02, 24:35-25:30). Thus, several of the *Gruen* factors were present and again, a reasonable person would not have felt free to leave under these circumstances.

A legal *Terry* detention forcibly impacts the inquiry of whether a reasonable person is free to leave. In Mr. Rotolo's case, the decisions of both the circuit court and court of appeals demonstrate the confusion regarding the interplay between the Fourth and Fifth Amendment analyses, with both applying

the "degree of restraint test" rather than the "freedom to leave test" to determine that there is no *Miranda* custody. In doing so, both lower courts analysis ignored *Lonkoski* holding that "[a] person is in 'custody' if under the totality of the circumstances 'a reasonable person would not feel free to terminate the interview and leave the scene.'" *Lonkoski,* 346 Wis. 2d 523, ¶6. This Court should take review to determine when, if at all, this language applies in *Terry* stop situations.

CONCLUSION

Notwithstanding *Dobbs*, it is still not clear to what extent a legal *Terry* detention should impact the Fifth Amendment analysis, and when a legal Fourth Amendment detention turns into a Fifth Amendment custody. *See Dobbs,* ¶99, (J. Ziegler, concurring) (discussing federal circuit split on this issue). This Court should take review to clarify when the different iterations of the *Miranda* custody test apply and specifically address when the central inquiry in the custody analysis should be guided by the "freedom to leave" test rather than the "restraint" test.

Dated this 17th day of July, 2020.

Respectfully submitted,

LAURA M. FORCE
Assistant State Public Defender
State Bar No. 1095655

FRANCES REYNOLDS COLBERT
Assistant State Public Defender
State Bar No. 1050435

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440
forcel@opd.wi.gov

Attorneys for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,265 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 17th day of July, 2020.

Signed:

LAURA M. FORCE
Assistant State Public Defender

APPENDIX

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