**[Cite as *State v. Dunn*, 2009-Ohio-3304.]**

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

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| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | C.A. CASE NO. 2008 CA 20 |
| v. | : | T.C. NO. 07 CR 0666 |
| KELLIE DUNN | : | (Criminal appeal from Common Pleas Court) |
| Defendant-Appellant | : | |
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**O P I N I O N**

Rendered on the 2nd day of July, 2009.

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FROELICH, J.

**{¶ 1}** Kellie Dunn pled no contest in the Clark County Court of Common Pleas to one count of illegal processing of drug documents, in violation of R.C. 2925.23(B)(1), after the trial court denied her motion to suppress evidence. The trial court found Dunn guilty and sentenced her to four years of community control.

**{¶ 2}** Dunn appeals from her conviction, raising three assignments of error, all related to the court's denial of her motion to suppress. We conclude that the trial court properly overruled the motion to suppress, and the trial court's judgment will be affirmed.

I

**{¶ 3}** The State's evidence at the suppression hearing established that Dunn was identified as a person of interest in the forgery of a prescription presented at a Kroger Pharmacy on November 6, 2006. For several months, Detective Ethan Cox, who was assigned to the case, was unable to get in contact with Dunn. In late June 2007, Dunn contacted Detective Cox after he left his business card at her parents' residence. Dunn was at her child's pediatrician's office talking on her cellular phone when this conversation occurred, and Detective Cox recorded the conversation with Dunn. In the conversation, Dunn admitted having altered a prescription for painkillers by modifying a prescription for 20 pills to 120 pills and then filling the modified prescription.

**{¶ 4}** On July 16, 2007, Dunn was indicted for illegal processing of drug documents. She pled not guilty and filed a motion to suppress the statements she made to Detective Cox. In January 2008, the court held a hearing on the motion, during which Detective Cox and Dunn testified and the court heard a tape recording of their conversation. At the conclusion of the hearing, the court orally denied the motion, stating:

**{¶ 5}** "The Court disagrees with [Dunn's] interpretation of what she said. [Dunn] specifically told the officer she did not have an attorney at that time. That she had talked to you, however, she couldn't afford your retainer.

**{¶ 6}** "I don't believe that she was under any indicia set forth in *Miranda* regarding

custodial interrogations. In fact, she was on her cell phone in her doctor's office.

**{¶ 7}** "I don't hear anything on the tape that would sound like coercion or threats in any way of any type. She obviously was in control of her end of the conversation.

**{¶ 8}** "She talked about past problems, did indicate to the officer she was having problems that would make it improper for her to continue talking.

**{¶ 9}** "Therefore, the motion is overruled. Evidence will be admitted."

**{¶ 10}** The court issued a written entry summarily denying the motion to suppress. Dunn subsequently pled no contest to illegal processing of drug documents and was sentenced accordingly. Dunn appeals from her conviction.

II

**{¶ 11}** As a preliminary matter, the State argues that Dunn has failed to provide us with an adequate record to review her assignments of error. App.R. 9(A) provides that "*** the transcript of the proceedings *** shall constitute the record on appeal in all cases. *** Proceedings recorded by means other than videotape must be transcribed into written form. ***" The audiotape was admitted as a State's exhibit, but was not transcribed into written form and filed with this Court.

**{¶ 12}** Appellate courts are split on this issue. Some courts have held that, because an audiotape was an exhibit and not part of the trial court proceedings, it was not required to be transcribed pursuant to App.R. 9(A). See, e.g., *State v. Carter*, Jefferson App. Nos. 04-JE-32, 07-JE-33, 2008-Ohio-6594, at ¶81; *State v. Wedge* (Dec. 21, 2001), Hamilton App. No. C-000747. Other courts have held that the contents of audiotapes admitted as exhibits fall within the App.R. 9(A) requirement that proceedings recorded by means other than videotape must be

transcribed into written form. See, e.g., *In re Grand Jury* (June 1, 1995), Washington App. Nos. 93CA09, 93CA10, 93CA12, affirmed on other grounds, (1996), 76 Ohio St.3d 236. We have not previously addressed this issue.

**{¶ 13}** Although the best practice is to have the attorneys agree that the evidentiary tape need not be transcribed simultaneously with its playing to the trier-of-fact, a court reporter does not need to transcribe such a tape. "Audiotapes which are admitted into evidence as exhibits are evidence, rather than a part of the trial proceedings. When appellate courts review these exhibits, we should review in the same state that the jury reviewed the evidence, i.e., as audiotape exhibits." *Carter* at ¶81. Thus, we turn to Dunn's assignments of error.

III

**{¶ 14}** Dunn's first assignment of error states:

**{¶ 15}** "THE DETECTIVE'S QUESTIONING OF APPELLANT CONSTITUTED INTERROGATION AND THE DETECTIVE VIOLATED APPELLANT'S RIGHTS BY NOT MIRANDIZING HER PRIOR TO THE INTERVIEW."

**{¶ 16}** Dunn contends that she was "significantly deprived of her freedom" during her telephone interview with Detective Cox such that she should have been advised of her rights pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. She asserts that she was "compelled to speak when she would have otherwise refused" because of Cox's persistence.

**{¶ 17}** In *Miranda*, the United States Supreme Court held that the prosecution may not use statements stemming from a defendant's custodial interrogation unless it demonstrates the use of procedural safeguards to secure the defendant's privilege against self-incrimination.

"Custodial interrogation" means questioning initiated by the police after the person has been taken into custody or otherwise deprived of his freedom in any significant way. *State v. Wilson*, Montgomary App. No. 22665, 2009-Ohio-1279, at ¶18, citing *State v. Steers* (May 14, 1991), Greene App. No. 89-CA-38. Police are not required to give *Miranda* warnings to everyone they question, even when that questioning takes place in a police station and the person being questioned is a suspect. *State v. Sosnoskie*, Montgomery App. No. 22713, 2009-Ohio-2327, at ¶45, citing *State v. Biros*, 78 Ohio St.3d 426, 440, 1997-Ohio-204. Whether a custodial interrogation has occurred depends upon whether a reasonable person in the suspect's position would have understood that there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Biros*, supra, citing *California v. Beheler* (1983), 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275.

**{¶ 18}** The following factors are relevant in determining whether a custodial interrogation occurred: 1) the location where the questioning took place; 2) whether the defendant was a suspect at the time the interview began (bearing in mind that *Miranda* warnings are not required simply because the investigation has focused); 3) whether the defendant's freedom to leave was restricted in any way; 4) whether the defendant was handcuffed or told he was under arrest; 5) whether threats were made during the interrogation; 6) whether the defendant was physically intimidated during the interrogation; 7) whether the police verbally dominated the interrogation; 8) the defendant's purpose for being at the place where the questioning took place; 9) whether neutral parties were present at any point during the questioning; and 10) whether the police took any action to overpower, trick, or coerce the defendant into making a statement. *Sosnoskie* at ¶45-55, citing *State v. Estepp* (Nov. 26, 1997),

Montgomery App. No. 16279.

**{¶ 19}** Under the facts presented in this case, we cannot conclude that Cox's interview with Dunn was a custodial interrogation. Dunn was at her child's pediatrician's office when she talked with Cox on her cell phone. Statements made during phone conversations do not occur as a result of a custodial interrogation, because there is no deprivation of freedom of action and an individual can terminate the conversation at any time by hanging up the phone. *State v. Stout* (1987), 42 Ohio App.3d 38, 41; *State v. Simmons*, Cuyahoga App. No. 85297, 2005-Ohio-3428, at ¶16; *State v. Whaley* (Mar. 25, 1997), Jackson App. No. 96CA779. Dunn could have ended the conversation at any time, no threats were made, she was not restrained in any way, she was conducting her own personal business, and she was in a neutral location with no connection to the authorities. Although Cox was persistent in trying to contact Dunn over several months, there is no evidence that he attempted to intimidate, overpower, trick, or coerce Dunn during their conversation. For all of these reasons, we conclude that Dunn's comments were not made in the course of a custodial interrogation and that Cox was not required to advise her of her *Miranda* rights at the outset of this conversation.

**{¶ 20}** The first assignment of error is overruled.

IV

**{¶ 21}** Dunn's second assignment of error states:

**{¶ 22}** "EVEN IF THE INTERROGATION WAS NON-CUSTODIAL, APPELLANT DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HER RIGHTS WHEN SHE MADE HER STATEMENTS TO THE DETECTIVES."

**{¶ 23}** Dunn contends that, even if her interrogation were non-custodial, her statements

were not knowing and voluntary because she had mental health issues at the time of the conversation, was off her medications because of a recent pregnancy, and was overwhelmed by the birth of her child, her father's death, and her recent involvement in an abusive relationship.

**{¶ 24}** Even if interrogation is not custodial and *Miranda* warnings are not required, a confession may be involuntary if the defendant's will was overborne by the totality of the facts and circumstances surrounding the giving of the confession. *State v. Porter*, 178 Ohio App.3d 304, 2008-Ohio-4627, at ¶14, citing *Dickerson v. United States* (2000), 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405; *State v. Pettijean* (2000), 140 Ohio App.3d 517. To determine whether the defendant's due process rights were violated, we must consider both the characteristics of the accused and the details surrounding the interrogation. *Pettijean*, 140 Ohio App.3d at 526. Factors to be considered include the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threats or inducements. *State v. Edwards* (1976), 49 Ohio St.2d 31, 40-41; *State v. Moore*, Greene App. No. 07CA093, 2008-Ohio-6238, at ¶13.

**{¶ 25}** Whether a defendant may have other issues on her mind, not be feeling well, be distracted or have similar conscious or subconscious factors affecting her, while perhaps relevant to the interpretation of her statements by a fact-finder, is not controlling as to voluntariness. A defendant's statement to police is voluntary absent evidence that her will was overborne and her capacity for self-determination was critically impaired due to coercive police conduct. *Colorado v. Spring* (1987), 479 U.S. 564, 574, 107 S.Ct. 851, 93 L.Ed.2d 954; *State v. Otte*, 74 Ohio St.3d 555, 562, 1996-Ohio-108.

**{¶ 26}** The trial court found that the tape did not demonstrate any coercive or threatening behavior by Cox and that Dunn "obviously was in control of her end of the conversation." We agree with this assessment. Although Dunn was somewhat tearful on the phone with Cox as she described her personal crises and efforts to straighten out her life, she answered very firmly when she disagreed with one of Cox's assertions. Dunn did recount her history of mental illness and drug addiction, her father's recent death, and the end of an abusive relationship, but there is no suggestion in the conversation that Dunn was not thinking clearly or was unduly influenced as a result of these circumstances. The conversation lasted only about five minutes. In sum, the recording of the conversation with Cox does not substantiate Dunn's claim that she was especially susceptible to pressure by Cox because of her mental illness and other personal crises, that he was overbearing, threatening, or coercive, or that the length and intensity of the conversation made her statement involuntary or unknowing.

**{¶ 27}** The second assignment of error is overruled.

V

**{¶ 28}** Dunn's third assignment of error states:

**{¶ 29}** "WHEN THE DETECTIVE INTERVIEWED APPELLANT HE HAD FOCUSED HIS INVESTIGATION, AND APPELLANT DID INVOKE HER RIGHT TO COUNSEL SO THE INTERVIEW SHOULD HAVE CEASED."

**{¶ 30}** Dunn claims that her statements should have been suppressed because she invoked her Sixth Amendment right to counsel.

**{¶ 31}** We begin with Dunn's premise that her right to counsel had attached at the time of her conversation with Cox. The Sixth Amendment right to counsel attaches only at or after

the time that adversarial judicial criminal proceedings have been initiated, whether by way of indictment, information, arraignment, or preliminary hearing. *Moore*, 2008-Ohio-6238, at ¶10, citing *Kirby v. Illinois* (1972), 406 U.S. 682, 689-690, 92 S.Ct. 1877, 32 L.Ed.2d 411. Although Cox had been trying to contact Dunn for several months, she had not yet been charged with a crime, let alone been arrested or detained, when Cox called her. While it is true that Sixth Amendment protections require neither custody nor interrogation, these rights do not attach until after a suspect is formally charged. E.g., *State v. McGhee* (1987), 37 Ohio App.3d 54.

**{¶ 32}** We also note that Dunn did not ask for an attorney, as she claims. A request for an attorney must be clear and unambiguous such that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to counsel. *United States v. Davis* (1994), 512 U.S. 452, 458, 114 S.Ct. 2350, 129 L.Ed.2d 362. If a suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, at ¶18, citing *Davis*, 512 U.S. 452. Moreover, the officers have no obligation to ask clarifying questions to ascertain if a suspect is attempting to invoke his right to counsel. *Davis*, 512 U.S. at 459.

**{¶ 33}** It is clear from the audiotape of the conversation, and the trial court specifically found, that Dunn did not ask for an attorney. In response to a question about whether further contact should be through her attorney or with Dunn directly, Dunn told Cox that she had talked with an attorney but could not afford to retain him. Dunn's comment about not being able to pay the attorney, who had apparently represented her on matters in the past, did not change the nature of the conversation, nor did it otherwise create any obligation on Cox's part to inform

Dunn of her right to counsel. See, e.g., *State v. Cochran*, Clark App. No. 2006-CA-87, 2007-Ohio-4545, at ¶59 (internal citations omitted).

**{¶ 34}** The third assignment of error is overruled.

VI

**{¶ 35}** The judgment of trial court will be affirmed.

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BROGAN, J. and HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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