COURT OF APPEALS DECISION DATED AND FILED

April 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP1293-CR **Cir. Ct. No. 2010CF4660**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON D ANDRE BURNSIDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS CIMPL, Judge. *Reversed and cause remanded for further proceedings*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Brandon D Andre Burnside appeals a judgment entered after a jury found him guilty of first-degree intentional homicide while using a dangerous weapon, *see* WIS. STAT. §§ 940.01(1)(a) and 939.63(1)(b), and an order

denying his motion for postconviction relief. Burnside argues that: (1) the trial court should have granted his motion to suppress statements he made before police told him his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966); (2) the police used unreliable procedures during the line-ups where witnesses identified him as the person who shot and killed the victim, Bryan Drake; (3) the trial court should not have allowed the jury to see the autopsy photographs; (4) his lawyer gave him constitutionally deficient representation; and (5) the trial court should have granted his postconviction motion asking for DNA tests on shirts found at the crime scene. We reverse on the first issue and therefore do not address the other issues because there must be a new trial, and the circuit court will be able to re-address those issues *ab initio* on remand. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 664 (1938) (only dispositive issue need be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

I.

¶2 In August of 2010 at approximately 1:50 a.m., Bryan Drake and his friend Barry McDade left a bar and walked to their car parked in a nearby parking lot. A man approached Drake, and shot and killed him. Witnesses later said that Burnside shot Drake.

¶3 Milwaukee police in the area heard the gunshots and were on the scene quickly. McDade told the police that the shooter was a "[b]lack male, eighteen to twenty-two years of age, five nine to five - - then six one, 160/170, dark skinned, braids to back, shorter length, having no facial hair, red and black polo, light black pants and armed with a blue steel revolver." McDade also told the police that the shooter left in a red Dodge Magnum. Police were told by

someone whom the Record does not identify that the Dodge Magnum's license plate was 291 PYT. The officers immediately broadcast the shooter's and his car's description over the radio. At the homicide scene, Milwaukee Police Detective David Chavez found broken pieces from a car's tail light and the complaint alleges that the owner of a minivan said that the Dodge Magnum had backed into his minivan in the parking lot where the shooting occurred.

¶4 At about 2:20 a.m., police stopped a Dodge Magnum with license plate 291 PYT and saw that it had a broken tail light. Burnside was driving the Dodge Magnum. The police put Burnside in the back seat of a locked squad car and searched the Dodge Magnum. Forty minutes later, Milwaukee Police Detective Luke O'Day arrived at the traffic stop. He testified at the suppression hearing that he then knew:

- "there had been a homicide,"
- police had stopped a car "that matched a description possibly involved in a shooting," and
- that "there had been an accident on the scene prior to the shooting" causing "damage" to the Dodge Magnum.

¶5 O'Day went to the locked squad car where the police put Burnside and "asked for him to meet with me in my car so I could interview him." Burnside was not handcuffed. O'Day testified that he wanted to ask Burnside "where he had been prior to the traffic stop." During the interview in O'Day's unmarked squad car, Burnside told O'Day, according to O'Day's testimony: (1) he had been at the bar near where the shooting occurred; (2) "he had left the club at 11:30 p.m."; and (3) "he wasn't aware of any shootings or any accidents."

¶6 O'Day testified that based on the "further information regarding fragments on the scene, given the similarities on scene and his vehicle that was stopped and also regarding he had left at 11:30 p.m., there was differences where he was stopped and where he said he had been driving. I took him downtown just for a more in-depth interview." According to O'Day, Burnside had not been arrested, but had agreed to "voluntarily" come downtown. A squad car "transported him down" "to the Police Administration Building." O'Day also ordered Burnside's car towed to the police administration building.

¶7 At the police administration building, Burnside sat in an open interview room, and, according to Day's testimony, "the officers were with [Burnside] outside" of the room because O'Day had to stop at the shooting scene before going to the police administration building. When O'Day got to the police administration building, he moved Burnside to another room "because it is a larger room, more comfortable to sit in." Burnside had not been handcuffed in either room. O'Day's questioning of Burnside started at 5:54 a.m. and ended at 7:52 a.m. when Burnside "refus[ed] to make a statement." At the start of the interview, O'Day said: "This is gonna be an interview of a subject regarding the homicide at 3013 West North Avenue at 1:52 am. RI #102230019. This subject is not in-custody and this is not a Mirandized interview." The transcript of this interview shows that during the questioning:

- Day repeatedly asked Burnside about the broken tail lamp on his Dodge Magnum; Burnside insisted he had not been in an accident near the shooting scene and any damage to his car had occurred a month earlier.

- Day questioned Burnside's claim that he left the bar at 11:30 p.m. because that would mean he "drove around the area for 2 ½ hours."

- Burnside admitted that he must have left later than 11:30 p.m. because he had only been driving around for about thirty minutes.

- When Burnside could not explain why the tail light fragment matched the damage on his Dodge Magnum, O'Day told him "Well, you're gonna have to have an answer cause otherwise you're gonna get arrested."

¶8 O'Day took a break to look at Burnside's car after it arrived at the police administration building, and afterwards came back to question Burnside again. The transcript of this second round of questioning shows:

- Burnside insisted he had been the only one in his car that night and that he had not been in an accident.

- He said he only had a few drinks, was not intoxicated, and "you can just book me man cause I don't, I don't know dude. This is (stuttering) ridiculous."

¶9 After the second round of questioning, O'Day arrested Burnside for obstruction. *See* WIS. STAT. § 946.65. At 11:18 a.m., detectives Michael Sykes and William Smith began a third round of questioning. According to the transcript of the third round, Smith started the questioning when he asked Burnside "you change your mind?" to which Burnside answered "Yeah," and then Smith read Burnside his ***Miranda*** rights. Burnside told the officers and admitted that his car had been in the parking lot near the homicide, that it had been in an accident, that his friend had been driving because Burnside had had too much to drink, that he

heard the shooting "around the time we was driving off," and that he knew the victim from the neighborhood. There is no indication that the police handcuffed Burnside for this post-***Miranda*** questioning.

¶10 After witnesses identified Burnside as the shooter, Burnside was charged with first-degree intentional homicide while armed. Burnside sought to suppress what he told O'Day in O'Day's car and at the police administration building. The trial court denied the motion ruling that Burnside had not then been "in custody for any reason." This, of course, is a question of law that we review *de novo*. *See* ***State v. Morgan***, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 612, 648 N.W.2d 23, 28 ("[W]hether a person is "in custody" for Miranda purposes is a question of law, which we review de novo based on the facts as found by the trial court.").

II.

¶11 As noted, Burnside claims that anything he told O'Day in O'Day's car or at the police administration building should be suppressed because neither O'Day nor anyone else warned him of his rights under ***Miranda***. A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 668, 762 N.W.2d 385, 388. We will uphold the trial court's findings of fact unless they are clearly erroneous. ***Ibid.***; WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). We review the trial court's application of constitutional principles *de novo*. ***Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d at 667–668, 762 N.W.2d at 388–389. As seen from our analysis below, we take the facts as related by the testifying officer to be true. Thus, this appeal presents only an issue of constitutional law.

¶12 The dispositive issue on this appeal is whether Burnside was "in custody" for ***Miranda*** purposes when O'Day questioned him. ***Miranda*** warnings are only required when a person is "in custody." ***State v. Schloegel***, 2009 WI App 85, ¶7, 319 Wis. 2d 741, 747, 769 N.W.2d 130, 132. ***Miranda*** indicates that a person is in "custody" either when "a person has been taken into custody or otherwise deprived of his freedom of action *in any significant way*." ***Miranda***, 384 U.S. at 444 (emphasis added). Thus, "[l]aw 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." ***State v. Martin***, 2012 WI 96, ¶33, 343 Wis. 2d 278, 298, 816 N.W.2d 270, 280 (citing ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995)). This is an objective standard, and does not depend "on the subjective views harbored by either the interrogating officers or the person being questioned." ***Stansbury v. California***, 511 U.S. 318, 323 (1994).

¶13 The question then is whether a reasonable person in Burnside's position would have, under the totality of the circumstances, believed that he or she could stop O'Day's questioning and leave. We conclude the answer to that legal question is no.

¶14 After stopping Burnside, police took him from his car and locked him in the back of a squad car. He sat locked in the squad car for forty minutes, and there is nothing in the Record that indicates that anyone would have unlocked the squad car had Burnside so requested. Next, O'Day took Burnside from the locked squad car and placed him in the front of O'Day's unmarked car. As noted, O'Day testified that O'Day "asked for him to meet with me in my car so I could interview him." During that thirty-minute questioning there is nothing in the Record that even suggests that the police would have allowed Burnside to simply

leave, or that Burnside could have left because, as we have seen, his car was in police possession and was towed from the scene.

¶15 O'Day testified that he then told Burnside he wanted to continue the questions at the police administration building. And, according to his testimony, asked Burnside if he was willing to do so voluntarily. According to O'Day, Burnside said yes. O'Day then told Burnside that an officer would drive him to the police administrating building in a squad car.

¶16 When Burnside arrived at the police administration building, the police put him in an interview room with police officers outside the open door. Burnside had to wait there for O'Day. Under all these circumstances, a reasonable person would not have felt free to: leave the locked squad car, walk away from O'Day when O'Day put him in the front of O'Day's car, or when he was placed in first one and then another interview room simply walk out of the police administration building. In the words of ***Miranda*** that we quoted earlier, the police deprived Burnside "of his freedom of action in a[] significant way." *See* ***Miranda***, 384 U.S. at 444. Indeed, ***Miranda*** specifically recognized that there is an inherent "compulsion to speak in the isolated setting of the police station." ***Id.***, 384 U.S. at 461. The trial court's legal conclusion that Burnside was not in custody during O'Day's questioning was wrong. Accordingly, everything that Burnside told O'Day must be suppressed. *See* ***Miranda***, 384 U.S. at 479.[1]

[1] The State does not argue that if the circuit court erred in denying Burnside's suppression motion, the error was harmless beyond a reasonable doubt.

By the Court.—Judgment and order reversed and cause remanded for further proceedings.

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