COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2017

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. 2015AP1977-CR **Cir. Ct. No. 2012CF837**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID LEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. David Lee appeals from a judgment of conviction entered after he pled guilty to the following crimes: two counts of being a felon in possession of a firearm; one count of possession of cocaine with intent to deliver (more than 40 grams); one count of possession with intent to deliver THC

(between 2500 and 10,000 grams); and one count of possession of methamphetamine. *See* WIS. STAT. §§ 941.29(2)(a), 961.41(1m)(cm)4., 961.41(1m)(h)4., & 961.41(3g)(g) (2011-12).[1] Prior to sentencing, Lee moved to withdraw his pleas, asserting that his trial counsel provided ineffective assistance by failing to file a suppression motion alleging a ***Miranda*** violation. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). The trial court concluded that Lee was not prejudiced by any alleged deficiency in his trial counsel's performance because even if trial counsel had filed such a motion, it would have been denied. Having rejected Lee's allegations of ineffective assistance of counsel, the trial court found that Lee had not shown a "fair and just reason" to withdraw his pleas prior to sentencing. *See* ***State v. Jenkins***, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24 (recognizing that a defendant can withdraw his plea prior to sentencing if he proves "by a preponderance of the evidence that he has a fair and just reason"). On appeal, Lee argues that the suppression motion would have been granted if his trial counsel had brought it and, therefore, his allegations of ineffective assistance constituted a fair and just reason to withdraw his guilty pleas prior to sentencing. We reject his argument and affirm.

BACKGROUND

¶2 According to the criminal complaint, police officers conducted a consent search of Lee's residence and recovered guns and drugs. Lee was charged with the aforementioned crimes and filed a motion to suppress. That motion alleged that officers were conducting surveillance of Lee's residence. After Lee

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

got into his vehicle and drove away, two other officers followed him, saw him throw a cigarette wrapper out of his car window, and then initiated a traffic stop. The officers conducting the traffic stop did not find any contraband in Lee's vehicle or on his person, but they obtained Lee's verbal consent to search his residence, where they later found guns and drugs. The motion to suppress challenged the basis for the traffic stop and the voluntariness of Lee's consent to search his residence.

¶3 The trial court conducted an evidentiary hearing on Lee's motion to suppress and ultimately denied the motion. The testimony from that hearing provides helpful background relating to the issue presented on appeal. Officers testified that as Lee was pulling his vehicle over, the officers saw that one of his vehicle's taillights was defective. The officers approached the vehicle and told Lee he had been pulled over for littering, which he admitted. After Lee made movements toward the vehicle's center console, he was asked to step out of the vehicle and he complied. He was patted down but not handcuffed. Lee gave the officers consent to search his vehicle and also agreed to allow a K-9 dog to search the vehicle. Both searches were conducted as Lee stood nearby.

¶4 After the searches, Lee was allowed to get back inside his vehicle while the officers wrote him a citation for having a defective taillight. When the citation was ready, the officers asked Lee to again step out of his vehicle and they gave him the citation. Then, as the officers and Lee stood next to the vehicle, the officers told Lee they had information that Lee, a convicted felon, had a firearm. Lee initially denied having a firearm but eventually admitted to the officers that there was a firearm at his residence. The officers then drove Lee to his residence to conduct the search. One officer estimated that the length of time that elapsed

between the beginning of the traffic stop and when Lee was driven to his residence to be about thirty minutes.

¶5 The trial court denied Lee's suppression motion, concluding that there was a valid basis for the stop and that Lee's consent to search his residence was voluntary.[2] Lee subsequently entered a plea agreement with the State and pled guilty to all five counts.

¶6 Before sentencing, Lee told his trial counsel that wanted to withdraw his guilty pleas and retain new counsel. New counsel was ultimately appointed for Lee. With his new counsel's assistance, Lee moved to withdraw his guilty pleas and reopen the suppression motion hearing on grounds that his first trial counsel provided ineffective assistance by not alleging that "Lee was in custody at the scene of the traffic stop" and was therefore "entitled to ***Miranda*** warnings prior to being questioned about whether he, while being a felon, kept or had a gun in his house." Lee argued that the evidence obtained from his residence should have been suppressed due to violations of his Fifth Amendment rights.

¶7 The trial court conducted another evidentiary hearing concerning what occurred during the traffic stop and trial counsel's failure to argue at the first suppression hearing that Lee was in custody during the traffic stop. Trial counsel, Lee, and one officer testified. The trial court found the officer's testimony credible, and it also found parts of Lee's testimony credible and parts incredible. Based on those credibility determinations and its factual findings, the trial court concluded that Lee was not in custody at the time he told the officers he had a gun

[2] On appeal, Lee explicitly states that he is not seeking review of these trial court rulings.

at his home. Having rejected the argument that Lee claimed his trial counsel should have made, the trial court concluded that Lee was not prejudiced by his trial counsel's allegedly deficient performance and, therefore, Lee had not shown a fair and just reason for plea withdrawal. The trial court denied Lee's motion to withdraw his pleas and sentenced him. This appeal follows.

DISCUSSION

¶8 Resolution of this appeal turns on a narrow legal issue: whether Lee was "in custody" at the time he was questioned about whether he had a firearm at his residence. We begin our analysis with the relevant legal standards.

¶9 A defendant is entitled to ***Miranda*** warnings "when being interrogated while 'in custody.'" ***State v. Kilgore***, 2016 WI App 47, ¶17, 370 Wis. 2d 198, 882 N.W.2d 493 (citation omitted). ***Miranda*** "described 'custody' as when a suspect has been 'deprived of his freedom of action in any significant way.'" ***Kilgore***, 370 Wis. 2d 198, ¶18 (quoting ***Miranda***, 384 U.S. at 444). To determine "whether there was 'a formal arrest or restraint on freedom of movement of the degree associated with formal arrest,'" courts will "look at the totality of the circumstances." ***Kilgore***, 370 Wis. 2d 198, ¶18 (citation omitted). "Among the factors a court may consider are 'the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint.'" ***Id.***, ¶19 (citation omitted). Considerations concerning the degree of restraint include "whether the defendant was handcuffed, whether a gun was drawn on the defendant, whether a ***Terry*** frisk was performed, the manner in which the defendant was restrained, whether the defendant was moved to another location, and the number of police officers involved." ***Kilgore***, 370 Wis. 2d 198, ¶19 (referencing ***Terry v. Ohio***, 392 U.S. 1 (1968)) (footnote omitted). The applicable

test is objective, requiring courts to consider "'whether a reasonable person in the suspect's position would have considered himself or herself to be in custody.'" ***Kilgore***, 370 Wis. 2d 198, ¶19 (citation omitted).

¶10 On appeal, "we accept the court's findings of historical fact unless clearly erroneous." ***Id.***, ¶20. "The question of whether a defendant is in custody, however, is one of law, and, thus, we review that question *de novo* based on the facts as found by the [trial] court." ***Id.*** (italics added).

¶11 Here, Lee does not challenge the trial court's factual findings or credibility determinations. Accordingly, we must determine whether, accepting the facts found by the trial court, Lee was "in custody" when he was questioned about having a firearm in his home. *See* ***id.***

¶12 Lee argues that he was "in custody" because "[a]t no point during the ***Terry*** stop was [he] free to leave."[3] Lee's brief continues:

> Lee was subjected to a ***Terry*** frisk, a dog sniff, and was asked multiple times for consent to search his person, his car, and home. There was a minimum of four officers involved in the stop. He was told he was the target of a drug investigation and that the officers intended to get a search warrant if he did not consent. There is absolutely nothing in the record which suggests Mr. Lee felt free to leave at any point during the ***Terry*** stop. Accordingly, Mr. Lee was in custody, should have received ***Miranda*** warnings prior to his consent to search his home and garage, and the fruits of the search should be suppressed.

¶13 We are not convinced that the trial court erred when it concluded, after considering the totality of the circumstances, that Lee was not in custody

[3] Throughout this opinion, when we quote from the parties' briefs, we have added bolding and italics to case names, and we have removed underlining.

when he was questioned about having a firearm. At the time Lee was questioned, he had already been given the traffic citation and "was outside of the vehicle" and not "in a police vehicle." Only two officers were present when Lee was questioned,[4] and Lee was not physically restrained. The questioning did not last long; the entire traffic stop took about thirty minutes, and one officer testified that Lee was not given the citation until approximately fifteen or twenty minutes had passed. Considering the totality of the circumstances, we agree with the trial court that "'a reasonable person'" in Lee's position would not have considered himself "'to be in custody.'" *See* ***Kilgore***, 370 Wis. 2d 198, ¶19 (citation omitted). Accordingly, we affirm.

By the Court.—Judgment affirmed.

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

[4] The undisputed testimony was that two officers conducted the traffic stop, another officer stopped by the scene of the traffic stop for about five minutes, and later, a fourth officer arrived to conduct the vehicle search using the K-9 dog and then left the scene.