**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 11, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2012AP1092-CR** **Cir. Ct. No. 2010CF987**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KEANDRE M. FRAZIER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Dane County: JULIE GENOVESE, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Kloppenburg, JJ.

¶1 PER CURIAM. Keandre Frazier appeals a judgment of conviction. He challenges the denial of his pretrial suppression motion. Frazier contends that: (1) the police illegally searched and seized him; (2) the police failed to give

required ***Miranda***[1] warnings before questioning him; and (3) his statements to police were involuntary. We disagree, and affirm.

*Background*

¶2 In June 2010, the State charged Frazier with first-degree intentional homicide based on information gathered in a police investigation of the death of Lorenzo McKittrick. McKittrick's body had been discovered behind a shopping center in Fitchburg, fully clothed but without shoes. Police subsequently observed Frazier wearing shoes matching the description of the shoes McKittrick had been wearing the night he was killed; the shoes appeared too large for Frazier, but matched McKittrick's shoe size. Frazier then made incriminating statements during questioning by police.

¶3 Frazier moved to suppress the shoe evidence, the statements he made to police, and other physical evidence obtained from a search of his mother's room at the Dane County Women's Shelter. Frazier argued that police obtained the evidence as to the shoes Frazier was wearing by means of an illegal search. He also argued that his statements to police followed an illegal seizure and custodial questioning without ***Miranda*** warnings, and were involuntary. Frazier argued that any subsequently obtained evidence, including the evidence obtained from the shelter, was tainted by the prior illegal police conduct.

¶4 Following an evidentiary hearing, the circuit court denied Frazier's motion to suppress the shoe evidence and statements and physical evidence from

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

the shelter.[2] Frazier entered a plea of no contest to an amended charge of first-degree reckless homicide. Frazier appeals.

*Standard Of Review*

¶5 On review of a circuit court's decision on a motion to suppress, we accept the court's findings of historical fact unless those findings are clearly erroneous. *See* ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. Whether those facts meet constitutional standards is a question of law that we review de novo. ***Id.***

*Discussion*

¶6 Frazier contends that the police conducted an illegal search in obtaining the evidence regarding the shoes he was wearing, and illegally seized him by placing him in a police squad car and transporting him to the police station. He argues that his statements to police were involuntary and obtained in the absence of required ***Miranda*** warnings. We conclude, however, that the undisputed facts establish that the police interaction with Frazier was non-coercive, that Frazier voluntarily consented to the search of his shoes and to provide statements, and that Frazier was not in custody when he made the challenged statements. Accordingly, we reject Frazier's claim of an illegal search and seizure or illegally obtained statements.[3]

[2] The circuit court granted Frazier's motion to suppress subsequent statements Frazier made after he was read his ***Miranda*** warnings and invoked his Fifth Amendment rights. That decision is not challenged on appeal.

[3] Because we reject Frazier's claim of illegal police conduct, we also reject his claim that subsequently obtained evidence was tainted by that conduct.

¶7 In general, warrantless searches are unreasonable under the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution; however, evidence obtained in a warrantless search is not subject to suppression if the defendant voluntarily consented to the search. ***State v. Artic***, 2010 WI 83, ¶¶28-29, 327 Wis. 2d 392, 786 N.W.2d 430. The State has the burden of proving, by clear and convincing evidence, that consent was given voluntarily, which requires a showing of something more than mere acquiescence to police authority. ***Id.***, ¶32. We look to the totality of the circumstances, including the following, in determining whether consent was voluntary:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent.

***Id.***, ¶33.

¶8 Additionally, "[u]nder ***Miranda***, police may not interrogate a suspect in custody without first advising the suspect of his or her constitutional rights," and statements obtained in violation of ***Miranda*** must be suppressed. ***State v. Torkelson***, 2007 WI App 272, ¶11, 306 Wis. 2d 673, 743 N.W.2d 511. "A person is in custody for purposes of ***Miranda*** 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. The test for whether a person was in custody at the time of interrogation is an objective test of "whether a reasonable person in the

suspect's position would have considered himself or herself to be in custody." ***Id.*** We look to the totality of the circumstances, including "the defendant's freedom to leave the scene; the purpose, place and length of the interrogation; and the degree of restraint." ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). In examining the degree of restraint, we consider:

> (1) whether the defendant was handcuffed; (2) whether a gun was drawn on the defendant; (3) whether a … frisk was performed; (4) the manner in which the defendant was restrained; (5) whether the defendant was moved to another location; (6) whether the questioning took place in a police vehicle; and (7) the number of police officers involved.

***Id.*** at 594-96 (footnotes omitted).

¶9 The Fifth and Fourteenth Amendments to the United States Constitution also require that statements to police be voluntary to be admissible. ***State v. Ward***, 2009 WI 60, ¶18, 318 Wis. 2d 301, 767 N.W.2d 236. "[S]tatements were voluntary if they were 'the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.'" ***Id.*** (quoted source omitted).

¶10 Here, the circuit court made the following findings of fact based on testimony at an evidentiary hearing. Police contacted Frazier's mother, Cynthia Scott, because her phone number was dialed from McKittrick's cell phone around the time of McKittrick's death. Scott agreed to meet police at a library in Madison. Two police officers met Scott at the library; while they talked with Scott, Frazier approached and sat next to Scott. Police then noticed that Frazier was wearing shoes that matched the shoes McKittrick was wearing the night he

died, and that the shoes appeared too large for Frazier. One officer asked Frazier if she could look at his shoes. Frazier took each shoe off and allowed the officer to inspect them. The officer established that the shoes were a size 12, and that McKittrick's shoe size had been size 12.

¶11 One of the officers then asked Frazier if he would be willing to answer some questions, and Frazier agreed to do so. The officer led Frazier outside, where it was raining. The officer asked Frazier if he wanted to be interviewed outside or in the officer's unmarked squad car. Frazier agreed to go into the squad car. Frazier sat in the back seat and the officer sat in front. The rear doors of the squad car locked automatically, but there was no barrier between the front and back seats. After about twenty-five minutes, the other officer approached the squad car and asked Frazier if he was willing to come to the police station to answer questions, and stated that Scott had given permission for Frazier to do so. Frazier agreed to go to the police station.

¶12 At the police station, the police transported Frazier through the station and to the city hall crime prevention room. He was left in the room unattended, and outside the room was a hallway leading to an unlocked exit to the outside. Frazier was not frisked, was not told he was under arrest, was not handcuffed, and was not told he could not leave. When an officer returned to interview Frazier, Frazier confirmed that he was there voluntarily, and agreed to answer questions. During the interview, which lasted from the afternoon to early evening, police offered Frazier food and drink.

¶13 Partway through the interview, Frazier indicated he was present when his friend killed McKittrick. Frazier then asked to use the restroom, and police escorted him to the restroom and instructed him to leave the door open.

When Frazier returned from the restroom, police read him his ***Miranda*** rights. Frazier consented to continue the interview. A little more than two hours later, Frazier indicated that he had killed McKittrick. He then invoked his right to remain silent.

¶14 We conclude that: (1) Frazier voluntarily consented to the search of his shoes; (2) Frazier voluntarily consented to go with the police into the squad car and to the police station; (3) Frazier was not in custody prior to police escorting Frazier to the restroom; and (4) Frazier's statements to police were voluntary.

¶15 First, the facts do not support Frazier's argument that his consent to the search of his shoes was not voluntary. Rather, they establish that Frazier initiated the contact with police and the police did not use or threaten the use of force in any way before the search. Additionally, while Frazier was young, he had prior experience with police and did not have any characteristics that would render him unable to understand what was happening, and his mother was present the entire time. Accordingly, we reject Frazier's claim that he did not voluntarily consent to the search of his shoes.

¶16 Additionally, the facts do not support Frazier's argument that he was illegally seized, that he was subjected to custodial questioning without being read his ***Miranda*** rights, or that his statements were involuntary. Frazier consented to each step in his interaction with the police, from the library to the police station. *See* ***State v. Mosher***, 221 Wis. 2d 203, 212, 584 N.W.2d 553 (Ct. App. 1998) (considering fact that defendant went voluntarily to police station with police in the totality of circumstances in determining suspect was not in custody when he gave statements to police). At the station, police left Frazier unguarded by an unlocked door leading to the outside. *See* ***id.*** at 212-13 (also considering fact that

door to interview room remained unlocked). Moreover, there is nothing in the record indicating that the police used pressure or force to obtain Frazier's consent, and the record does not indicate that Frazier had any particular characteristics that made him susceptible to police pressure or unable to understand his options.

¶17 Frazier cites facts such as the police officers' failure to explicitly inform Frazier that he did not have to consent to their requests, the officers' subjective intentions, and police pressure on Scott prior to the interview at the library to support his argument that he was in custody once he entered the squad car and that his statements were involuntary. We are not persuaded.

¶18 Frazier agreed to enter the squad car to answer questions and, although the rear doors locked automatically, the police did not indicate to Frazier that they would not let him out if he desired to leave. The police then asked Frazier to go with them to the police station, and again Frazier willingly agreed. There is no indication that Frazier was not free to leave at any step in the process until partway through the interview, after Frazier made incriminating statements and police denied his request to use the restroom unless accompanied by police, and then read Frazier his ***Miranda*** rights. We conclude that, under the totality of the circumstances, a reasonable person would not have believed himself to be in custody during the time Frazier was in the squad car and driven to the police station, or during the initial questioning at the station before police would not allow Frazier to use the restroom unescorted. Up to that point, nothing in the interaction between Frazier and the police indicated that Frazier was not free to leave. We conclude that Frazier was not placed in a coercive or police-dominated atmosphere, subjecting him to "'compelling pressures generated by the custodial setting itself,'" such that ***Miranda*** warnings were required. *See* ***Torkelson***, 306 Wis. 2d 673, ¶20 (quoted source omitted).

¶19 Finally, we conclude that nothing in Frazier's interaction with the police during the initial encounter at the library, the time in the squad car, or the questioning at the police station rendered Frazier's consent to speak with the police involuntary. Significantly, the police obtained Frazier's consent to go with them to answer questions, left Frazier unguarded, offered him food and drink, and ensured that he was willing to talk to them. Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

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