

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP423-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF153

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN J. STREICHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES G. POURROS, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Justin Streicher appeals from a judgment convicting him on his no contest plea of being party to the crime of neglecting a child who died as a consequence. The circuit court denied Streicher's motion to suppress statements Streicher gave at the West Bend police department before and

after he received *Miranda*¹ warnings. Streicher renews his suppression claim on appeal. We agree with the circuit court that Streicher was not in custody when he gave the pre-*Miranda* statements and therefore his pre- and post-*Miranda* statements need not be suppressed due to a *Miranda* violation. We affirm.

¶2 The factual basis for Streicher's no contest plea is found in the complaint. The complaint alleged that police responded to the home of Streicher and the child's mother, Leann Leszynski, to investigate a report of an unresponsive child, who was later declared dead. Streicher lived in the home with the child, to whom he was not related, and he cared for the child and her siblings in the mother's absence. An autopsy revealed a significant finger laceration and a Streptococcus Group A infection. The untreated infection likely arose from the laceration and was a substantial factor in the child's death.

¶3 Police officers were the only witnesses who testified at the suppression hearing, and the circuit court found their testimony credible. After hearing testimony and reviewing an audio recording of Streicher's interview, the circuit court made the following findings. When a police officer discovered the dead child, he escorted Streicher and Leszynski from the apartment to the hallway to secure the scene. The court found that Leszynski told a law enforcement officer at the apartment building that she did not want to talk about the child's death in the apartment hallway and wanted a more private setting. When offered the West Bend police department as an option, both Leszynski and Streicher agreed to go there. The police officer told them they would be transported to the station, but they were not being detained. Detective McCarthy testified at the joint

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

suppression hearing that both Leszynski and Streicher agreed to travel to the police department to discuss the child's death.

¶4 Streicher, who was not handcuffed, was transported to the police department in the back of a squad car. He smoked a cigarette in the department's parking lot and was then placed in an interview room whose door locked automatically. Streicher could have exited the room by knocking on the door. After nine minutes alone in the interview room, Streicher was joined by McCarthy, who spoke with him for four minutes. Streicher had been in the interview room for approximately an hour when the detective returned and interviewed Streicher for thirty-seven minutes before Streicher received *Miranda* warnings.

¶5 The circuit court declined to suppress Streicher's pre-*Miranda* statements because Streicher was not in custody in the interview room when he made those statements. Streicher went to the police department voluntarily, he was told that he was not under arrest and that he could knock on the interview room door for it to be opened, he was not handcuffed or otherwise restrained, no weapons were brandished, he was not searched, Streicher smoked a cigarette in the parking lot before entering the department building, the interview room was monitored by a camera, and he was only in the company of one to two law enforcement officers at any one time.

¶6 Streicher received *Miranda* warnings thirty-seven minutes into his interview.² Streicher's post-*Miranda* interview lasted three hours and fifty-three minutes, and when he asked for a lawyer, the questioning stopped immediately.

¶7 The circuit court concluded that Streicher's post-*Miranda* statements were voluntary³ and admissible based on these findings: no threats or promises of leniency were made to Streicher; food, water, cigarettes and comfort breaks were available to him upon request; he could alert department personnel by knocking on the interview room door; Streicher was coherent throughout the interview; Streicher was largely calm during the interview process, although he did become agitated on a few occasions during the interview.

¶8 The circuit court concluded that Streicher was not in custody until law enforcement officers informed him that he was under arrest, all of his statements were voluntary, and the *Miranda* warnings were properly given. The court denied Streicher's motion to suppress his statements.

¶9 On appeal, Streicher challenges his pre- and post-*Miranda* statements in the police department interview room.⁴ He does not challenge the circuit court's findings of fact based on the evidence adduced at the suppression

² Streicher received *Miranda* warnings after drugs and drug paraphernalia were discovered at the apartment. At that time, the circumstances of the child's death were still not clear.

³ Streicher does not allege on appeal that his statements were involuntary, i.e., that they resulted from pressure exerted by the police. "A statement is voluntary if pressures exerted by the police do not exceed the defendant's ability to resist." *State v. Lemoine*, 2013 WI 5, ¶14, 345 Wis. 2d 171, 827 N.W.2d 589.

⁴ Streicher does not challenge the circuit court's determination that he was not in custody and made voluntary statements in the apartment hallway, in the squad car and in the police department parking lot during a cigarette break.

hearing. Streicher argues that his pre-*Miranda* statements should have been suppressed because he was in custody and his post-*Miranda* statements should have been suppressed because they were tainted by the failure to give *Miranda* warnings at the outset of his custody period in the interview room.

¶10 A person is in custody for *Miranda* purposes if, under the totality of the circumstances, a reasonable person in that situation would not feel free to terminate the interview and depart. *State v. Lonkoski*, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552. The State had the burden to prove by a preponderance of the evidence that Streicher did not experience a custodial interrogation prior to receiving *Miranda* warnings. *State v. Fischer*, 2003 WI App 5, ¶22, 259 Wis. 2d 799, 656 N.W.2d 503 (2002). Whether a person is in custody for *Miranda* purposes presents a question of law that we determine independently. *State v. Goetz*, 2001 WI App 294, ¶8, 249 Wis. 2d 380, 638 N.W.2d 386. Because Streicher does not challenge the circuit court’s findings of fact, the question is whether those findings support a legal conclusion that Streicher was not in custody when he gave his pre-*Miranda* statements. We conclude that they do.

¶11 The following factors are relevant in the totality of the circumstances analysis: “the defendant’s freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint.” *Lonkoski*, 346 Wis. 2d 523, ¶6 (citation omitted). The objective circumstances of the defendant’s interaction with law enforcement officers are examined including whether the defendant was free to leave the scene; the purpose, place and length of the questioning; the degree to and manner in which the defendant was restrained considering whether the defendant was handcuffed; whether the police brandished a weapon; and whether

the defendant was frisked or moved to another location. *State v. Gruen*, 218 Wis. 2d 581, 594-96, 582 N.W.2d 728 (Ct. App. 1998).

¶12 Streicher contends that he was confined or restrained at the police station such that he was in custody when he gave his pre-*Miranda* statements. We disagree. First, a person is not in custody for *Miranda* purposes merely because the person is a suspect being questioned at the police station. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *United States v. Jones*, 21 F.3d 165, 170 (7th Cir. 1994). Streicher agreed to travel to the police department to discuss the circumstances surrounding the child's death. "A reasonable person is less likely to believe he or she is in custody when he or she is asked, rather than ordered, to do something by a police officer." *Gruen*, 218 Wis. 2d at 596.

¶13 Second, the hallmarks of restraint were not present: no handcuffs or frisk, not held involuntarily or pursuant to an arrest, and free to exit the interview room upon request. We do not agree that being transported to the police department in a squad car featuring secured rear doors or being placed in a locked interview room, from which he could exit on demand, constituted restraint or created a coercive environment. Furthermore, a person being escorted by police for comfort and cigarette breaks is not a person in custody absent other indicia of restraint. *State v. Mosher*, 221 Wis. 2d 203, 213, 584 N.W.2d 553 (Ct. App. 1998). We conclude that the level of restraint to which Streicher was subject at the police department did not amount to custody.

¶14 Streicher relies heavily upon *State v. Uhlenberg*, 2013 WI App 59, 348 Wis. 2d 44, 831 N.W.2d 799, to support his claim that he was in custody. *Uhlenberg* is distinguishable. Uhlenberg was handcuffed and transported to the police station. *Id.*, ¶2. In contrast, Streicher voluntarily agreed to go to the police

station, and he was not handcuffed at any time. Uhlenberg was held in a locked interview room with little explanation of why he was being interviewed or when that process would start. *Id.*, ¶13. In contrast, Streicher was informed that he could request assistance by knocking on the interview room door, and he was told that Leszynski would be interviewed first. Streicher was not left alone in the interview room for an excessive period of time.

¶15 Because we affirm the circuit court’s conclusion that Streicher was not in custody at the police department when he gave statements before he received *Miranda* warnings, we need not address Streicher’s claims that his post-*Miranda* statements were tainted by the failure to give *Miranda* warnings at the outset of his sojourn in the interview room.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

