2016 IL App (1st) 140868-U

FIRST DIVISION
September 26, 2016

No. 1-14-0868

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 C4 40456
	)	
JESSE OLIVER,	)	Honorable
	)	Gregory Robert Ginex,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justice Harris and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's conviction for possession of a controlled substance affirmed over his contention that the trial court erred in denying his pretrial motion to suppress his statements to the police where the evidence at the suppression hearing showed defendant was not in custody when questioned.

¶ 2 Following a bench trial, defendant Jesse Oliver was found guilty of possession of a controlled substance (heroin) (720 ILCS 570/402(c) (West 2012)) and sentenced to one year in prison. On appeal, defendant contends that the trial court erred in denying his pretrial motion to

suppress his statements to the police because he was in custody and interrogated without being informed of his *Miranda* rights. We affirm.

¶ 3 Prior to trial, defendant filed a motion to suppress his statements to the police admitting that heroin found outside his family's residence belonged to him. He argued the statements were made during custodial interrogation, and the police failed to inform him of his *Miranda* rights. The State responded, conceding that the police did not inform defendant of his *Miranda* rights, but asserted that he had not been subjected to custodial interrogation.

¶ 4 At the hearing on the motion, the State introduced evidence that on April 6, 2012, at approximately 6:45 a.m., Forest Park Police Detective Daniel Pater and several other officers executed a search warrant on a single-family residence on the 3200 block of West Adams Street in Bellwood. After forcibly entering the residence, Pater observed defendant's parents, Jesse Oliver Sr. and Luverne Oliver, and his cousin, Dempsey Oliver, but not defendant. All three individuals were detained in the living room of the residence. Luverne told Pater that defendant was not home. Pater told her to call defendant and have him return to the residence. Luverne called defendant, who refused to come back. Pater picked up the telephone and told defendant he was the subject of a search warrant and "needed" to return to the residence. Defendant said he was in Louisville, Kentucky, would not be able to return and hung up the phone. Dempsey "scoffed" at the notion that defendant was in Louisville, and 10 minutes later, he called defendant on his own. Defendant told Dempsey that he was on the south side of Chicago and could not obtain a ride back.

¶ 5 A few minutes later, defendant called Dempsey back and asked to speak with Pater, who proceeded to pick up the telephone. Pater repeated to defendant that the police were executing a

warrant on his residence, he was the target of the warrant and he "needed" to return to the residence. Defendant told him that he was on the south side of Chicago and would return to the residence as soon as he could get a ride back. At some point between Pater's two conversations with defendant, the police found narcotics.

¶ 6 At approximately 9 a.m., Pater and Forest Park Police Detective Nick Defors observed defendant walking on Adams Street toward the residence. As the detectives met defendant in front of the residence, he had his arms up and told them he did not have anything on him. The detectives introduced themselves to defendant and told him they had a search warrant for him and his residence. Because there were other officers outside the residence, Pater and Defors asked defendant to come with them to the backyard and talk privately. The detectives described the tone of the conversation with defendant as "normal" and "conversational." While they both had on badges and "vests" and were armed with firearms, neither detective had his weapon drawn. The officers in front of the residence also did not have their weapons drawn.

¶ 7 As Pater and Defors walked defendant to the backyard, they told him they were not handcuffing him, he was "not in custody" and he was not under arrest. Defendant told them that he appreciated them being "respectful" toward his family members, who remained inside the residence. Once Pater, Defors and defendant were in the backyard, the detectives searched him and found nothing on him.

¶ 8 After searching defendant, both Pater and Defors testified defendant was free to leave, but they did not explicitly tell this to defendant. They also acknowledged not informing him of his *Miranda* rights, which they both explained was because defendant "wasn't in custody" at the time. Pater added that they were not "asking any custodial questions." The detectives proceeded

to tell defendant that they found a clear plastic bag containing suspect heroin in the grill next to the backdoor of the residence. They asked defendant if it belonged to him, and defendant responded "whatever you all found, it's mine, not theirs."

¶ 9 After this question, Pater testified that defendant would not have been free to leave, though Defors testified defendant would have been. The detectives clarified and asked defendant "are you saying that the drugs that we found from this search belonged to you?" Defendant responded "it's not theirs, so who's it got to be then?" After this question, Pater and Defors placed defendant under arrest and read him his *Miranda* rights. They did not ask defendant any more questions because, according to Defors, they "already had the answers" they needed. Defendant was arrested no more than five minutes after arriving at his residence. Both detectives denied making any threats to defendant that if he did not admit to ownership of the narcotics, his family members would be arrested.

¶ 10 Defendant presented three witnesses on his behalf: Luverne, Jesse Sr. and himself.

¶ 11 Luverne stated that a police officer told her to call defendant, but not to mention the police were at his house. During a later phone call, Luverne heard a police officer tell defendant that, if he did not return home, the officer would arrest his family. Jesse stated that a police officer told defendant on the telephone that, if he did not come home, his three family members would be arrested until he returned. Jesse also stated that he had $4,000 hidden in the basement, which the police found. The police told him that, if defendant did not return, they would "confiscate" the money.

¶ 12 Defendant testified that, on the morning in question, Luverne called him early, sounding "nervous" and asking him to come home. She did not tell him that the police were at their

residence. Luverne called him a second time and asked him to come home. During the second call, Detective Pater picked up the phone and asked where defendant was located. Defendant told him he was in Louisville. Pater responded that defendant needed to come home or the police would arrest his family. Defendant refused and hung up the phone. Shortly after, Dempsey called defendant and asked where he was located. Defendant told him he was on the south side of Chicago, and after talking for five minutes, defendant hung up the phone. Ten minutes later, defendant called Dempsey back and asked to speak to the police. Defendant then asked the police why they were at his house, and they responded that he needed to come home.

¶ 13 Defendant came back home around 9 a.m. and saw police officers outside the residence. Defendant approached them and said "I don't have nothing. What is this about?" Detectives Pater and Defors asked defendant if he would come with them to the backyard. There, they searched him and then placed him in handcuffs. Afterward, they told defendant they found heroin and asked him if he knew where they found it. Defendant did not know. The detectives told defendant that they could "take all you down or are you taking responsibility?" Defendant replied "[t]hat's not necessary. I will take the charge."

¶ 14 Following argument, the court denied defendant's motion to suppress his statements. It found that defendant was not in custody at the time he made the statements to the detectives because defendant had approached the police and there were only two members of law enforcement present at the time he made the statements. Furthermore, while defendant was not in the presence of family members when he made the statements, the court noted the circumstances lacked an "indicia of formal arrest" as there was no show of force, physical restraint and "no

booking or fingerprints." It observed that the "only indicia of formal arrest" was "a search warrant."

¶ 15 The case proceeded to a bench trial, where the State presented evidence that, during the execution of the search warrant on the residence, a police dog began to dig at a smoker grill in the backyard. The dog's handler, Forest Park Police Officer Daniel Miller, explained this was an indication of the presence of narcotics. Miller proceeded to open the grill and observed a bag with tin foil packets. He did not touch the suspect narcotics and closed the grill's lid. He alerted Detective Defors who photographed and recovered the suspect narcotics, which the parties stipulated tested positive for heroin and weighed 5.1 grams.

¶ 16 During the search, Detective Defors stated that, in the basement, he recovered a box with several pieces of mail and a pay stub addressed to defendant at the residence. In the basement, Defors also found a Cook County bond receipt and a traffic ticket containing defendant's name and the address of the residence. In a first floor bedroom, Defors recovered two pieces of mail addressed to defendant at the residence and a state identification card containing defendant's name and the address of the residence. In an attic bedroom, Defors recovered an Illinois Tollway bill addressed to defendant at the residence.

¶ 17 Later in the day, after defendant had returned to the residence, Defors and Detective Pater questioned defendant about the narcotics recovered in the grill. Defendant admitted the narcotics belonged to him.

¶ 18 The court found defendant guilty of possession of a controlled substance. Defendant filed a motion for new trial, arguing, *inter alia*, that the trial court erred in denying his pretrial motion to suppress his statements to the police where he was subjected to custodial interrogation without

first being given his *Miranda* warnings. The court denied the motion and subsequently sentenced defendant to one year in prison. This appeal followed.

¶ 19 Defendant contends that the trial court erred when it denied his motion to suppress his statements because he was subjected to custodial interrogation without first being informed of his *Miranda* rights.

¶ 20 On review of a trial court's ruling on a motion to suppress, we afford great deference to its factual findings and credibility determinations. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). We will not disturb those findings unless they are against the manifest weight of the evidence (*id.*), which occurs "only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *People v. Clayton*, 2014 IL App (1st) 130743, ¶ 22. However, we review the legal challenge to the court's denial of the suppression motion *de novo* and will reverse only if the court misapplied the facts to the law. *Slater*, 228 Ill. 2d at 149; *People v. Buschauer*, 2016 IL App (1st) 142766, ¶ 24.

¶ 21 In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court held that prior to the start of an interrogation of a suspect in custody, he "must first 'be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.' " *Slater*, 228 Ill. 2d at 149 (quoting *Miranda*, 384 U.S. at 444). These warnings safeguard an individual's privilege against self-incrimination. *Miranda*, 384 U.S. at 444. "Absent the interplay of custody and interrogation, an individual's privilege against self-incrimination is not threatened." *People v. Villalobos*, 193 Ill. 2d 229, 239 (2000). Custody has been defined as, under the circumstances of police questioning, whether "a reasonable person would have felt he or she was not at liberty

to terminate the interrogation and leave." *People v. Braggs*, 209 Ill. 2d 492, 506 (2003). Interrogation has been defined as police questioning "reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Consequently, if the police want to interrogate a suspect without providing *Miranda* warnings, they must do so in a non-custodial setting. *People v. Griffin*, 385 Ill. App. 3d 202, 213 (2008).

¶ 22 As a violation of *Miranda* requires both custody and interrogation, we will begin by determining whether defendant was in custody, which requires two distinct inquiries. *Slater*, 228 Ill. 2d at 150. First, we must determine the circumstances surrounding the police questioning. *Id.* Second, we must objectively determine, given those circumstances, whether " 'a reasonable person, innocent of any crime' would have believed that he or she could terminate the encounter and was free to leave." *Id.* (quoting *Braggs*, 209 Ill. 2d at 506).

¶ 23 In examining the circumstances surrounding police questioning, we look at many factors to determine if a statement was made in a custodial setting, including:

> "(1) the location, time, length, mood, and mode of the questioning; (2) the number of police officers present during the interrogation; (3) the presence or absence of family and friends of the individual; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking or fingerprinting; (5) the manner by which the individual arrived at the place of questioning; and (6) the age, intelligence, and mental makeup of the accused." *Id.*

Another relevant factor is whether the suspect "had reason to believe that he or she was the focus of a criminal investigation." *People v. Vasquez*, 393 Ill. App. 3d 185, 190 (2009). No one factor is dispositive. *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 37.

¶ 24 Applying the factors, we first note that there was no evidence presented at the suppression hearing concerning defendant's age, intelligence or mental makeup. Consequently, this factor is neutral.

¶ 25 Only two of the factors weigh in favor of finding defendant in custody: the absence of his family and his reason to believe he was the focus of a criminal investigation. Detective Pater told defendant on the telephone that they were at his residence to execute a search warrant, which named him and the residence. Therefore, he knew he was the focus of a police investigation. See *Vasquez*, 393 Ill. App. 3d at 190 (where the defendant "was, in all likelihood, aware that she was the focus of [a police] investigation" of criminal wrongdoing, this weighed in favor of custody).

¶ 26 Additionally, defendant's family was inside the residence while he was outside. While the facts here are not as strong in favor of finding custody as situations where the police question a suspect at a police station without any family or friends present (see *People v. Harris*, 2012 IL App (1st) 100678, ¶ 54), it is also different from situations where the police question a suspect while his family is present in the same room. See *In re Tyler G.*, 407 Ill. App. 3d 1089, 1093 (2010). Therefore, although defendant's family was nearby, because they were not physically with him, these facts lend themselves more favorably to a custodial situation. See *Vasquez*, 393 Ill. App. 3d at 187, 190 (where the police spoke to the defendant in a hospital room with her parents outside the room, this weighed in favor of custody).

¶ 27 However, the remaining factors weigh in favor of a non-custodial setting. Pater and Defors' conversation with defendant, described by them as normal and conversational, took place in the morning in his backyard and finished within five minutes. Both detectives stated that defendant even thanked them for being respectful to his family. See *Beltran*, 2011 IL App (2d)

090856, ¶¶ 41-42 (location, time, length, mood, and mode of the questioning weighed in favor of non-custodial setting where the questioning of the defendant took 45 minutes, "not atypical of a noncustodial interview," the State investigator did not "badger" the defendant and "he did not employ a hostile or accusatory tone"). Furthermore, as the trial court found, Pater and Defors were the only two members of law enforcement with defendant during the questioning. See *Vasquez*, 393 Ill. App. 3d at 192 (fact that only two police officers questioned the defendant weighed against a finding of custody); *People v. Ripplinger*, 316 Ill. App. 3d 1261, 1271 (2000) (same).

¶ 28 Next, defendant was questioned without handcuffs on and the detectives did not draw their weapons on him. The evidence at the suppression hearing also demonstrates that the detectives told defendant he was not under arrest at the time of questioning. Clearly, there had not been any indicia of a formal arrest procedure. See *Slater*, 228 Ill. 2d at 156 (no indicia of formal arrest existed where, during the questioning of the defendant, there was no evidence of "a show of force or weapons, physical restraint, booking, or fingerprinting").

¶ 29 Additionally, defendant approached the house voluntarily and told the officers to search him. See *id.* at 154 ("Defendant's voluntary arrival at the [place of questioning] by means of [his] own transportation is distinguishable from a situation in which a defendant is transported to and from the place of [questioning] by law enforcement officers and has no other means of egress from that location."). Although defendant's appearance was requested by the detectives as they had a search warrant for him, he could have remained where he was and refused to appear. See *Beltran*, 2011 IL App (2d) 090856, ¶ 44 (finding "a custodial situation was not created when

[a State investigator] told the defendant that he had a search warrant to execute"). Defendant voluntarily chose to come to the residence.

¶ 30 Given the evidence strongly favors a non-custodial setting when the detectives questioned defendant, we find that a reasonable person, innocent of any crime, would have believed that he could stop the questioning with the detectives and leave. See *Slater*, 228 Ill. 2d at 150. Therefore, defendant was not in custody.

¶ 31 Defendant relies on *People v. Fort*, 2014 IL App (1st) 120037, to support his contention that he was in custody during the police questioning. In *Fort*, this court determined that the defendant had been in custody when questioned by police who had executed a search warrant at her home. *Id.* ¶¶ 14-15. In reaching this conclusion, this court found that the "[p]olice made a considerable show of force as several officers forcibly entered the home with guns drawn" and the defendant had to ask permission to retrieve her baby, which an officer had to clear with his supervisor. *Id.* ¶ 14. We find the facts of *Fort* distinguishable from the instant case where, here, there was no show of force and the environment in which the police questioned defendant was much less hostile. Moreover, determining whether an individual is in custody for purposes of *Miranda* "is a factual question that must be determined on a case-by-case basis" (*People v. Foster*, 195 Ill. App. 3d 926, 943 (1990)), making cross-case comparisons difficult. Based on the facts of the present case, the factors weigh strongly in favor of finding defendant was not in custody.

¶ 32 As we have determined that the trial court correctly found that defendant was not in custody at the time the detectives questioned him, we do not need to determine whether the detectives' questioning was an interrogation because "[a]bsent the interplay of custody *and*

interrogation, an individual's privilege against self-incrimination is not threatened." (Emphasis added.) *Villalobos*, 193 Ill. 2d at 239. Accordingly, the trial court properly denied defendant's motion to suppress statements.

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.