COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2749

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

IN THE INTEREST OF ERIC J.D., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ERIC J.D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

EICH, C.J.[1] Eric J.D., a minor, appeals from a dispositional order placing him under the supervision of the Dane County Department of Human Services for six months, with placement in his parental home. The order was

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(e), STATS.

issued when, after a trial, the juvenile court found him guilty of obstructing an officer by providing false information during a police investigation. He argues that: (1) the statements he gave to police should have been suppressed because he was "illegally detained," in custody, and was not advised of his ***Miranda*** rights;[2] (2) the court improperly continued the trial in violation of the double jeopardy provisions of the state and federal constitutions; and, alternatively, (3) his trial attorney was ineffective for not challenging the illegality of his detention and for failing to object to continuance of the trial. We resolve all issues against Eric J.D. and affirm the order.

On the evening of September 24, 1996, several individuals in a white Dodge or Plymouth car bearing dealer plates were observed vandalizing vehicles and mailboxes with a baseball bat in the Sun Prairie area. The following afternoon, Sun Prairie Police Officers Randall Sharpe and Jesse Zurbuchen stopped a car matching that description. Eric J.D. and another juvenile were passengers in the car when it was stopped, and the delinquency petition was based on statements Eric J.D. made to the officers on that occasion.[3] Eric J.D. moved to have those statements suppressed at a hearing, but the trial court admitted them.

I. Suppression of Eric J.D.'s Statements to Police

Eric J.D. argues that he was "in custody" when the officers briefly questioned him at the scene of the stop and that his statements should be suppressed because he was not given ***Miranda*** warnings. He does not question the

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

[3] Eric J.D., in the company of his mother, went to the police station the following day and made other statements to the officers. The trial court suppressed those statements, however, and they are not involved on this appeal.

legality of the stop itself. Rather, he argues that the stop was "transformed" into an illegal detention when the officers required him to give more information than his name and address. According to Eric J.D., no reasonable suspicion existed, much less probable cause to believe, that he may have been involved in criminal activity. He maintains that because the vandalism took place the night before the stop, the officers could only speculate where the car and its occupants were the night before.

A valid stop can ripen into an illegal detention for ***Miranda*** purposes if events transpire sufficient for a reasonable person in the defendant's position to consider himself or herself to be in custody. ***State v. Pounds***, 176 Wis.2d 315, 321, 500 N.W.2d 373, 376 (Ct. App. 1993). Eric J.D. argues that situation applies here because "[n]o fifteen year old person would have believed he was free to leave when the car in which he was a passenger was stopped … by a police officer in a marked squad car and in full … uniform." He emphasizes that two cars and two officers were at the scene, and he testified that he did not feel free to leave.

Section 968.24, STATS., provides as follows:

> **968.24 Temporary questioning without arrest.** After having identified himself or herself … a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person … has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct. Such detention and temporary questioning shall be conducted in the vicinity where the person was stopped.

We agree with the State that it was reasonable for Officer Sharpe to infer that several persons found in an offending automobile the day after occupants of that vehicle were seen engaging in acts of vandalism were likely to have been

the same persons. The only facts Eric J.D. puts forth as indicating that he was in custody are his own subjective belief that he was not free to leave and the presence of two police officers, who had told him and the others to get out of the car.

First, as indicated above, the test is objective, not subjective. It is geared to what a reasonable person in the defendant's position might reasonably believe, not what the defendant might testify he or she believed at the time. ***Pounds***, 176 Wis.2d at 321, 500 N.W.2d at 476. Second, Eric J.D. does not refer to any statements, gestures or conduct on the part of either officer that would suggest he was not free to leave or was obligated to answer their questions about his whereabouts the night before. Under § 968.24, STATS., as applied to the facts established at the hearing, Eric J.D. has not persuaded us that a reasonable person, of his age and in the same situation, would have considered himself in custody or under arrest when he was questioned by the officers at the scene.[4]

II. Double Jeopardy

Eric J.D. asserts that there were, in effect, two "trials"—one at the time evidence was taken on his suppression motion and one later, when the hearing was continued. He argues that the continued hearing was, in effect, a second "trial" which placed him twice in jeopardy in violation of the constitution. And, he argues that insufficient evidence was presented at the first "trial" for the court to find that he had lied to an officer, since it concerned only Officer Sharpe's statement recounting what was said. He claims that, as a result, the State was permitted to try the case twice. We disagree.

[4] Eric J.D.'s suppression hearing testimony, and that of the officer, is discussed further in Section II of this opinion, and we incorporate that discussion here.

Eric J.D.'s motion to suppress evidence was rescheduled for a hearing on January 17, 1997, the same date set for the fact-finding hearing. Eric J.D. has not argued that it is legally impermissible for the court to hear a motion prior to the commencement of a scheduled trial. As the hearing commenced, the prosecutor, noting that a motion to suppress had been filed, stated that she was prepared to proceed both on the motion and with the fact finding. When the court indicated that it would hear the suppression motion first, the prosecutor stated that she had only one witness (Officer Sharpe), whose testimony would be the same with respect to both the suppression motion and the fact finding. The court, stating that it "d[id]n't need to hear it twice," proceeded to take Sharpe's testimony.

Sharpe testified that he stopped a car matching the description of the one involved in the previous night's vandalism, identified himself, showed his badge and asked the driver a few questions. Sharpe stated that when Eric J.D. got out of the car, he asked him whether he had been in Sun Prairie in the car the preceding night and that Eric J.D. responded that he had not and that he knew nothing about any vandalism. Shortly thereafter, Eric J.D. and the others got back into the car and drove away. Sharpe testified that he never touched Eric J.D., restrained him in any way or said anything to indicate he was not free to leave. No objections were made to any of this testimony.

At one point in his lengthy cross-examination of Sharpe, Eric J.D.'s attorney remarked to the court: "Your Honor, I feel we are in a peculiar situation right now that if this was a trial … I would be moving to have the petition dismissed due to insufficiency of the evidence." The court asked counsel whether he wanted to put on any testimony "pertaining to the motion," and counsel said that he did, with the caveat that "this is only going to the motion, and not to the

fact finding hearing." He then proceeded to call Eric J.D. to the stand. Eric J.D. testified that he was asked to get out of the car and to line up with the others, where one of the officers took their photograph. He testified that he did not feel that he was free to leave and that the entire encounter took about thirty minutes.

At the conclusion of the testimony, the court asked for argument on the motion. The prosecutor argued that the evidence indicated that Eric J.D. was not in custody either at the scene or at police headquarters; Eric J.D.'s counsel argued that he was.

The trial court then ruled that the stop and questioning at the scene were not coercive and that the officers proceeded in accordance with all applicable law. The court, noting that the two hours it had originally set for both the motion and the fact-finding hearing had expired, stated that it would set another date—February 13, 1997—for the trial.

Eric J.D. filed a motion asking the court to reconsider its denial of his suppression motion, rearguing that his statements at the scene should have been suppressed. He also moved to dismiss the petition on grounds that the trial had already been held and any further proceedings would place him twice in jeopardy. At the commencement of the proceeding on February 13, 1997, Eric J.D.'s attorney argued his motion to the court, basing his double-jeopardy claim on the prosecutor's statement at the earlier hearing that she had only one witness and that his testimony would be the same at both the suppression hearing and the fact-finding hearing. According to counsel, the earlier hearing constituted the fact-finding hearing as well—despite his statement at the time that he was limiting his evidence solely to the motion—and without proof that Eric J.D.'s denial of any involvement in the vandalism was untrue, no evidence supported a finding that he

had obstructed the officers. The trial court denied the motion and the fact-finding hearing proceeded. The State offered testimony indicating that Eric J.D. had been with the group vandalizing the cars and mailboxes, although he had not "smash[ed] any cars" himself.

On appeal, Eric J.D. renews his argument that January 17, 1997, was the one and only trial date in the case and that no good cause was shown for any continuance under § 938.315(2), STATS., which states, "A continuance may be granted by the court only upon a showing of good cause …." And he argues that neither his lawyer nor the prosecutor requested a continuance. That statement seals the fate of his argument. Had anyone requested a continuance—in the words of the statute, had anyone asked the court to "grant" a continuance—the court would have had to consider good cause. Eric J.D. has not offered any authority to indicate that a trial court may not continue proceedings for purposes of scheduling, judicial economy, or any other valid reason. Here, the trial court indicated that because the proceeding exceeded the time allotted, it would continue on a later date; Eric J.D. has not satisfied us that that act was beyond the court's authority.

The January 17, 1997, proceeding was plainly devoted to Eric J.D.'s motion to suppress and, at its conclusion, the trial court ruled on that motion. There is no question that the evidence before the court at the conclusion of the

fact-finding proceeding on February 13 was sufficient to establish that Eric J.D. had given Officer Sharpe false information.[5]

III. Ineffective Assistance of Counsel

In an "alternative" argument, Eric J.D. argues that his trial counsel was ineffective in one or more respects. He has waived the right to raise any such argument, however, for failing to raise it in the trial court and failing to preserve trial counsel's testimony in a ***Machner*** hearing. ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979); *see also* ***State v. Mosley***, 201 Wis.2d 36, 48, 547 N.W.2d 806, 811 (Ct. App. 1996).

By the Court.–Order affirmed.

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

[5] At the conclusion of the February 13, 1997, hearing, Eric J.D.'s counsel stated, "Officer Sharp[e]'s testimony cannot be entered in today for testimony … because we have a second trial that is taking place right now, and that (sic) is not a hearsay exception that would allow his testimony today to be put forward at this fact finding hearing." He did not elaborate further on the point, and he has now renewed this "argument" on appeal. He argues only that the State "rested" its entire case at the conclusion of the first hearing. We find no such statement by the prosecutor in the transcript of the proceeding.