Illinois Official Reports

Appellate Court

***People v. Buschauer*, 2016 IL App (1st) 142766**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. FRANK BUSCHAUER, Defendant-Appellee.
District & No.	First District, Second Division Docket No. 1-14-2766
Filed Rehearing denied	February 16, 2016 March 14, 2016
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 13-CR-9408; the Hon. James N. Karahalios, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	Anita M. Alvarez, State's Attorney, of Chicago (Alan J. Spellberg, Peter D. Fischer, and Sari London, Assistant State's Attorneys, of counsel), for the People. Cynthia Giacchetti and Allan A. Ackerman, both of Chicago, for appellee.
Panel	JUSTICE HYMAN delivered the judgment of the court, with opinion. Presiding Justice Pierce and Justice Neville concurred in the judgment and opinion.

OPINION

¶ 1 On an early morning in February 2000, defendant Frank Buschauer's wife died at their home in the master bathroom. At 2:30 a.m., Buschauer called 911 after allegedly finding his wife unresponsive in the whirlpool bathtub. About five minutes later, a South Barrington police officer arrived and was met by Buschauer who brought him upstairs to the bathroom. A week later, Illinois State Police officers interviewed Buschauer for 13 hours at the Hoffman Estates police station. During the morning, Buschauer gave inconsistent answers, and after a lunch break, he was read his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) and signed a waiver indicating he understood the warnings. He continued to answer questions throughout the afternoon and evening. In the early evening he signed a voluntary consent to search his home. Buschauer agreed to return to the Hoffman Estates police station the following morning. He showed up, and told the officers he did not want to speak to them further.

¶ 2 Years later, in 2013, Buschauer was arrested for his wife's murder. The defense filed motions to suppress Buschauer's statements and exclude evidence seized from his home. After a two day hearing, the trial court ruled that the totality of the circumstances demonstrated Buschauer was "arrested" without probable cause while at the police station in March 2000, and granted Buschauer's motions to suppress.

¶ 3 The State challenges the trial court's ruling on the motions to suppress as erroneous as a matter of law. In the alternative, the State argues that if Buschauer was "seized" in violation of the fourth amendment (U.S. Const., amend. IV), probable cause existed to arrest him, and, thus, he was not detained illegally.

¶ 4 We reverse. The trial court's finding was against the manifest weight of the evidence in that a reasonable person in Buschauer's situation would have felt free to leave at any point during the questioning.

¶ 5 BACKGROUND

¶ 6 At 2:25 a.m. on February 28, 2000, Buschauer made a 911 call to the South Barrington police. Officer Bryant Haniszewski responded. Buschauer met Haniszewski at the front door, and said that his wife had drowned in the bathtub. Buschauer took Haniszewski to the second floor master bathroom where Cynthia Hrisco, Buschauer's wife, was lying on the floor next to the whirlpool tub still full of hot water and running. Haniszewski touched the body; it felt hot. Buschauer told Haniszewski that he had pulled his wife from the tub after reaching under the foamy water and feeling her body.

¶ 7 On March 1, Detective Daniel Kaepplinger of the South Barrington police department interviewed Hrisco's friend, Deborah Kram. She said that for the past two years the couple had been arguing about issues involving the building of their home. When they talked about the house, Buschauer would "blow up." Hrisco described her husband to Kram as a "Jekyll and Hyde and would go off." On one occasion he grabbed her around her neck, threatened her, and told her he should never have married. Four days before she died, Hrisco told Kram that she was afraid of Buschauer. On March 4, another friend of Hrisco's, Cheryl Kolweier, told police that Hrisco had marital difficulties. Hrisco said that during an argument about the Barrington house, Buschauer threatened to kill her.

¶ 8 On March 4, two South Barrington police officers interviewed Dr. Nancy Jones of the Cook County Medical Examiner's office. Dr. Jones did not conduct the autopsy, but reviewed the results. Dr. Jones opined that Hrisco had injuries inconsistent with accidental drowning. Hrisco had a hemorrhage in her neck that would have occurred at or near the time of death and indicated either strangulation or being hit with a blunt object. She also had petechial hemorrhaging under the scalp which was more consistent with asphyxiation than drowning. The lividity that was present indicated she would have been facedown at the time of death. Dr. Jones described Hrisco's death as "very suspicious."

¶ 9 March 2000 Interview and Search

¶ 10 On March 6, 2000, Buschauer voluntarily drove to the South Barrington police station, left his car, and rode with Detective Kaepplinger to the Hoffman Estates police station for an interview. (Buschauer had been told the day before that he would be taken for questioning to the Hoffman Estates station, a larger facility.) Buschauer sat in the front passenger seat with the doors unlocked. When they arrived, Kaepplinger left Buschauer in the lobby for several minutes to find special agents Cindy Tencza and Peter Zeman of the Illinois State Police.

¶ 11 Tencza and Zeman interviewed Buschauer in an unlocked interview room for over 13 hours. During that time they took several short breaks and, also, lunch and dinner breaks. During the morning, Buschauer told Tencza and Zeman that Hrisco had gone upstairs to take a bath around 9 p.m. A half hour later, he went to bed. Although the bathroom door was closed, he heard Hrisco getting into the tub and could hear the whirlpool running. He slept until 2:30 a.m. when he heard cries from his infant son. The whirlpool was still running so he went into the bathroom and, at first, did not see Hrisco. The water was foamy. He reached under the water and felt Hrisco's body, which was facedown. He pulled her out of the tub, placing her facedown on the floor. He then called 911.

¶ 12 After a break in the interview, Buschauer told the investigators that he and Hrisco had recently been arguing about the cost of building their home and structural problems that they had discovered. Buschauer said he found Hrisco faceup but a short time later, he again said that she was facing down. He could not explain why none of the objects around the tub were disturbed when he pulled her out.

¶ 13 After a break for lunch, the interview resumed at 12:30 p.m. Zeman advised Buschauer of his *Miranda* rights from a preprinted form. Buschauer signed the waiver form, indicating he understood his rights. During the afternoon, he made statements that he could have killed Hrisco but not did remember doing so. He offered to take a "truth serum" and a polygraph test.

¶ 14 At about 6:35 p.m., Buschauer signed a voluntary consent to search his home. He provided the garage door code. South Barrington police officers searched the kitchen, dining room, first floor office, and the master bedroom for 40 minutes. Police seized two handwritten letters from the kitchen counter and seven pages obtained from the desktop computer. The interview concluded at 10:30 p.m. Buschauer promised to return the next morning, and Kaepplinger drove Buschauer back to the South Barrington police station.

¶ 15 The following morning Buschauer returned to the Hoffman Estates police station, accompanied by his sister. Buschauer told Tencza and Zeman that he did not want to talk to them without an attorney.

¶ 16 April 2013 Arrest

¶ 17 In June or July 2000, the death investigation concluded. A decade later, the South Barrington police department reopened the investigation. In July 2011, the department had the Jacuzzi bathtub removed from the residence for an "ongoing death investigation." Sometime between 2010 and 2013 (when Buschauer was arrested), the investigators used a GPS tracking device on Buschauer's cars. By this time Buschauer had sold the Barrington home and moved with his son to Lake Geneva, Wisconsin.

¶ 18 On April 24, 2013, Buschauer was picked up in Walworth County, Wisconsin, interviewed, and gave a statement at the Walworth County sheriff's office. That afternoon, Buschauer was formally arrested and charged with murder.

¶ 19 Pretrial Motions

¶ 20 The defense filed a motion to suppress Buschauer's March 6, 2000 statements; a motion to suppress evidence seized on March 6 from Buschauer's home; and a motion to suppress Buschauer's April 24, 2013 statements. After a two day hearing, the trial court granted the motion to suppress the statements and evidence from the March 6 interrogation and ruled that the April 2013 statements would be admitted.

¶ 21 The trial court weighed the custodial factors listed in *People v. Braggs*, 209 Ill. 2d 492, 506-07 (2004), ruling Buschauer was under arrest and subjected to a custodial interrogation when he left the South Barrington police station in the police car. According to the trial court, only one *Braggs* factor favored a finding of noncustody–the absence of a formal arrest. The trial court found that Buschauer's age, intelligence, mental makeup, and the mode of the interrogation were neutral. But the trial court found Buschauer would not have felt free to leave based on (i) the location of the interview (the Hoffman Estates police station); (ii) duration (13 hours); (iii) mood ("focused, persistent, and unrelenting"); (iv) police presence (two State Police officers); (v) the absence of family and friends; and (vi) the police attitude of subjectively viewing Buschauer as a suspect. Therefore, the trial court granted the defense's motion to suppress the statements and evidence obtained in March 2000.

¶ 22 ANALYSIS

¶ 23 The State contends that Buschauer voluntarily made the statements at the Hoffman Estates police station and voluntarily consented to the search of his home. According to the State, the trial court's conclusion that Buschauer had been "arrested" without probable cause was contrary to the manifest weight of the evidence.

¶ 24 We apply a two-part standard in reviewing the trial court's ruling on a motion to suppress a defendant's statement. On findings of fact and credibility assessments, we defer to the trial court and reverse only if its decision is against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). On the legal challenge to the trial court's ruling, we review *de novo*, and reverse only if the trial court improperly applied the law to the facts. *Id*.

¶ 25 Whether a person is in custody, and thus whether *Miranda* warnings are required, involves two discrete inquiries: (i) a full assessment of the circumstances at the interrogation; and (ii) given the circumstances, whether a reasonable person would believe he or she was free to leave the interrogation. *People v. Schoening*, 333 Ill. App. 3d 28, 32 (2002) (relevant inquiry is whether under circumstances a reasonable person would have felt he or she was not at liberty

to leave). A custodial interrogation involves "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (noting interrogation is police practice reasonably likely to elicit incriminating response from suspect). "If the police wish to interrogate a suspect without first informing him of his *Miranda* rights, they must ensure that they do not do so in a custodial setting." *People v. Griffin*, 385 Ill. App. 3d 202, 213 (2008).

¶ 26 In *People v. Slater*, 228 Ill. 2d 137, 150 (2008), the Illinois Supreme Court identified several factors relevant to objectively assessing the circumstances at the interrogation:

1. Location, time, length, mood, and mode of questioning;
2. Number of police officers present during interrogation;
3. Presence or absence of family and friends of the accused;
4. Indicia of formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting;
5. Manner by which accused arrived at the place of questioning; and
6. Age, intelligence, and mental makeup of the accused.

¶ 27 After considering and weighing these factors, the court moves to the second inquiry–an objective determination as to whether a reasonable person, innocent of wrongdoing, would have believed he or she was free to end the questioning and leave. *Id*. Indicia include: (i) the intent of the officer; (ii) the understanding of the accused; (iii) the accused being informed either that he or she could leave or was under arrest; (iv) the probability of restraint of accused had he or she attempted to leave; (v) length of time of interrogation; and (iv) the giving of *Miranda* warnings. *People v. Lopez*, 229 Ill. 2d 322, 346 (2008).

¶ 28 We note the trial court made no pronouncements on credibility of the witnesses, all of whom were presented by the State. (Buschauer did not testify or call any witnesses on his behalf.) Thus, the evidence at the hearing is neither contradicted nor refuted.

¶ 29 The circumstances of the interview–the location, time, length, mood, and mode of the questioning–might, at first glance, seem somewhat coercive. A day-long interview in a police station is more formal and potentially uncomfortable than a short discussion at a neutral location. See, *e.g.*, *People v. Slater*, 228 Ill. 2d 137, 156 (2008) (distinguishing between questioning outside of police offices with at police offices which "would likely present a more foreboding, intimidating and adversarial environment"). But the timing of this interview was 9:30 a.m. until late evening with multiple breaks including for lunch and dinner. Although stretching several hours, no overnight or extended uninterrupted periods of time occurred.

¶ 30 Two Illinois State Police investigators conducted the interviews. The trial court discerned this as "focused, persistent, and unrelenting" and accusatory in mood. The trial court further perceived the "two officers [were present], presumably one on each side of the defendant, in close quarters in an interview room with no windows and a closed door." But to the contrary, the testimony indicated the mood and mode of questioning was not confrontational and followed a logical progression from the initial questioning through the precautionary reading of *Miranda* rights. The record indicates the tone as "conversational." We find the presumption expressed in the trial court's order unsupported by the evidence. Nothing in the record indicates the positions of the investigators in the interview room, the room's size, whether the room had windows, or whether the door was always open or closed.

¶ 31 The trial court viewed the location of the interview as inherently coercive because Buschauer was "isolated from his car and dependent on the police for a ride." But to regard this as inherently coercive does not make it so and ignores Kaepplinger's testimony that he asked Buschauer to come to the South Barrington police station the next morning and that he would be taken to the Hoffman Estates police station for questioning.

¶ 32 Buschauer rode in the front passenger seat in the unlocked police car. While it is unrealistic to assume that Buschauer could have just gotten out and walked away, it is also unlikely that any individual "in custody" would be seated in the front passenger seat next to an officer. In addition, although no family or friend was present, Buschauer's sister was at his home shortly after he found his wife's body and accompanied him the morning after the questioning, which would indicate she was reasonably close and available.

¶ 33 The trial court viewed the age, intelligence, and mental makeup of Buschauer as neutral factors. We disagree. Buschauer's background contrasts sharply with many individuals in similar circumstances. He had neither youth nor limited intelligence, nor was he suffering from mental issues that would indicate a failure to appreciate the situation. The record contains no testimony regarding Buschauer's understanding of his situation while at the police station. Indeed, despite his wife having recently drowned under mysterious circumstances, he agreed to come in for questioning and remained after receiving the *Miranda* warnings. He did not invoke a right to remain silent nor did he ask to leave or even call anyone.

¶ 34 The trial court recognized, and we agree, that there were no indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting. This factor, too, weighs in favor of a finding of no custody.

¶ 35 After Buschauer signed a *Miranda* waiver, the discussion continued to center around the facts of Hrisco's death and the possibility of an accidental drowning. The trial court's order pointed out that Buschauer "was 'presented with the possibility that perhaps [he] killed his wife.' " Buschauer "emphatically" denied this, and the trial court noted that the rest of the afternoon and evening, "and into the night," Buschauer was presented with different scenarios and continued to reject them. During the post-*Miranda* questioning, Buschauer asked to be given truth serum and to take a polygraph. Focus on Buschauer as a suspect emerged after the statements he made during the morning when Buschauer spoke of his marital difficulties and the arguments over the house. Buschauer also gave inconsistent descriptions of the position of Hrisco's body in the bathtub. He had no explanation for the items undisturbed on the tub ledge, even though he said he pulled her lifeless body onto the floor. After making these statements, the investigators testified that Buschauer received his *Miranda* rights as a precaution and he then signed a written waiver of those rights.

¶ 36 Simply giving *Miranda* warnings as a precautionary measure does not transform an investigative interrogation into a custodial interrogation. *People v. Willoughby*, 250 Ill. App. 3d 699, 716-17 (1993). Tencza testified that Buschauer was free to leave, would not have been prevented from doing so, was never formally arrested, and was given *Miranda* warnings as a precaution. And after agreeing to return in the morning, Buschauer was driven to his car and allowed to go home. Examining the factors of the intent of the officers; the understanding of the defendant; whether the defendant was told he was free to leave or that he was under arrest; whether the defendant would have been restrained if he had attempted to leave; the length of the interrogation; and whether *Miranda* warnings were given, we find that a reasonable

individual, innocent of wrongdoing, would have felt free to leave.

¶ 37 Consent to Search

¶ 38 The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV; see *People v. James*, 163 Ill. 2d 302, 311 (1994) ("The principles of the fourth amendment are applicable to the States through the due[-]process clause of the fourteenth amendment ***."). Subject to a few exceptions, warrantless searches are *per se* unreasonable. *People v. Cregan*, 2014 IL 113600, ¶ 25. One exception to the warrant requirement involves consent to a search. *People v. Pitman*, 211 Ill. 2d 502, 523 (2004) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). Consent to search one's residence must be given voluntarily. *People v. Anthony*, 198 Ill. 2d 194, 202 (2001). Consent is not voluntary when it results from coercion, intimidation, or deception (*People v. Prinzing*, 389 Ill. App. 3d 923, 932 (2009)) or if obtained as a result of acquiescence or submission to the assertion of lawful police authority (*People v. Davis*, 398 Ill. App. 3d 940, 956 (2010)).

¶ 39 Whether consent has been voluntarily given presents a question of fact to be determined from the totality of the circumstances. *Anthony*, 198 Ill. 2d at 202. The State bears the burden of proving consent was actually voluntary. *Id.* A motion to suppress presents mixed questions of law and fact. *People v. Gherna*, 203 Ill. 2d 165, 175 (2003). Factual findings made by the trial court will be upheld on review unless determined to be against the manifest weight of the evidence. *Id.*

¶ 40 As stated, Buschauer went voluntarily to the police station, and remained there freely. After a lunch break, he was given the *Miranda* warnings. At that point, this was precautionary because (i) earlier he made inconsistent statements about the position of Hrisco's body; (ii) he could not explain why items were not disturbed on the side of the tub when he lifted her out; and (iii) he revealed having marital difficulties. Buschauer signed the preprinted waiver form but did not attempt to leave nor did he at any time refuse to continue talking with the investigators. During the afternoon, Buschauer was given several bathroom breaks plus a break for dinner.

¶ 41 Following dinner, Buschauer signed consent to search his home. No coercion, deception, or duress was indicated in the record. Therefore, Buschauer was not in custody on March 6. We find Buschauer's consent to the search to have been voluntary, in part, because he was free to leave–that is, he was not seized–when he gave consent. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.").

¶ 42 Finally, knowledge of the right to refuse consent is a factor to be considered, but the State does not need to establish knowledge to prove an effective consent. *Prinzing*, 389 Ill. App. 3d at 932 (citing *Schneckloth*, 412 U.S. at 227). Although nothing indicates Buschauer was informed of his right to refuse consent, "it would be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996).

¶ 43 Probable Cause to Arrest

¶ 44 In the alternative, the State argues that if this court finds that Buschauer was "seized" in violation of the fourth amendment, the totality of the facts known to the investigators established probable cause to arrest Buschauer at 9:30 a.m. on March 6 when he voluntarily went to the Hoffman Estates police station, but certainly at 12:30 p.m. when he was Mirandized.

¶ 45 Specifically, according to Dr. Jones, Hrisco had a hemorrhage on the left side of her neck that would be typical in a strangulation case. This injury plus Hrisco's other injuries were "inconsistent with" an accidental drowning. Two of Hrisco's friends spoke to the police about the couple getting into bad arguments. One friend said Hrisco told her she was afraid of Buschauer and the other that Hrisco had said he threatened to kill her. The State argues that these factors, plus Buschauer being the only other adult present in the house, established probable cause to arrest him.

¶ 46 A finding of probable cause to arrest would nullify the illegal seizure issue. We do not need to address this argument because we hold Buschauer was not "in custody" while at the Hoffman Estates police station, and, therefore, his statements and the evidence obtained incident to the search of his home are admissible.

¶ 47 Reversed and remanded.