2017 IL App (1st) 161711-U
No. 1-16-1711

THIRD DIVISION
June 28, 2017

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 15 CR 1843
	)	
DEVIN DOCKERY,	)	
	)	The Honorable
Defendant-Appellee.	)	Alfredo Maldonado,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's order suppressing the defendant's incriminating statements to the police reversed where the defendant was neither in custody, nor subject to interrogation by police.

¶ 2 The defendant, Devin Dockery, was charged by information with one count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)) and two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)). The trial court granted the defendant's motion to suppress statements on the basis that the officer failed to advise the

defendant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and the State now appeals. For the reasons that follow, we reverse the trial court's order suppressing the defendant's statements and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 At the hearing on the defendant's motion to suppress statements, Officer Jose Duran of the Chicago Police Department was the only witness called to testify. Duran's testimony was as follows. On January 19, 2015, at approximately 11:15 a.m., a total of 12 officers, including Duran, participated in the execution of a search warrant on the defendant's home in the basement apartment of 1251 South Fairfield. The defendant was the targeted individual of that warrant.

¶ 5 The officers entered the outer door of the apartment building after being let in by an individual exiting the door. Upon arriving at the door to the defendant's apartment, the officers knocked on the door, announced, "Chicago police search warrant," and then forced the door open. The officers immediately forced the doors open because they had observed someone watching out the window as they approached the apartment. Due to the small size of the apartment, only approximately eight officers made entry into the apartment.

¶ 6 Once inside the apartment, Duran saw the defendant standing in the kitchen, approximately 20 feet from the front door. Duran again announced that he was Chicago police and detained the defendant and conducted a protective pat down of the defendant. The defendant was no longer free to leave at that point. In addition, the defendant's girlfriend and two-year-old daughter were located in a bedroom. Other officers brought the defendant's girlfriend and daughter to where Duran was holding the defendant.

¶ 7 After the defendant was detained, another officer, Officer Daniel Honda showed the defendant the search warrant and informed the defendant that he was the target of the warrant.

The defendant then immediately turned to Duran and said, "Can I talk to you, Duran?" and "I'd like to talk to you." Duran told the defendant that he should speak with Honda because Honda was the affiant of the search warrant. The defendant stated that he would rather talk to Duran, so Duran agreed. The defendant also asked to step out of the apartment into the hallway, so that he was outside of the presence of his girlfriend. Duran obliged. In the hallway, it was just the defendant and Duran, standing a couple of feet away from the defendant's apartment. Duran was dressed in plain clothes with a vest indicating that he was a police officer. Duran did not have his gun drawn.

¶ 8 At that point, the defendant told Duran that he had a gun in the house and pleaded for Duran to take it but to let his girlfriend and daughter go. The defendant also informed Duran that the gun could be found in a brown box in the apartment hallway. Duran then asked the defendant why he had a gun, and the defendant responded that he had it for protection, because he had experienced a couple of problems on the block. Prior to the defendant telling Duran that he had a gun in a box in the hallway of his apartment, Duran had not asked the defendant any questions whatsoever. The only question Duran asked of the defendant during the conversation was why the defendant possessed the gun. During this conversation, the defendant appeared to converse with Duran easily and to understand what was happening. Only two to three minutes elapsed between the time the officers made entry into the defendant's apartment and the time that the defendant made his statements to Duran in the hallway.

¶ 9 At no point prior to any part of this conversation did Duran advise the defendant of his rights under *Miranda*. Duran testified that this was because he did not have a chance to do so. Duran also testified that he did not give the defendant his *Miranda* warnings prior to the defendant's request for the conversation because the defendant was not charged with anything at

that point, so there was no need to do so. It was only after the defendant told Duran about the gun and after the officers located the gun that the defendant was formally placed under arrest.

¶ 10 According to Duran, the defendant was 27 years old at the time of the warrant execution, and Duran knew the defendant to have had previous contact with law enforcement based on the fact that the defendant was on parole at the time.

¶ 11 After taking the matter under advisement, the trial court granted the defendant's motion to suppress. In doing so, the trial court relied on the facts that the officers had made forcible entry into the defendant's apartment, he was not free to leave, and he was informed that he was the subject of the search warrant to conclude that the defendant was in custody at the time of his statements to Duran. In addition, although the trial court acknowledged that the defendant approached Duran and requested to speak to Duran, the defendant was subject to police interrogation, because "it was plainly obvious at what direction [the defendant] was going to go, and what information he was about to offer ***."

¶ 12 The State filed a motion to reconsider, which the trial court denied for the same reasons that it granted the defendant's motion to suppress. The State then filed its certificate of impairment and brought this timely appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, the State argues that the trial court erred in concluding that the defendant's statements were made in violation of *Miranda* and, thus, granting the defendant's motion to suppress. In reviewing the trial court's determination on a motion to suppress, we give deference to the trial court's finding of facts, disturbing them only if they are against the manifest weight of the evidence. *People v. Slater*, 228 Ill. 2d 137, 149 (2008). The ultimate legal challenge posed to the trial court's ruling on the motion to suppress, however, is reviewed *de novo*. *Id.*

¶ 15 Under *Miranda*, to protect a defendant's fifth amendment right against self-incrimination, prior to any custodial interrogation of the defendant, he must be advised that he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has the right to have an attorney present, whether retained or appointed. *Miranda*, 384 U.S. at 444. Statements resulting from custodial interrogation that occurs prior to the giving of these warnings are not admissible evidence. *Id.*; *People v. Schoening*, 333 Ill. App. 3d 28, 32 (2002).

¶ 16 In explaining just when the requirement to provide *Miranda* warnings applies, the Supreme Court clarified that "[b]y custodial interrogation, we mean 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*, 384 U.S. at 444. In other words, the defendant must be both (1) in custody and (2) subject to interrogation/questioning by police. *U.S. v. Burns*, 37 F.3d 276, 280 (1994).

¶ 17 The State, on appeal, challenges both the trial court's finding that the defendant was "in custody" at the time he made the incriminating statements and the trial court's finding that he was subject to police interrogation. We agree with the State on both counts.

¶ 18 When examining whether a defendant is in custody, we first examine the circumstances surrounding the claimed interrogation to determine whether a reasonable person, under those circumstances, would have felt that he or she was at liberty to terminate the interrogation and leave. *Slater*, 228 Ill. 2d at 150. Our supreme court has identified six factors to consider in determining whether a statement was made in a custodial setting. These factors are:

> "(1) the location, time, length, mood, and mode of 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.*

¶ 19 The first factor—the location, time, length, mood, and mode of questioning—cuts in favor of a conclusion that the defendant was not in custody at the time he made the statements. The defendant made the statements in the hallway of his apartment building, in the middle of the day. The conversation was not extensive, lasting just long enough for the defendant to inform Duran that there was a gun in the apartment, its location, and the reason that the defendant possessed it. There is nothing in the evidence that suggests that the mood of the conversation was anything other than calm, and the trial court made no findings to the contrary. As for the mode of the questioning, the evidence establishes that there was no questioning of the defendant by Duran prior to the defendant revealing that he had a gun in the apartment. The only question asked of the defendant by Duran was why he had the gun, and there is nothing in the evidence suggesting that the question was asked in any forceful way.

¶ 20 The fact that Duran was the only officer present at the time that the defendant made his statement also cuts in favor of a conclusion that the defendant was not in custody. Although twelve officers were part of the team executing the warrant, only eight entered the defendant's apartment, and the defendant requested to speak to only Duran. Duran obliged and was the only officer present at the time that the defendant made his statements. It appears that the remaining officers were either inside the defendant's apartment or outside the building entirely at the time of the defendant's statements.

¶ 21 Although the defendant's family—his girlfriend and daughter—were inside the apartment at the time that the defendant told Duran that he had a gun, their absence during the defendant's

confession was at the express request of the defendant. Accordingly, this factor does not cut in favor of either a finding of custody or no custody.

¶ 22 Fourth, there were no indicia of formal arrest. There was no evidence that the defendant was handcuffed, booked, or fingerprinted. Duran testified that he did not have his gun drawn at the time of his conversation with the defendant in the hallway. This factor favors a conclusion that the defendant was not in custody

¶ 23 The fifth factor—the manner in which the defendant arrived at the location of the questioning—also cuts in favor of a conclusion that the defendant was not in custody. As discussed, at the defendant's request, he and Duran relocated to the hallway of his apartment building to have the conversation initiated by the defendant.

¶ 24 Finally, nothing in the evidence that the defendant's age, intelligence, or mental makeup in any way hindered his ability to understand his conversation with Duran or its implications. Duran testified that the defendant was 27 years old at the time of the conversation and that the defendant appeared to understand what was happening. Moreover, the defendant's own words suggest that he understood that he was making incriminating statements by admitting that he had a gun and that the presence of the gun could result in legal trouble. After all, in admitting that there was a gun in the apartment, the defendant asked that Duran let his girlfriend and daughter go, as if to avoid any ramifications of the gun's presence falling on them.

¶ 25 All of these factors either cut in favor of a conclusion that the defendant was not in custody or do not cut in favor of a finding of custody or non-custody. We note that the trial court and the defendant emphasize that the officers entered the defendant's apartment by force and that the defendant was detained while the officers executed the search warrant. While both of these facts are true, a defendant temporarily detained during the execution of a search warrant is not

typically considered to be in custody absent other indicia of custody. See *Burns*, 37 F.3d at 281. Here, as discussed, there are no other facts suggesting that the defendant was in custody at the time he made his inculpatory statements. Because the defendant was not in custody at the time of the statements, there was no need for *Miranda* warnings and the statements need not be suppressed.

¶ 26 We also note that the trial court relied on the cases of *People v. Fort*, 2014 IL App (1st) 120037, and *People v. Hannah*, 2013 IL App (1st) 111660, in making its finding that the defendant was in custody. Both of these cases are readily distinguishable from the present case. In *Fort*, the defendant, during the execution of a search warrant, was sequestered in her living room during the execution of a search warrant. *Fort*, 2014 IL App (1st) 120037, ¶ 14. During that time, the defendant requested that she be allowed to retrieve her baby from a bedroom. *Id.* The officer from whom she requested permission had to first seek clearance from his supervisor before permitting the defendant to get her child. *Id.* It was this very specific fact—the need to request permission to retrieve and care for her small child—that the court emphasized in holding that the defendant's freedom was so restricted that a finding of custody was warranted. *Id.* at ¶ 15 ("Police had deprived Fort of freedom of action in a very significant way, by restricting her ability to attend to her baby."). In the present case, there is no evidence that the defendant's freedom of action was so significantly restricted. Although he asked to speak to Duran and asked to do so, the evidence suggests that the request was relatively casual and quickly obliged by Duran without need to first obtain clearance from a supervisor. In addition, we hardly think that any restriction in speaking to an officer alone is of the same magnitude as restricting a mother's ability to tend to her small child.

¶ 27 In *Hannah*, the defendant was not just temporarily detained during the execution of the search warrant, but was also handcuffed during that time and while questioned by police, a fact that the appellate court found highly persuasive, as evidenced by the fact that it distinguished other similar cases based on the non-use of handcuffs in those cases. *Fort*, 2013 IL App (1st) 111660, ¶ 45. There is no evidence that the defendant in the present case was handcuffed at the time that he made his statements to Duran.

¶ 28 Moreover, even if we were to conclude that the defendant was in custody at the time that he made the statements, he was not subject to interrogation. Interrogation in the *Miranda* context includes not only express questioning but also "any words or actions on the part of the police, other than those normally accompanying arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect." *People v. Olivera*, 164 Ill. 2d 382, 391-92 (1995). This is consistent with the Supreme Court's statement that voluntary confessions are not inadmissible for want of *Miranda* warnings:

> "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

Miranda, 384 U.S. at 478.

¶ 29 Here, even assuming that the defendant was in custody at the time of his statements, the evidence is unequivocal in demonstrating that Duran did not ask any questions of the defendant before the defendant told Duran that he had a gun and that it was located in a box in the apartment hallway. Nor is there any evidence that Duran said or did anything else designed to elicit incriminating information from the defendant before the defendant made such statements. Rather, the evidence simply demonstrates that the defendant, of his own volition, requested to speak to Duran in the apartment building hallway, and Duran obliged. Upon reaching the hallway, before Duran could say anything, the defendant told Duran that he had a gun in the apartment and revealed its location. We can think of few circumstances that could have made the defendant's statement more voluntary.

¶ 30 The trial court's conclusion that it was "plainly obvious" what information (*i.e.*, incriminating) the defendant was going to offer is unsupported by the evidence. There is nothing in the record that indicates that Duran knew or should have known why the defendant asked to speak with him in the hallway or what the content of the conversation was going to be. For all Duran could have known at the time that the defendant made the request, the defendant could have intended to provide the police with incriminating evidence against his girlfriend or to reveal an embarrassing medical condition that required attention. Accordingly, the trial court's finding that it was "obvious" that the defendant was about to provide incriminating information to Duran is against the manifest weight of the evidence. See *People v. Montgomery*, 375 Ill. App. 3d 1120, 1124 (2007) ("A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." (Internal quotations omitted.)).

¶ 31 We note that the defendant's statement that he had the gun for purposes of protection was made in response to a direct question posed by Duran. Although the State, in its prayer for relief, requests a general reversal of the trial court's suppression order, the body of the State's argument makes clear that the gravamen of its complaint is the trial court's suppression of the defendant's statement that he possessed a gun and where it was located. In any case, as discussed above, because the defendant was not in custody at the time he made *any* of the statements, the officer's failure to advise him of his rights under *Miranda* does not warrant suppression of the defendant's statements.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the trial court's suppression order is reversed and this matter is remanded for further proceedings.

¶ 34 Reversed and remanded.