

Review of Recent Juvenile Cases (2011)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

The mere fact that an interrogation begins as noncustodial does not prevent custody from arising later in the interrogation.[McCulley v. State](11-4-4)

On August 18, 2011, the Fort Worth Court of Appeals held that custody is established with the manifestation of probable cause, combined with other circumstances, which would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest.

¶ 11-4-4. **McCulley v. State**, No. 02-09-00222-CR, --- S.W.3d ----, 2011 WL 3672062 (Tex.App.-Fort Worth, 8/18/11).

Facts: McCulley called the police on the night of May 20, 2007. When police arrived at his house, McCulley was covered in blood and his wife had been stabbed. The police took McCulley to the hospital, where an ambulance transported his wife, who later died. The police extensively photographed McCulley. From there, McCulley accompanied the police to the police station, where the police questioned him for almost four and one-half hours. McCulley eventually implicated himself in his wife's death. Before trial, McCulley filed a motion to suppress the statement he made to police. The trial court held a suppression hearing.

At the suppression hearing, the State called Detective Kelly Brunson of the City of Wichita Falls Police Department to testify. Brunson testified that he was trained in conducting interviews for the police department. He averred that he also had been trained regarding *Miranda* warnings and the warnings contained in Texas Code of Criminal Procedure article 38.22. According to Brunson, his sergeant called him on the night of May 20, 2007. The sergeant sent Brunson to the hospital to "view the body and to speak to [] McCulley." After McCulley consented to the search of his house, Brunson said that he asked McCulley to go to the police station so that he could interview him. Brunson testified that McCulley obliged and that another officer brought McCulley to the police station. He also said that McCulley was not a suspect at this time and that the interview was intended to "gather leads and any intelligence he might have to try to find out what happened." Brunson said that the videotaped interview began shortly before 1:00 a.m. on May 21.

Brunson said that as he interviewed McCulley, he had McCulley verify to him that he was there of his own free will, and Brunson said that McCulley freely answered his questions. Brunson testified, as the video of the interview played for the trial court, that after asking McCulley, "is there anything that you haven't talked about that might help me out on this case, anything at all that might help me," McCulley responded, "I just want to see her," and "I just want to go to the hospital." After telling McCulley that his wife "was still at the hospital," Brunson told McCulley that he could see her "as soon as we finish here."

Brunson said that during the interview, he reminded McCulley that he was still free to leave: "I was just making sure that he understood that he was there on his own free will, that he wasn't under arrest and he wasn't charged with any offense." Brunson testified that his specific statement was "You're here under your

own free will, you still understand that, right?" McCulley responded, "I would like to go to the hospital." Brunson responded, "Even if we let you go to the hospital, ... I don't know if we would let you see your wife right away," and "Now's probably not a good time to see her." When asked what would have happened if McCulley had gone to the hospital, Brunson said, "I wouldn't have let him see her [body]."

Brunson testified that after asking to go to the hospital, McCulley asked, "Can I go home?" Brunson responded that the police were still at his house and that he could take him there as soon as they were finished. As the interview continued, Brunson said that another detective stepped into the interview room. Brunson explained to the other detective that McCulley wanted to see his wife and that Brunson had told McCulley it probably wasn't a "good idea at this time." The detective responded that she did not think it was a good idea for McCulley to see his wife and also that the police would be at his home for some time. McCulley asked again, "Can I go home?" He was told again that it was not a good idea. Brunson said that what the detective meant when she said that the police would be at McCulley's home for a while was that the police would be processing crime-scene evidence and no one would be allowed in the home. Brunson said that even after these requests, McCulley was not a suspect at this time and that he was still free to leave the interview.

By Brunson's account, if McCulley were to leave the police station, an officer "would have transported him." Brunson acknowledged that McCulley was not wearing shoes. Brunson said that McCulley's transportation "would have been up to me." An hour into the interview, Brunson asked McCulley whether he had committed the murder. Later, Brunson explained to McCulley that the person closest to the victim is often the suspect in a murder. Brunson maintained that for the majority of the nearly four and one-half hour interview, McCulley was free to leave at any time but that to leave would have required Brunson's assistance because "it's ... kind of a sneaky way out." When asked directly how McCulley would have left the police station, Brunson said, "I would have to had shown him the way out."

Brunson said that just before 5:00 a.m., he and McCulley read McCulley's *Miranda* rights and his article 38.22 rights together. Brunson averred that McCulley acknowledged that he understood his rights. When asked whether he was still willing to talk to Brunson, McCulley responded, "Can I just go to sleep?" Brunson responded, "We need to talk. We need to get things worked out." He told McCulley, "You can go to sleep when we're done." But Brunson also said, "If you want to invoke your rights, that's your right also." McCulley said, "I'll talk to you," and signed a waiver that he understood his rights and that he was talking to the police voluntarily. According to Brunson, he did not have probable cause to arrest McCulley even at this juncture, but McCulley "was becoming a focus of the investigation." At that time, another detective entered the room, and McCulley said, in response to the detective's question about how he was doing, that he was not doing well because he was being charged with murder. The detective responded that McCulley was not actually being charged at this time. But Brunson did testify that at this time, McCulley was no longer free to leave. The trial court denied McCulley's motion to suppress.

The video of the interview reflects many of the statements Brunson testified to. In the video, as the interview begins, Brunson tells McCulley that he is not under arrest and is not being charged with anything. Brunson also has McCulley verify that he knows he is there of his own free will. It is clear that McCulley is not wearing shoes. Less than thirty minutes into the interview, the questions by the detectives primarily concern McCulley's timeline of events. McCulley's initial story is that his wife had left earlier that day, that he was watching a movie, and that his stomach got upset during the movie, so he went for a walk. When he arrived home from his walk, he discovered his wife lying on the living room floor, bleeding. According to McCulley's initial story, she asked for his help and declared that she was dying.

Brunson asks McCulley about previous physical altercations with his wife and a prior record of violence with her. Brunson asks several questions about why McCulley was not wearing shoes, what shoes he wore when he allegedly went for a walk during the movie, and when and where he took them off. Brunson

physically examines McCulley by looking at the bottoms of his feet, looking at his hands, and lifting up his shirt and examining his torso. Brunson questions McCulley about cuts on his hands. Each time McCulley asks to go home or to the hospital, Brunson's responses, although couched in terms of that not being a "good idea" or not "right now," were statements suggesting that McCulley could eventually go to those places, but not during the time the interview was being conducted. At one moment, McCulley asks "when" he can go to the hospital. Brunson responds, "[A]s soon as we finish here." Later, when McCulley asks to go home, Brunson responds similarly with, "[W]e can take you there when we get finished."

Multiple times during the interview, Brunson asks McCulley whether things had gotten "out of hand," and "[D]id you do this?," and he tells McCulley that the person closest to the victim is usually the suspect. Multiple detectives ask McCulley about the whereabouts of a particular knife. Multiple detectives also state to McCulley that his timeline does not make sense.

In the interview, two detectives other than Brunson also question McCulley. The first of the two question him before he was ever given any warnings. She asks him about violence in his relationship. The detective also tells McCulley that, according to his timeline, he would have been leaving the movie during its climactic moment. She tells him directly that his timeline does not make sense. After almost four hours, Brunson and McCulley read McCulley's *Miranda* and article 38.22 warnings together. McCulley eventually states that he had "killed her" and had thrown the knife in a neighboring yard.

The State introduced McCulley's videotaped statement at trial, and a jury found him guilty of murder. The jury also found that McCulley acted in the heat of passion. See Tex. Penal Code Ann. § 19.02 (West 2011). McCulley was sentenced to twenty years' incarceration. This appeal followed.

Held: Affirmed

Opinion: Four factors are relevant to determining whether a person is in custody: (1) probable cause to arrest, (2) subjective intent of the police, (3) focus of the investigation, and (4) subjective belief of the defendant. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex.Crim.App.1996). Factors two and four have become irrelevant except to the extent that they may be manifested in the words or actions of police officers; the custody determination is based entirely upon objective circumstances. *Id.*; see also *Stansbury v. California*, 511 U.S. 318, 322–23, 114 S.Ct. 1526, 1528–29, 128 L.Ed.2d 293 (1994). Simply becoming the focus of the investigation does not necessarily equate to custody for purposes of determining whether a statement is voluntarily given. *Meek v. State*, 790 S.W.2d 618, 621 (Tex.Crim.App.1990).

As a general rule, when a person voluntarily accompanies law enforcement to a certain location, even though he knows or should know that law enforcement suspects that he may have committed or may be implicated in committing a crime, that person is not restrained or "in custody." *Livingston v. State*, 739 S.W.2d 311, 327 (Tex.Crim.App.1987), *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2858, 101 L.Ed.2d 895 (1988). More specifically, so long as the circumstances show that a person is acting only upon the invitation, request, or even urging of law enforcement, and there are no threats, either express or implied, that he will be taken forcibly, the accompaniment is voluntary, and such person is not in custody. *Anderson v. State*, 932 S.W.2d 502, 505 (Tex.Crim.App.1996), *cert. denied*, 521 U.S. 1122, 117 S.Ct. 2517, 138 L.Ed.2d 1019 (1997). But the mere fact that an interrogation begins as noncustodial does not prevent custody from arising later; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation. *Ussery v. State*, 651 S.W.2d 767, 770 (Tex.Crim.App.1983).

There are at least four general situations when a suspect's detention may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would

lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest^{FN1} and law enforcement officers do not tell the suspect that he is free to leave. *Dowthitt*, 931 S.W.2d at 255. In the first through third situations, the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. *Id.* (citing *Stansbury*, 511 U.S. at 322–23, 114 S.Ct. at 1528–29). Concerning the fourth situation, the officers' knowledge of probable cause must be manifested to the subject, and such manifestation could occur if information sustaining the probable cause is related by the officers to the suspect or by the suspect to the officers. *Id.*; see *Ruth v. State*, 645 S.W.2d 432, 436 (Tex.Crim.App. [Panel Op.] 1979) (holding that a suspect's "statement that he had shot the victim immediately focused the investigation on him and furnished probable cause to believe that he had committed an offense[;] [a]fter that time, the continued interrogation must be considered a custodial one"). Situation four, however, will not automatically establish custody; rather, custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. *Dowthitt*, 931 S.W.2d at 255. Additionally, the length of time involved is an important factor to consider in determining whether a custodial interrogation occurred. *Id.* at 256.

Here, according to Brunson, McCulley voluntarily rode with an officer to the police station from the hospital. Brunson's testimony is the only evidence at the suppression hearing regarding McCulley's ride to the police station. This testimony indicates that McCulley was not in custody when the interview at the police station began. *Miller v. State*, 196 S.W.3d 256, 266 (Tex.App.-Fort Worth 2006, pet. ref'd) (reasoning that appellant's choice to voluntarily meet police at a location demonstrated that police encounter was initially noncustodial). McCulley, however, was not wearing shoes and had blood on his clothing. At the suppression hearing, Brunson testified that in order for McCulley to return home or to the hospital, the police would have needed to transport him. When asked whether McCulley was dependent upon the police for transportation, Brunson answered, "It would have been up to me." Brunson also averred that leaving the interrogation room would have been difficult, requiring knowledge of a "sneaky way out," so much so that Brunson said more than once that he would have been required to escort McCulley out of the building. When taken as a whole, we conclude that McCulley was physically deprived of his freedom in a significant way.

And even though the police never directly told McCulley that he could not leave, a reasonable person in McCulley's situation would have believed that his freedom of movement had been significantly restricted. Each time McCulley indicated a desire to go to the hospital or his home, the police indicated that he could not go to those places until the police were "finished." Furthermore, the police possessed probable cause that McCulley had committed the murder, and Brunson expressed this directly to McCulley several times during questioning. The questioning in the video reflects an interview primarily focused on McCulley. His version of his timeline was the subject of most of the questions asked by multiple police officers. Regarding McCulley's statement that he had been on a walk only to come home and find that his wife had been stabbed, Brunson asked McCulley several questions about his lack of shoes and when he had taken them off. Brunson asked McCulley multiple times, "Did you do this?," and if things had gotten "out of hand." Brunson also examined McCulley's hands, asked about cuts on his fingers, examined the bottoms of his feet, and even had him raise up his shirt to physically examine his torso. McCulley had already been photographed in this same manner at the hospital before he went to the interrogation room. Multiple police officers directed questions to McCulley that focused on the murder weapon.

At one point, Brunson explained to McCulley that the person closest to the victim was a natural suspect. McCulley responded "I'm probably in trouble." This statement later served as one of Brunson's transitions back to questioning McCulley about his timeline and about whether McCulley had been the one who stabbed his wife. McCulley was also told directly that his timeline did not make sense, and detectives asked him why he would leave the movie he was watching at such a climactic moment. Again, all of these questions were framed by McCulley's questions about when he could go home or to the hospital, and each

time those requests were rebuffed with statements indicating that McCulley could not go to either of those places and, moreover, could not leave until the officers were finished questioning him. Police finally read McCulley his rights almost four hours after they brought him to the interrogation room. *See Dowthitt*, 931 S.W.2d at 255–56 (reasoning that the length of time involved is an important factor to consider in determining whether a custodial interrogation occurred). We conclude that McCulley was in custody and the focus of the police's investigation well before 4:55 a.m., when police finally read McCulley his *Miranda* and article 38.22 warnings. *See id.*, 931 S.W.2d at 254 (holding that a suspect being the focus of police investigation is a relevant factor in determining whether suspect is in custody). But our analysis does not end with this conclusion.

The real question in McCulley's first point is whether the trial court erred by overruling his motion to suppress his statement that was the result of custodial interrogation without the benefit of police timely providing him with *Miranda* and article 38.22 warnings.

In this case, the trial judge made specific findings that McCulley's post-*Miranda* statement to police was voluntarily made. We find that the record and reasonable inferences from that record support this finding. Brunson administered appropriate *Miranda* and article 38.22 warnings prior to McCulley's statement that he had killed his wife. In the video of the interview, McCulley repeatedly said that he understood his rights and was willing to talk to the police. Thus, predicated on the legal conclusion that it was voluntarily made, we agree with the trial judge that McCulley's statement was admissible. *See Carter*, 309 S.W.3d at 37 (holding that trial court's finding that defendant's statement was voluntarily made supported trial court's admission of statement despite mid-*Miranda* warning). We overrule McCulley's first point.

Conclusion: Having overruled McCulley's points, we affirm the trial court's judgment.