

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 2026

Samuel A. Christensen
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. 2024AP2101-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2022CF1483

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

GIOVANNI X. SMYCZECK RIVERA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
MICHAEL O. BOHREN, Judge. *Reversed.*

Before Lazar, P.J., Gundrum, and Grogan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. The State seeks review of a circuit court order granting Giovanni X. Smyczek Rivera's motion to suppress statements made to

law enforcement officers both before and after being advised of his **Miranda** rights during the course of a child pornography investigation. See **Miranda v. Arizona**, 384 U.S. 436 (1966). It says the court erred both in concluding that Smyczek Rivera's pre-**Miranda** statements were inadmissible because he was in custody during the questioning that occurred during the execution of the search warrant and in also excluding the post-**Miranda** statements under **Missouri v. Seibert**, 542 U.S. 600 (2004). Based upon our review of the briefs and Record, we reverse.

¶2 In January 2022, the New Berlin Police Department received information from the National Center for Missing and Exploited Children regarding a child pornography investigation involving an account eventually tied to Smyczek Rivera. The investigation ultimately resulted in the State charging Smyczek Rivera with ten counts of possession of child pornography contrary to WIS. STAT. § 948.12(1m) and (3)(a) (2023-24),¹ one count of possession of tetrahydrocannabinols (THC) contrary to WIS. STAT. § 961.41(3g)(e), and one count of possession of drug paraphernalia contrary to WIS. STAT. § 961.573(1). The drug-related charges stemmed from marijuana and drug paraphernalia discovered during execution of the search warrant.

¶3 Smyczek Rivera filed a motion seeking to suppress incriminating statements and any derivative evidence based on an alleged **Miranda** violation, and the circuit court held a two-day motion hearing at which New Berlin Police Department Detectives Joshua Guevara and Thomas Johannik, as well as Smyczek Rivera, testified.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

¶4 Detective Guevara testified that in the course of the investigation, he obtained a search warrant for the Brookfield residence where Smyczek Rivera lived with his mother and stepfather as well as for their vehicles. Multiple law enforcement officers executed the search warrant at approximately 6:00 a.m. on July 19, 2022. Guevara, the lead investigator, along with Detective Johannik, initially made contact with Smyczek Rivera in his driveway after parking their unmarked vehicle at the end of Smyczek Rivera's driveway as he was about to leave for work. Smyczek Rivera was neither handcuffed nor placed under arrest; however, he consented to a brief search of his person for weapons. This was the only time during the interaction that an officer made physical contact with Smyczek Rivera. Guevara thereafter explained to Smyczek Rivera that they had received a tip regarding child pornography tied to an account they believed was associated with him, and Smyczek Rivera ultimately confirmed the account was his, that no one else had access to the account, and that he had shared the child pornography so that he would not get kicked out of a chat room. Smyczek Rivera asked whether there would be any jail time, and Guevara stated that although he would not be taking Smyczek Rivera to jail that day, he could make no promises about the future.

¶5 Detective Johannik remained approximately five to ten feet away from Smyczek Rivera while Detective Guevara questioned him, and other officers walked past while going in and out of the house. Johannik at times engaged in casual conversation with Smyczek Rivera; however, Guevara was the only one who questioned him regarding the investigation, and out of the approximately one hour law enforcement was on the scene, Guevara only engaged in questioning for approximately 25 minutes. Smyczek Rivera ultimately went to the police station voluntarily to be booked for possession of marijuana-related

charges stemming from the marijuana and drug paraphernalia discovered in his bedroom. While at the police station, Guevara advised Smyczek Rivera of his **Miranda** rights for the first time, and Smyczek Rivera thereafter largely provided the same information he had provided during Guevara’s prior questioning in Smyczek Rivera’s driveway.

¶6 The circuit court granted the suppression motion based largely on its understanding of three cases—**State v. Kilgore**, 2016 WI App 47, 370 Wis. 2d 198, 882 N.W.2d 493; **Seibert**; and **Oregon v. Elstad**, 470 U.S. 298 (1985). First, the court concluded Smyczek Rivera was in custody while the detectives questioned him in his driveway, and that his pre-**Miranda** statements were therefore inadmissible. In large part, it appears to have reached this decision based on its conclusion that the search warrant execution and corresponding interview had been “structured in order to get all the evidence[,]” including incriminating statements, prior to administering the **Miranda** warning contrary to **Seibert**.² In reaching this conclusion, the court’s totality of the circumstances analysis was minimal at best. Second, the court also suppressed the post-**Miranda** statements based on **Seibert**. The State appeals.

¶7 In reviewing a circuit court’s decision on a motion to suppress, “we apply a two-step standard.” **State v. Lonkoski**, 2013 WI 30, ¶21, 346 Wis. 2d 523, 828 N.W.2d 552. First, we will accept the circuit court’s factual findings “unless they are clearly erroneous.” **Id.** Applying those factual findings to the relevant constitutional principles, we determine de novo whether an individual was in

² Interestingly, shortly prior to reaching this conclusion, the circuit court stated that it was “not sure that the evidence in this case supports the decision that it’s a two-phase -- it was meant to be a two-phased interrogation,” which was “one of the concerns that [it had].”

custody. *Id.* We neither weigh a witness’s testimony nor assess a witness’s credibility, see *Lang v. Lowe*, 2012 WI App 94, ¶16, 344 Wis. 2d 49, 820 N.W.2d 494, but instead defer to the circuit court’s credibility determinations, see *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶8 We must first determine whether Smyczek Rivera was in custody while being questioned during the execution of the search warrant at his home such that officers were required to administer a *Miranda* warning. If he was in custody, we must also determine to what extent his pre- and post-*Miranda* statements must be suppressed. On appeal, the State asserts that under the totality of the circumstances, Smyczek Rivera was not in custody during questioning in his driveway and that his statements are therefore admissible because no *Miranda* violation occurred. Alternatively, it argues that even if Smyczek Rivera was in custody at the time and those statements are therefore inadmissible, the post-*Miranda* statements made at the police station are not subject to suppression under *Elstad*. Smyczek Rivera, to the contrary, asserts he was in custody while being questioned in his driveway and that those statements must be suppressed, and he also asserts the post-*Miranda* statements are inadmissible under *Seibert* because the police intended to employ a two-stage interrogation to subvert *Miranda*’s requirements. We agree with the State.

¶9 “*Miranda* warnings are a procedural safeguard aimed at ‘protecting a defendant’s Fifth Amendment privilege against self-incrimination.’” *State v. Rejholec*, 2021 WI App 45, ¶18, 398 Wis. 2d 729, 963 N.W.2d 121 (citation omitted). Accordingly, a *Miranda* warning must be administered prior to a custodial interrogation. See, e.g., *Miranda*, 384 U.S. at 444, 492; *Elstad*, 470 U.S. at 309; *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004). For *Miranda*

purposes, “[a] person is in custody ... if the person is either formally arrested or has suffered a restraint on freedom of movement of the degree associated with a formal arrest.” *State v. Goetz*, 2001 WI App 294, ¶11, 249 Wis. 2d 380, 638 N.W.2d 386. Whether an individual is in custody for *Miranda* purposes is determined based on the totality of the circumstances. *State v. Martin*, 2012 WI 96, ¶35, 343 Wis. 2d 278, 816 N.W.2d 270.

¶10 Factors relevant to the “in custody” inquiry include “the suspect’s freedom to leave, the purpose, place and length of the interrogation and the degree of restraint.” *State v. Mosher*, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App. 1998); *see also State v. Blatterman*, 2015 WI 46, ¶30, 362 Wis. 2d 138, 864 N.W.2d 26. As to the degree of restraint, reviewing courts consider: (1) “whether the suspect is handcuffed”; (2) “whether a weapon is drawn”; (3) “whether a frisk is performed”; (4) “the manner in which the defendant was restrained”; (5) “whether the suspect is moved to another location”; (6) “whether questioning took place in a police vehicle”; and (7) “the number of officers involved.” *Mosher*, 221 Wis. 2d at 211. “The test is ‘whether a reasonable person in the defendant’s position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances.’” *See, e.g., State v. Pounds*, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993) (citation omitted). The State bears the burden of establishing by a preponderance of the evidence that an individual was not in custody for *Miranda* purposes. *State v. Harris*, 2016 WI App 2, ¶9, 366 Wis. 2d 777, 874 N.W.2d 602 (2015).

¶11 Applying the above factors, we conclude Smyczek Rivera was not in custody while being questioned in his driveway. First, although Smyczek Rivera was detained while officers executed the search warrant, this did not automatically render him “in custody” for *Miranda* purposes under these

circumstances. See *Kilgore*, 370 Wis. 2d 198, ¶¶29-34 (“a detention during execution of a search warrant does not amount to custody in and of itself”; “the objective circumstances must be the functional equivalent of a formal arrest, along with the inherently coercive aspects of custodial questioning designed to overcome the suspect’s free choice”). While that may not always be the case, here, Smyczek Rivera was neither placed in handcuffs or otherwise restrained apart from a brief pat-down for officer safety nor informed that he was not free to leave. This counsels against a conclusion that he was in custody simply because he was detained during execution of the search warrant.

¶12 Both the place and length of questioning also indicate Smyczek Rivera was not in custody. Specifically, the questioning occurred in the open in Smyczek Rivera’s driveway—not in a police station or other custodial setting—and although the officers were on scene for approximately one hour, Detective Guevara was engaged in questioning Smyczek Rivera for less than half that time. While the questioning lasted for more than a few minutes, it was less than the 30 minutes at issue in *Lonkoski*, where our supreme court concluded the defendant was not in custody for *Miranda* purposes. See *Lonkoski*, 346 Wis. 2d 523, ¶¶26, 31 (stating that open-ended questions lasting approximately 30 minutes did not indicate that the defendant was in custody). Additionally, Smyczek Rivera’s body language was generally relaxed—he spent much of the interview leaning against a vehicle in his driveway—and his responses were at times interspersed with seemingly casual conversation. Taken together, these factors are not indicative of a custodial setting.

¶13 Although it is true that Detective Guevara questioned Smyczek Rivera to obtain information related to the child pornography investigation, this does not inherently render this a custodial interrogation.

See *State v. Bartelt*, 2018 WI 16, ¶33, 379 Wis. 2d 588, 906 N.W.2d 684 (“Any interview of one suspected of a crime by a police officer will have coercive aspects to it ... [b]ut police officers are not required to administer **Miranda** warnings to everyone whom they question.” (Alteration and omission in original; citation omitted.)). And, to the extent Smyczek Rivera asserts that Guevara was deceptive regarding whether there was “jail time” associated with the crime being investigated, Guevara clearly confirmed that while he did not intend to take Smyczek Rivera to jail *that day*, he could make no guarantees regarding what may transpire in the future. We are not convinced the purpose or nature of Guevara’s questioning here tips the balance such that Smyczek Rivera was in custody for **Miranda** purposes.

¶14 Finally, the degree of restraint likewise does not suggest Smyczek Rivera was in custody while in his driveway. As noted, he was casually standing against a vehicle during the majority of the questioning, he was not handcuffed, and Detectives Guevara and Johannik only briefly restrained him while performing a brief search for officer safety. No weapons were drawn, and although multiple officers were on scene, the additional officers were present to execute the search warrant and had little, if any, interaction with Smyczek Rivera at all.

¶15 Based on the totality of the circumstances, we are satisfied that Smyczek Rivera was not in custody at the time Detective Guevara questioned him in his driveway. Because he was not in custody, no **Miranda** violation occurred and the circuit court therefore erred in concluding Smyczek Rivera’s pre-**Miranda** statements while being questioned in his driveway were inadmissible. We also conclude that the circuit court erred in excluding

Smyczek Rivera's post-***Miranda*** statements under ***Seibert***, as that case is inapplicable based on the circumstances present here.

By the Court.—Order reversed.

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

