IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1999

FILED
March 30, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	**)**	**C.C.A. NO. 01C01-9811-CC-00453**
	)	No. M1998-00257-CCA-R3-CD
Appellant,	**)**	
	)	
	)	**WILLIAMSON COUNTY**
VS.	**)**	
	)	**HON. TIMOTHY L. EASTER**
ANDREW LAY,	**)**	**JUDGE**
	)	
Appellee.	**)**	**(Direct Appeal - D.U.I.)**
	(	**Opinion on Rehearing**

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OPINION FILED ________________________

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION ON PETITION TO REHEAR

In September, 1998, the appellant, Andrew Lay, was convicted by a Williamson County jury of driving under the influence, third offense. The trial court sentenced the appellant to eleven (11) months and twenty-nine (29) days, with all but 150 days suspended. On November 29, 1999, this Court entered an opinion affirming the appellant's conviction. In his direct appeal, the appellant argued, *inter alia*, that the trial court erred in denying his motion to suppress his statements made to a police officer; however, this Court concluded that the issue had been waived due to the appellant's failure to include a transcript or a video tape of the hearing on the motion to suppress.

The appellant subsequently filed a petition to rehear his motion to suppress issue, claiming that his designation of the record included a request for the video tape of the hearing on the motion to suppress, but the trial court clerk failed to include the video tape in the record. Attached to the petition to rehear was an affidavit of the clerk which confirmed appellant's claims regarding the video tape of the motion to suppress. On December 29, 1999, this Court granted the petition to rehear the appellant's issue regarding his suppression motion.

The appellant now alleges that the trial court erred in denying his motion to suppress his statements made to Officer Daniel Stubbs. He argues that the officer failed to advise him of the required Miranda[1] warnings prior to questioning him. After thoroughly reviewing the supplemental record submitted to this Court, we conclude that the trial court did not err in denying the appellant's motion to suppress. Therefore, the judgment of the trial court is affirmed.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

I.

At the hearing on the motion to suppress, Officer Daniel Stubbs testified that on September 29, 1996, he observed the appellant driving his vehicle at approximately 14 miles per hour over the posted speed limit. When he stopped the appellant's vehicle, the officer detected an odor of alcohol about the appellant's person. In addition, the appellant's eyes were glassy, and his speech was slurred. Officer Stubbs inquired whether the appellant had been drinking, and the appellant responded that he had consumed two (2) beers. The appellant then consented to perform several field sobriety tests, and in the officer's opinion, the appellant performed poorly on those tests.

At the conclusion of the field sobriety tests, Officer Stubbs asked the appellant whether his prior statement that he had only consumed two (2) beers was accurate. The officer testified that the appellant then stated that he had consumed ten (10) beers and that he had not eaten that day. The appellant also acknowledged to the officer that he had had too much to drink to operate his vehicle safely. The officer testified that he then arrested the appellant and obtained his consent for a blood alcohol test.[2]

The officer stated that the appellant made the statements prior to his being informed that he was under arrest. Stubbs insisted that he never told the appellant that he was in custody until he handcuffed him. Although the officer did not administer Miranda warnings, he testified that he did not question the appellant after he had been arrested.

The appellant also testified at the hearing. Contrary to the officer's testimony, the appellant maintained that, at the time he made any statement to the officer, he was restrained by handcuffs. He stated that the officer did not read him his Miranda warnings prior to questioning him. While he agreed with Officer Stubbs that, if he made a statement, he would have made that statement after he performed the field sobriety tests, the

[2] At trial, a TBI toxicologist testified that the appellant had a blood alcohol content of 0.18%.

appellant could not recall informing the officer that he had consumed ten (10) beers that evening.

The trial court denied the appellant's motion to suppress, finding that a reasonable person in the appellant's position would not have believed that he was in custody. The court determined that the appellant was not in custody until the officer arrested him. Thus, because the appellant was not in custody, the trial court concluded that Miranda warnings were not mandated. From the trial court's ruling, the appellant brings this issue.

II.

In reviewing a trial court's denial of a motion to suppress, this Court is bound by the trial court's findings of fact unless the evidence preponderates otherwise. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). However, the law as applied to those facts is subject to *de novo* review. Id. The appellant bears the burden of demonstrating that the evidence preponderates against the trial court's findings. State v. Odom, 928 S.W.2d 18, 22-23 (Tenn. 1996).

III.

The appellant contends that the trial court erred in denying his motion to suppress his statement made to Officer Stubbs. He argues that he was subjected to custodial interrogation without having been advised of his Miranda rights. He claims that any statement to the officer as a result of such custodial interrogation was unconstitutionally obtained, and thus, the statement should not have been admitted at trial.

A.

In Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that the constitutional prohibition against compelled self-incrimination requires police officers, before initiating questioning, to advise

an accused of his right to remain silent and his right to counsel. Specifically, Miranda requires police to inform the person being questioned that (a) he has the right to remain silent; (b) any statement made may be used as evidence against him; (c) he has the right to the presence of an attorney; and (d) if he can not afford an attorney, one will be appointed for him prior to questioning, if he so desires. Id., 384 U.S. at 444, 86 S.Ct. at 1612.

However, police officers are only required to give Miranda warnings prior to "custodial interrogation" which has been defined as a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322-23, 114 S.Ct. 1526, 1528-29, 128 L.Ed.2d 293 (1994); State v. Bush, 942 S.W.2d 489, 499 (Tenn. 1997). The United States Supreme Court has held that it is appropriate to apply an objective test to determine whether a person is in custody and therefore entitled to receive Miranda warnings. Courts must consider the totality of the circumstances of the interrogation and inquire "how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 422, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984); *see also* Stansbury v. California, 511 U.S. at 323-24, 114 S.Ct. at 1529.

In State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996), the Tennessee Supreme Court expressly adopted the objective analysis employed by the United States Supreme Court and recognized several nonexclusive factors to aid in the assessment of whether a reasonable person would consider himself deprived of freedom of movement to a degree associated with a formal arrest. Relevant factors include:

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Id. The determination of whether an individual is in custody is fact specific, and the trial court should assess the applicability of the relevant factors in making its findings. Id.

In facts remarkably similar to this case, the defendant in Berkemer v. McCarty was stopped by a highway patrolman as a result of his erratic driving. 468 U.S. at 423, 104 S.Ct. at 3141. The defendant had trouble standing and failed to satisfactorily perform a field sobriety test. Id. Although the officer subjectively believed that he would charge the defendant with a traffic offense, he did not advise the defendant that he was in custody. Id. The defendant then made incriminating statements to the officer that he had consumed alcohol and marijuana shortly before being stopped. Id.

______The United States Supreme Court concluded that the statement was admissible, despite the fact that the defendant had not been advised of his Miranda rights. In making that determination, the Court held that the brief, roadside detention did not constitute "custody" for the purposes of Miranda. 468 U.S. at 440, 104 S.Ct. at 3150; *see also* State v. Snapp, 696 S.W.2d 370, 371 (Tenn. Crim. App. 1985).

B.

In the present case, we agree with the trial court that the appellant was not in custody for purposes of Miranda at the time his statement was given. In denying the appellant's motion to suppress, the trial court implicitly discredited the appellant's testimony that he was physically restrained while the officer questioned him. Additionally, as in Berkemer, the appellant was detained for a short period of time prior to his arrest, and the officer never informed the appellant that he was not free to leave. 468 U.S. at 441-42, 104 S.Ct. at 3151. Moreover, as in Berkemer, the record indicates that the appellant's statement was in response to only modest questioning by the officer.

The appellant claims that he did not feel free to leave the scene; thus, he argues that he was in custody. In making this argument, the appellant points to the officer's testimony that he subjectively believed that the appellant was under the influence and that he intended to arrest the appellant after the appellant performed poorly on the field sobriety tests. "The question of whether a person has been seized, however, does not turn on the

subjective impressions or intentions of the officer involved." State v. Greene, 929 S.W.2d 376, 379 (Tenn. Crim. App. 1995); *see also* Berkemer, 468 U.S. at 442, 104 S.Ct. at 3151. The "only relevant inquiry is how a reasonable man in the suspect's position would have understood his position." Berkemer, 468 U.S. at 442, 104 S.Ct. at 3151.

The appellant was not in "custody" for Miranda purposes at the time he gave a statement to the police officer. As a result, the officer was not constitutionally required to advise the appellant pursuant to Miranda. Therefore, the trial court properly denied the appellant's motion to suppress his statement to the officer.

Moreoever, even if there had been error in failing to suppress the appellant's statement at trial, any error would have been clearly harmless beyond a reasonable doubt. The evidence against the appellant was overwhelming. Officer Stubbs testified that, when he initially stopped the appellant, he detected an odor of alcohol about his person. In addition, the appellant had glassy eyes, slurred speech, and failed to adequately perform three (3) field sobriety tests. Finally, the appellant consented to a blood alcohol test, which indicated that the appellant had a blood alcohol level of 0.18%. It is abundantly clear that the appellant would have been convicted even absent his statement.

Accordingly, the judgment of the trial court is AFFIRMED.

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JERRY L. SMITH, JUDGE

CONCUR:

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THOMAS T. WOODALL, JUDGE

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NORMA MCGEE OGLE, JUDGE