COURT OF APPEALS
DECISION
DATED AND RELEASED

December 20, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 95-1727-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GORDON GREER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

NETTESHEIM, J. Gordon Greer appeals from a judgment of conviction for the unlawful possession of a controlled substance pursuant to § 161.41(3r), STATS. Greer contends that he was in custody for purposes of ***Miranda***[1] when he was questioned by the police during a search of his residence. Since the police did not first advise him of his ***Miranda*** rights, Greer contended that his statement was inadmissible. The trial court disagreed and

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

denied Greer's motion to suppress. Following his plea of guilty and conviction, Greer takes this appeal.

The controlling facts are not disputed. On January 17, 1995, Deputy Timothy Otterbacher of the Walworth County Sheriff's Department applied to the Walworth County Circuit Court for a search warrant authorizing a search of Greer's residence for suspected controlled substances and related material. The same day, the Honorable Michael S. Gibbs issued the search warrant.

The next morning, Otterbacher and other officers of the Walworth County Drug Enforcement Unit arrived at Greer's residence to execute the warrant. Two officers knocked and announced their presence and purpose at the front door. Meanwhile, Otterbacher and another officer approached a rear entrance door. From this location, Otterbacher could hear conversation between the other officers and someone in the residence. Otterbacher and the other officer then entered the residence from the back door which was unlocked.[2]

As he walked through the residence, Otterbacher noticed a little girl opening the door for the officers at the front door. He also noticed a nearby bathroom from which he could hear the shower running. Otterbacher entered the bathroom and stated that he was with the sheriff's department and that the officers had a search warrant. A male voice replied that he would be right out.

[2] The officers' entry into the residence is not at issue on appeal.

Otterbacher quickly searched the bathroom for weapons and advised the person that he would be given privacy to finish his shower. Otterbacher then left the bathroom.

About five minutes later, Greer came out of the bathroom in a clothed condition. Otterbacher and Greer sat down at a table. Otterbacher then read the search warrant to Greer and advised him that he was not then under arrest, but that the result of the search would determine whether he would be arrested. Otterbacher also advised Greer that the police would be using a "drug dog" to assist in the search. Otterbacher told Greer that the dog was an "aggressive indicator," meaning that the dog "scratches when he detects an odor of narcotics, and that it—it is possible that furniture or something could get scratched as a result of this indication. And that's when I asked if he … would tell me where any drugs were so that we could avoid those problems." Greer responded that there was "a quarter ounce of marijuana … on his dresser" and "one pipe … in the bedroom also."

Otterbacher then asked Greer for some identification and read him the ***Miranda*** rights. In response, Greer said that he wanted to speak to an attorney and Otterbacher did not ask any further questions. The drug dog was then brought into the residence and the controlled substance was discovered. Otterbacher was then arrested.

At the conclusion of the suppression hearing, the trial court ruled that while Greer was detained for purposes of the temporary detention statute, § 968.24, STATS., he was not in custody for purposes of ***Miranda***. Greer appeals.

In ***Miranda***, the United States Supreme Court concluded that where a defendant is subject to "custodial interrogation," certain procedural safeguards are necessary to protect his or her Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. ***Rhode Island v. Innis***, 446 U.S. 291, 297 (1980); ***State v. Leprich***, 160 Wis.2d 472, 476, 465 N.W.2d 844, 845 (Ct. App. 1991). Thus, if the police take a suspect into custody and ask him or her questions without giving ***Miranda*** warnings, the responses cannot be used as evidence to establish guilt. ***Leprich***, 160 Wis.2d at 476, 465 N.W.2d at 845 (citing ***Berkemer v. McCarty***, 468 U.S. 420, 429 (1984)).

The ***Miranda*** Court stated that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), *quoted in* ***Leprich***, 160 Wis.2d at 476-77, 465 N.W.2d at 845. Not every on-the-scene questioning by a police officer need be preceded by a ***Miranda*** warning. ***Leprich***, 160 Wis.2d at 477, 465 N.W.2d at 845. When general on-the-scene questions are investigatory rather than accusatory in nature, the ***Miranda*** rule does not apply. ***Leprich***, 160 Wis.2d at 477, 465 N.W.2d at 845. "The ultimate inquiry is whether there is a formal arrest *or restraint on freedom of movement of a degree associated with a formal arrest.*" ***New York v. Quarles***, 467 U.S. 649, 655 (1984) (emphasis added), *quoted in* ***Leprich***, 160 Wis.2d at 477, 465 N.W.2d at 846.

In making this determination, a court should consider the totality of the circumstances. ***Leprich***, 160 Wis.2d at 477, 465 N.W.2d at 846. The defendant's freedom to leave the scene and the purpose, place and length of the interrogation are all relevant factors. ***Id***. Because the facts in this case are undisputed, this determination presents a question of law. ***Id***. at 477-78, 465 N.W.2d at 846.

In this case, the police had not arrested Greer at the time of the questioning. In fact, the police expressly told Greer that he was not under arrest. The questioning took place in Greer's residence, a location which "is not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation." *See* ***id***. at 478, 465 N.W.2d at 846 (quoted source omitted). In addition, the police did not lay any hands on Greer or physically restrain him or his movements in any fashion. *See* ***id***. at 479, 465 N.W.2d at 846-47. Finally, the questioning was brief, consisting of only one inquiry.

From these facts, we conclude that a reasonable person in Greer's position would not conclude that his or her "freedom of action [was] curtailed *to a degree associated with formal arrest.*" *See* ***Berkemer***, 468 U.S. at 440 (quoted source omitted; emphasis added). This is so even if the police harbored some unarticulated intent to detain or arrest Greer since such has no bearing on the question before us. *See* ***Leprich***, 160 Wis.2d at 479, 465 N.W.2d at 846-47. The only relevant inquiry is how a reasonable person in the suspect's position would have understood the situation. ***Id***. at 479, 465 N.W.2d at 847. Having been expressly told that he was not under arrest only moments before his

incriminating statement, it would be incongruous for us to nonetheless conclude that Greer's freedom was curtailed in a fashion associated with formal arrest in light of all the attendant circumstances.[3]

We see this case as being much like ***Leprich***. There, the police arrived at the site of a domestic disturbance between the defendant wife and her husband. The husband informed a police officer that his wife had been angry with him and had thrown a stereo speaker at him, injuring him. The officer then questioned the defendant wife regarding the incident. During this questioning, she made incriminating statements. The officer never advised the defendant of her ***Miranda*** rights. Eventually she was arrested and convicted of disorderly conduct. ***Leprich***, 160 Wis.2d at 474-76, 465 N.W.2d at 844-45.

In upholding the trial court's rejection of the defendant's motion to suppress her statements, the court of appeals noted that the questions were of an investigatory nature, were not coercive and were made in the defendant's home. ***Id***. at 478, 465 N.W.2d at 846. The court acknowledged that the defendant had not been advised that she was free to leave and further acknowledged that the officer had subjectively determined that he would not have allowed the defendant to leave if she had so attempted. ***Id***. at 479, 465 N.W.2d at 846-47. However, the court concluded that such did not convert the

[3] We also reject Greer's reliance on ***United States v. Warner***, 955 F.2d 441, 453 (6th Cir.), *cert. denied*, 112 S. Ct. 3050 (1992), which holds that the obligation to provide the ***Miranda*** warnings hinges on the status of the person questioned as a potential defendant, not on any custody assessment. This is contrary to ***Miranda*** and its progeny and Wisconsin law. Moreover, we observe that ***Warner*** was superseded by a subsequent decision that analyzes the issue in terms of custody and not on the status of the person questioned as a potential defendant. *See* ***United States v. Warner***, 971 F.2d 1189, 1200-02 (6th Cir. 1992).

situation into one where the defendant's freedom of action was of a degree associated with formal arrest. ***Id***. at 477-79, 465 N.W.2d at 846-47.

Here, since the police were about to search his residence under the auspices of a search warrant, Greer was obviously under suspicion at the time of the questioning. However, the same was true of the defendant in ***Leprich*** where the husband had already informed the police that his wife had assaulted him. The ***Miranda*** requirement is premised on custody, not on suspicion. Otterbacher specifically advised Greer that he was not under arrest, and that any future decision regarding arresting him would turn on the outcome of the search. Thus, like ***Leprich***, we see the questioning as investigatory focusing on the search, rather than accusatory focusing on Greer.

In addition, this case is stronger for the State than ***Leprich*** because in ***Leprich*** the defendant was never told that she was free to leave, whereas here Greer was expressly told that he was not under arrest. Moreover, like ***Leprich***, the search was conducted in Greer's home, was limited in duration, was conducted without coercion or compulsion and was free of any physical restraints against Greer.

Greer contends that Otterbacher's statement that he was not under arrest was simply a means by which the police could avoid giving him the ***Miranda*** rights prior to questioning. We cannot deny that in some instances the police might be tempted to employ such a tactic. However, if we were to hold that the police *must* always deliver the ***Miranda*** warnings in this kind of situation, we are functionally saying that the police *must* arrest. Such a rule

invites the prospect of premature or invalid arrests—a condition which would not only deprive many innocent suspects of their liberty, but also risks the loss of potential evidence to the state because of invalid arrests.

Instead, we can only echo the words of the United States Supreme Court in ***Berkemer*** offered in response to the same argument as Greer makes here:

> Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that Miranda applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws—by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists—while doing little to protect citizens' Fifth Amendment rights. The second would enable the police to circumvent the constraints on custodial interrogations established by Miranda.

Berkemer, 468 U.S. at 441.

We therefore uphold the trial court's denial of Greer's motion to suppress and we affirm the conviction.

Having said all of the above, we are compelled to make an observation regarding the current state of the law on this question. This law

pretends that a suspect comprehends the distinction between a seizure for purposes of the Fourth Amendment and custody for purposes of ***Miranda*** and the Fifth Amendment. As such, the law further pretends that a suspect whose detention for Fourth Amendment purposes has not yet progressed to the levels associated with formal arrest for Fifth Amendment purposes will understand that he or she, without the benefit of ***Miranda*** warnings, need not submit to police questioning. This reasoning is pure fiction and folly. And, it forces those of us who are duty bound to follow it to write decisions which look silly.

We could avoid this situation if the law instead forthrightly declared that the admissibility of a suspect's statement is governed solely by whether the statement was the product of a formal arrest or circumstances associated with such an arrest—*not by whether the suspect grasped the distinction.* The ability to change this law, however, does not lie within the province of this court.

Based on existing law, we uphold the trial court's order rejecting Greer's motion to suppress his statement. Accordingly, we affirm the conviction.

By the Court.—Judgment affirmed.

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