COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2805-CR **Cir. Ct. No. 2003CM4630**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER DILWORTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Reserve Judge. *Affirmed.*

¶1 CURLEY, J.[1] Christopher Dilworth appeals the judgment, entered following his guilty plea, convicting him of one count of carrying a concealed

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

weapon, contrary to WIS. STAT. § 941.23 (2003-04).[2] Dilworth contends that the trial court erred in denying his motion seeking to suppress his statements, which revealed the location of a firearm, leading to the carrying a concealed weapon charge. Dilworth claims that, contrary to the trial court's ruling, he was in custody when he was searched and questioned, and consequently, the police were required to advise him of his ***Miranda***[3] rights before questioning him. Since no warnings were given to him, he contends that his statements, and the evidence derived therefrom, should have been suppressed. While this court agrees that Dilworth was in custody at the time of questioning, here, the absence of the ***Miranda*** warnings was not fatal because the questioning fell within the public safety exception. As a result, the trial court is affirmed, but on different grounds.

I. BACKGROUND.

¶2 According to the testimony of two police officers, on June 4, 2003, at approximately 6:00 p.m., Dilworth entered the lobby of the Milwaukee District 7 police station wearing camouflage clothing and carrying a combat helmet. Dilworth drew the attention of the officers, both because of his clothing, and because he was acting strangely.

¶3 After one of the officers saw what he believed to be a police sap in Dilworth's pocket, Dilworth was asked to place his hands on the counter and a pat-down search was conducted. Upon searching Dilworth, the police found a police sap approximately eight inches in length, several bullets, and some pepper

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

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

spray in his pockets. After raising his shirt, they discovered that Dilworth was wearing a bulletproof vest and had an elastic black band around his waist that can be commonly used as a holster to conceal weapons. Upon finding the bullets and the empty holster, the officer conducting the search asked Dilworth where the gun was. Dilworth did not answer. Another officer again asked, "Where's the gun?" This time Dilworth replied, stating that the gun was in his truck. The police obtained Dilworth's keys, and upon locating the truck, the police saw the butt of a gun under the seat. Dilworth was arrested for carrying a concealed weapon.

¶4 Dilworth brought a motion to suppress the statements. The trial court ruled that the police did not have Dilworth in custody when he was questioned, and thus, the statements need not be suppressed. The trial court also suggested that even if Dilworth was in custody, either the public safety exception to the general rule requiring ***Miranda*** warnings before questioning, or the inevitability doctrine may apply. As to the inevitability doctrine, the trial court reasoned that the gun would have eventually been recovered because Dilworth could have been arrested for possessing the sap and, consequently, the police would have observed the firearm when they inventoried the truck.

¶5 After the motion was denied, the matter was set for a jury trial. After a jury was selected, Dilworth pled guilty. The trial court sentenced him to thirty days in the county jail, but stayed that sentence and placed Dilworth on probation for one year with certain conditions.

II. ANALYSIS.

¶6 Dilworth submits that because he was in custody when questioned by the police, without having been advised of his ***Miranda*** rights, the trial court

should have suppressed the statements in which he incriminated himself. He also insists that the "public safety exception" is inapplicable here.

¶7 In reviewing the trial court's decision, this court must accept the court's findings of historical fact unless they are clearly erroneous; however, whether a person is "in custody" for ***Miranda*** purposes is a question of law, which this court reviews *de novo* based on the facts as found by the trial court. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998).

¶8 Here, the initial question to be resolved is whether Dilworth was in custody at the time he was questioned. The trial court's findings regarding this aspect of the case are quite brief and focus more on the police decision to conduct a pat-down search.

> I think that when the sergeant approached Mr. Dilworth and patted him down, that was completely appropriate. I don't have any problem with the officers standing by to make sure that Mr. Dilworth didn't do anything suddenly or cause the officers to believe that he was more of a danger than he appeared to be. The fact that the officers were standing there in my view doesn't put him in custody. I think under the circumstances the officers were completely justified in approaching Mr. Dilworth and inquiring of him what was – what he was doing and patting him down for their own protection and for the protection of other people, and upon recovering the sap, observing that he was wearing a holster and body armor, asking him where the firearm was.

¶9 ***Miranda*** and its progeny are safeguards aimed at dispelling the compulsion inherent in custodial surroundings. ***State v. Pheil***, 152 Wis. 2d 523, 530-31, 449 N.W.2d 858 (Ct. App. 1989). Accordingly, the ***Miranda*** safeguards apply only to custodial interrogations. ***Id.*** at 531; *see also* ***State v. Armstrong***, 223 Wis. 2d 331, 344-45, 588 N.W.2d 606 (1999) ("***Miranda*** warnings need only be administered to individuals who are subjected to a custodial interrogation.").

Generally speaking, the prosecution may not use a defendant's statements stemming from custodial interrogation unless the defendant has been given the requisite warnings. ***Miranda***, 384 U.S. at 444. In ***Miranda***, the Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." ***Id.*** (footnote omitted). Subsequently, the Court has held that the ***Miranda*** safeguards "become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with [a] formal arrest.'" ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984) (quoting ***California v. Beheler***, 463 U.S. 1121, 1125 (1983) (per curiam)). The relevant inquiry is how a reasonable person in the suspect's situation would understand the situation. ***Id.*** at 442.

¶10 In determining whether an individual was "in custody" for purposes of deciding whether ***Miranda*** warnings were required, this court must consider the totality of the circumstances, including such factors as: the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). When considering the degree of restraint, this court considers: whether the suspect was handcuffed, whether a weapon was drawn, whether a frisk was performed, the manner in which the suspect was restrained, whether the suspect was moved to another location, whether questioning took place in a police vehicle, and the number of officers involved. ***Id.*** at 594-96.

¶11 In applying those factors, this court notes that when Dilworth was questioned, he was in a police station surrounded by uniformed officers. Although not handcuffed, he had been ordered to place his hands on the counter and told not to move while he was searched. His hands remained on the counter while he was

questioned. Dilworth had gone to the police station because he allegedly feared for his safety due to an argument with a neighbor. That was his apparent explanation for why he was wearing the clothes that he had on and carrying the items found on his person. However, once at the police station, Dilworth found himself the focal point of a police search for weapons. The officer who searched Dilworth testified that he was uncertain as to Dilworth's status when he was questioned. First, he testified that he did not know what he would have done had Dilworth made an attempt to leave the station. However, later he stated that he believed he had placed him under arrest for carrying the sap at the time of the questioning.

¶12 All of the facts here are in sharp contrast to those in ***State v. Koput***, 142 Wis. 2d 370, 418 N.W.2d 804 (1988), a case holding that the initial interview of Koput was admissible, despite the lack of ***Miranda*** warnings, because there were no facts, viewed objectively, that would lead a reasonable person to conclude he was in custody at the time he confessed. ***Id.*** at 380-82. There, the police interviewed Koput at the sheriff's department after Koput volunteered that he had some information regarding a homicide victim. He was interviewed in a room without a door. None of the deputies wore uniforms, and no weapons were displayed. While there, he was invited to use the restroom, given food, and even allowed to smoke. Testimony was presented indicating that "he could have left at any time prior to giving his inculpatory statement." ***Id.*** at 377.

¶13 Unlike the facts in ***Koput***, no reasonable person in Dilworth's position would have believed that he or she was free to leave. Dilworth was surrounded by two officers, had been ordered to put his hands on the counter, was told not to move, and had many of his belongings removed from his person. Moreover, the officer's question fell within the definition of "interrogation."

"Interrogation" is express questioning or its functional equivalent—"'words or actions on the part of the police (other than those normally attendant to arrest and custody) that police should know are reasonably likely to elicit an incriminating response from the suspect.'" ***State v. Cunningham***, 144 Wis. 2d 272, 277, 423 N.W.2d 862 (1988) (citation omitted). The officer's question was likely to, and indeed, did elicit an incriminating response. Dilworth's initial reluctance to respond is an indication of the fact that he recognized that the answer might incriminate him. Thus, this court is satisfied that Dilworth was in custody at the time questions were asked about the whereabouts of the gun. Having concluded that Dilworth was in custody, this court must next consider whether the public safety exception applies to this situation.

¶14 In ***New York v. Quarles***, 467 U.S. 649 (1984), the Supreme Court set forth a "public safety" exception to the requirement that ***Miranda*** warnings be given before a suspect's answers may be admitted into evidence. ***Id.*** at 655-60. The Supreme Court held that police are not required to give ***Miranda*** warnings before asking questions "reasonably prompted by a concern for public safety." The Court concluded: "[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." ***Id.*** at 657. Wisconsin extended the exception to include both a private safety situation and the safety of the police. *See* ***State v. Kunkel***, 137 Wis. 2d 172, 189, 404 N.W.2d 69 (Ct. App. 1987) ("The companion to the public safety exception must be a private safety exception, whether labeled as such or as a 'rescue doctrine.' The possible imminent loss of the life of a known and identifiable individual is entitled to the same weight as the public safety."); ***State v. Camacho***, 170 Wis. 2d 53, 72, 487 N.W.2d 67 (Ct. App. 1992) (***Quarles*** exception applies to safety of police

involved), *rev'd on other grounds*, 176 Wis. 2d 860, 501 N.W.2d 380 (1993). The public policy supporting the safety exceptions rests in the logic that the need for answers to questions in a situation posing a threat to safety, and thus, the need to protect life and neutralize volatile situations, outweighs the need for the ***Miranda*** rules. ***Camacho***, 170 Wis. 2d at 71-72.

¶15 The events as they unfolded here clearly fall within the exception. From the police perspective, an oddly-dressed and peculiarly-acting man appeared in the district station. The man, who was acting in a manner suggesting he was unstable, was dressed as though he were a combat soldier. The police saw what turned out to be a sap, a weapon used to subdue a person, in his pocket. A pat-down search of the man revealed bullets and an empty holster. Under these circumstances, it was not unreasonable for the police to fear that the gun was nearby and that Dilworth was prepared to use it. Here, the police asked questions that were designed to locate the weapon and neutralize its danger. Thus, the situation falls within the public safety exception, and the trial court's determination is affirmed on other grounds.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.