COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP4-CR **Cir. Ct. No. 2003CT3621**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LINDA L. MCCOY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DIANE M. NICKS, Judge, and RICHARD J. CALLAWAY, Reserve Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.[1] Linda McCoy[2] appeals a judgment of conviction for operating while intoxicated, third offense, and an order denying her suppression motion. Linda argues police seized her unconstitutionally and thus all evidence obtained thereafter must be suppressed. Linda further argues she was placed in police custody and that all statements she made must be suppressed because she did not receive the benefit of ***Miranda***[3] warnings. We conclude the police did not seize Linda within the meaning of the Fourth Amendment. Further, we conclude Linda was not in police custody at the time she made her incriminating statements. We therefore affirm the judgment.

FACTS

¶2 Linda was arrested and charged with OWI and operating a motor vehicle with a prohibited blood alcohol concentration, both as second offenses. She moved to suppress her statements based upon an alleged ***Miranda*** violation.

¶3 The following testimony was elicited during the suppression hearing. In the early morning hours of October 17, 2003, city of Madison police officer Andre Lewis was dispatched to a hit-and-run accident in the 4600 block of Milwaukee Street in Madison, Wisconsin. A witness at the scene indicated he had seen a dark-colored sedan hit a light pole and then drive two or three blocks down

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] When she was arrested and charged, McCoy's last name was Barrett. Since her arrest and charging, Barrett married Dale McCoy and is now known as Linda L. McCoy. For simplicity's sake, she will be referred to throughout this opinion as Linda. Also, Dale McCoy will be referred to as Dale.

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

the street with blown tires. Lewis followed the trail of leaking fluid from the scene to a home at 4822 Milwaukee Street where he found a car that had recently been involved in an accident.

¶4 Lewis and another officer knocked on the door and Dale McCoy, the owner of the residence, answered the door. Lewis and the other police officer had a conversation with Dale, either on the front stoop of the house or in the driveway. During the conversation, Lewis stood two or three feet away from Dale and the other officer stood two or three feet from Dale's side. Lewis asked Dale if he had been driving the damaged car sitting in the driveway. Dale denied driving the car and indicated Linda, his fiancée, had been the driver of the vehicle. Dale also indicated, after he was asked, that the damage to the car was fresh. Lewis then indicated that he would need to speak with Linda and he instructed Dale to get her. Lewis testified he twice told Dale to get Linda. Dale testified Lewis twice "[t]old me I need to go get Linda." The record does not contain any information regarding the tone of voice the police officer used when instructing Dale to retrieve Linda. Dale testified he felt he had no choice but to retrieve Linda and he felt Lewis was ordering him to bring Linda to the door. However, Dale never objected or refused to retrieve Linda.

¶5 Dale testified he went to the bedroom and informed Linda she needed to speak to the police officer. Linda indicated she was sleeping and did not want to speak to the police; Dale insisted. Linda exited the house and spoke to Lewis in the driveway. Linda was ten to fifteen feet away from the front door of her home with her back to the door. Lewis stood two to three feet away from Linda and Dale stood in the driveway five to seven feet behind Linda and to her right. The other police officer stood two to three feet away from Dale. Linda was not given any ***Miranda*** warnings at this time.

¶6 After approximately three to five minutes of questioning in the driveway, Linda told Lewis she was cold and wanted to go inside. Lewis refused to let her go inside by herself and instead accompanied her inside to continue their conversation. Dale and the other police officer entered the house approximately three or four minutes later.

¶7 Linda stated that at no time during the conversation did she feel she could go inside the house, close the door and refuse to talk to Lewis. However, Linda was not handcuffed and was never placed under arrest during the conversation with Lewis. Neither Lewis nor the other police officer had their weapons drawn. Only Lewis was visible to Linda during the time she was being questioned in her driveway. Lewis did not withhold food, drink or medical attention. Lewis did not threaten or beat Linda nor did he offer Linda anything in return for her statements.

¶8 During the conversation in the driveway, Linda informed Lewis she had been driving the vehicle and had been involved in the accident. Linda volunteered she had hit the light pole because she had fallen asleep on her way home from work and that she had consumed three glasses of wine after arriving home. After field sobriety tests, Linda was arrested for OWI.

¶9 In addition to moving to suppress her incriminating statements, Linda filed a motion to dismiss the charges. In her motion to dismiss, Linda alleged her warrantless seizure violated the Fourth Amendment. The trial court denied the motions to suppress and dismiss. The trial court found Lewis "asked" Dale to retrieve Linda. The trial court further found Linda "could have refused to come out of the house, forcing the officers to seek a search warrant at 1:30 in the

morning." It also found "Dale McCoy was not an agent of the State and therefore there was no violation of [Linda's] Fourth Amendment rights."[4]

¶10 On August 23, 2004, there was a stipulated trial to the court. Because of an intervening conviction for OWI causing injury, Linda was convicted in this case of OWI and PAC, both as third offenses. Linda appeals.

DISCUSSION

¶11 Linda complains her right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution was violated because Dale was used as an agent or instrument of the state when Linda was "seized" by the police. *See* ***State v. Rogers***, 148 Wis. 2d 243, 246, 435 N.W.2d 275 (Ct. App. 1988). We reframe the issue as, did the police unlawfully "seize" Linda through Dale when the police ordered Dale to retrieve Linda for questioning pursuant to its investigative authority under ***Terry v. Ohio***, 392 U.S. 1 (1968)? We conclude Linda was not "seized" so as to invoke the protections of the Fourth Amendment.[5]

¶12 Linda argues the police seized her unconstitutionally and all evidence obtained thereafter is tainted and must be suppressed. She bases her challenge on the testimony given by Lewis that he told Dale to retrieve Linda. The State argues the entire incident between Dale and the police and between Linda and the police was simply a ***Terry*** stop for the purpose of determining

[4] The trial court made no findings pertaining to whether Linda and Dale were compelled to obey Lewis's directive that Linda come to the door for questioning.

[5] Because our conclusion that Linda was not "seized" is dispositive, we need not address Linda's argument that Dale acted as an agent or instrument of the government.

whether a crime had or was in the process of being committed. The trial court apparently agreed with the State, concluding that Linda voluntarily and willingly came to the door and submitted herself to questioning by Lewis. We agree with both the trial court and the State.

¶13 In reviewing a trial court's denial of a motion to suppress evidence, we uphold the trial court's findings of fact unless they are found to be clearly erroneous. ***State v. Williams***, 2001 WI App 249, ¶9, 635 Wis. 2d 361, 635 N.W.2d 869. However, whether the trial court's findings of fact pass statutory or constitutional muster is a question of law that we review de novo. ***Id.***

¶14 The United States Constitution and the Wisconsin Constitution protect an individual's right to be free from unreasonable searches and seizures. *See* U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. The U.S. Supreme Court has ruled that detention need not rise to the level of a formal arrest to constitute a seizure for Fourth Amendment purposes. *See* ***Terry***, 392 U.S. at 22. A person has been "seized" for Fourth Amendment purposes "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980). In other words, a seizure occurs when, by means of physical force or show of authority, a person's freedom of movement is restrained. ***Id.*** at 553. In ***Mendenhall***, the Supreme Court provided examples of circumstances that might give rise to a conclusion that a person has been "seized" within the meaning of the Fourth Amendment, including "

> the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the

> public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-55.

¶15 In addition, a citizen may voluntarily consent to an encounter with a police officer. *See* ***State v. Stout***, 2002 WI App 41, ¶17, 250 Wis. 2d 768, 641 N.W.2d 474. "A consensual encounter occurs when 'the person to whom questions are put remains free to disregard the questions and walk away….'" ***Williams***, 248 Wis. 2d 361, ¶12 (citation omitted).

¶16 Linda argues she was "seized" by the police, with Dale acting as their agent, when Lewis twice "told" Dale to reenter his private residence and retrieve Linda for questioning. She characterizes Dale's action in retrieving her as a "search."[6] Linda's argument hinges entirely on her claim that Dale felt he had no choice but to retrieve Linda when Lewis told him to do so and her own belief that she also had no choice but to submit herself for questioning by Lewis. Based on the evidence of record, we conclude Linda voluntarily encountered the police and voluntarily answered the questions put to her. We also conclude Linda was not "seized."

¶17 The record supports our conclusion. Lewis and the other police officer questioned Dale on the front steps or in the driveway of Dale's residence. During the course of questioning it was determined Linda drove the freshly damaged car that day. At this point, Lewis told Dale to retrieve Linda because

[6] In her reply brief, Linda recharacterizes McCoy's conduct in retrieving her as a "seizure" for Fourth Amendment purposes. As we explain, we view McCoy's act of retrieving Linda as voluntary cooperation with the police for the purpose of permitting the police to perform a ***Terry*** investigation.

Lewis needed to talk to her. Lewis testified he twice told Dale to get Linda. Dale testified Lewis twice "[t]old me I need to go get Linda." Dale also testified he felt he had no choice but to retrieve Linda. However, the record does not indicate Dale objected to Lewis's demand that Dale get Linda. According to Dale's own testimony he simply went back into the house, woke up Linda and told her the police wanted to question her.

¶18 Linda testified Dale woke her up and "said that the police were outside and they said I needed to come outside." Linda said she told Dale she did not want to, that she was sleeping. Linda further testified Dale said she "had to get up and get dressed and go outside and talk to [the police]." She testified she did not think she had an option other than to go outside and speak to the police. Linda then went outside to talk to the police.

¶19 Based on these facts it is clear that Linda consented to the encounter with Lewis. *See* ***Williams***, 248 Wis. 2d 361, ¶18 (consensual encounter occurs when person to whom questions are put remains free to disregard the questions and walk away). These facts do not indicate Lewis forced Linda to exit the house for questioning. The police made no show of authority; they did not show their weapons and they did not make any threats. More importantly, the record does not indicate that the police were using a forceful tone when speaking with Dale or when asking Dale to retrieve Linda. Linda takes aim at the fact that Lewis twice "told" Dale to go get Linda for questioning in support of her claim that she was seized within the meaning of the Fourth Amendment. The Fourth Amendment is not implicated here simply because Lewis twice "told" Dale to retrieve Linda. There must be something more than a simple directive, issued twice, to retrieve Linda before we can conclude Dale was coerced or forced to act on behalf of the police.

¶20 Based upon the totality of the circumstances, a reasonable person would have believed she was free to remain within her home. As the trial court concluded, Linda was free to ignore Lewis's directive to exit the house for questioning. Although Dale represented to Linda she had no choice but to speak to the police, his perspective is not relevant. What is relevant is would a reasonable person believe she was not free to disregard Lewis's request and stay in the house?[7] Linda points to nothing in the record, other than Lewis's twice stated directive that Dale retrieve Linda for questioning, to indicate a reasonable person would believe she was not free to stay inside the house and not submit herself to police questioning. That is not enough to establish she was "seized" within the meaning of the Fourth Amendment.

¶21 Linda next argues her in-custody statements must be suppressed because she was never read her ***Miranda*** rights. We conclude Linda was not "in custody" for Fifth Amendment purposes when Lewis questioned her in the driveway.

¶22 As with the first issue, this question involves the application of constitutional principles to a set of facts. We decide such questions de novo. ***State v. Esser***, 166 Wis. 2d 897, 904, 480 N.W.2d 541 (Ct. App. 1992). But again, we uphold the trial court's findings of fact unless they are found to be clearly erroneous. ***State v. Roberts***, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995).

[7] The test is usually framed this way: would a reasonable person believe that he was not free to leave? *See* ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980). Because of the somewhat unique circumstances of this case, we rephrase the test to fit the facts.

¶23 In ***Miranda***, the 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. ***State v. Leprich***, 160 Wis. 2d 472, 476, 465 N.W.2d 844 (Ct. App. 1991). These procedural safeguards include the now famous ***Miranda*** warnings. ***Id.*** 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 his or her guilt. ***Id.***

¶24 An officer must administer ***Miranda*** warnings to an individual where there has been a restriction on the individual's freedom so as to render him or her "in custody." ***State v. Mosher***, 221 Wis. 2d 203, 210, 584 N.W.2d 553 (Ct. App. 1998). However, not every on-scene questioning by a police officer need be preceded by a ***Miranda*** warning. ***Leprich***, 160 Wis. 2d at 477. To determine whether a person was "in custody" and thus entitled to ***Miranda*** warnings, a court must consider the totality of the circumstances, including whether a person has been detained for investigatory purposes under ***Terry.*** *See* ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). Under such an inquiry the central question 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." ***Gruen***, 218 Wis. 2d at 594, *citing* ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991).

¶25 We consider certain relevant factors in examining the totality of the circumstances, such as the defendant's freedom to leave the scene, the purpose, place and length of the questioning and the degree of restraint. *See* ***State v. Leprich***, 160 Wis. 2d 472, ¶23. Important factors in our examination of the degree of restraint are whether the defendant was handcuffed, whether a weapon was

drawn on the defendant, whether the defendant was frisked, the manner in which the defendant was restrained, the number of police officers involved and whether the defendant was moved to a different location. *See* ***Gruen***, 218 Wis. 2d at 594-96.

¶26 We conclude, under the totality of the circumstances, that Linda was not in custody at the time she made her incriminating statements. Most of the questioning occurred outside Linda's home. Linda was never told she was under arrest and was not handcuffed. Lewis informed Linda he was investigating the driver of the vehicle that crashed into a pole and left a trail of fluid leading to the house. There is no evidence of any coercion, no evidence of weapons drawn and no evidence of excessive intimidation to support a finding that Linda was in custody. Linda also fails to point to any evidence that she was frisked or moved to a different location. In short, we find no support in the record for the conclusion that Linda was "in custody." The trial court properly denied Linda's motion to suppress. We affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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