[Cite as *State v. Severt*, 2010-Ohio-5389.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellant : C.A. CASE NO. 24074

v. : T.C. NO. 09 CR 3707

JAMES M. SEVERT : (Criminal appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 5th day of November, 2010.

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DONOVAN, P.J.

{¶ 1} Plaintiff-appellant State of Ohio appeals a decision of the Montgomery County Court of Common Pleas, General Division, granting defendant-appellee James M. Severt's motion to suppress. A hearing was held on said motion on April 15, 2010. On

April 20, 2010, the trial court issued a written decision sustaining the motion to suppress. On May 24, 2010, the court issued a second decision in which it extended the scope of exclusion to include not only the statements made by Severt, but also the physical evidence seized from his vehicle. The State filed a timely notice of appeal with this Court on June 1, 2010.

I

{¶ 2} The incident which forms the basis for the instant appeal occurred on the afternoon of November 2, 2009, when Agent Adam Ainsley, a loss prevention officer at Macy's in the Dayton Mall, observed Severt attempt to steal a fragrance set from the department store. Before Severt could leave with the stolen items, Agent Ainsley stopped him and brought him to a room in the store where shoplifting suspects were detained and questioned. Agent Ainsley placed Severt in handcuffs when they reached the detention room.

{¶ 3} While Severt was being detained, Officer Brandon Young of the Miami Township Police Department was dispatched to the department store. Officer Young testified that he had prior knowledge of Severt in connection with other thefts in the area. Officer Young also testified that Severt "was a known drug user."

{¶ 4} Upon his arrival at the detention room, Officer Young immediately asked Severt for his consent to search his vehicle. Severt responded by asking Officer Young why he wanted to search his car. Officer Young stated that he wanted to check his vehicle for any stolen merchandise or other illegal items. Severt then informed Officer Young that there was something illegal in his vehicle. Officer Young testified that he asked Severt

what that was, and Severt responded that he had a syringe and an empty heroin cap in his vehicle. It is undisputed that Officer Young did not provide Severt with his *Miranda* warnings prior to questioning him in the department store detainment room.

{¶ 5} Officer Young produced a consent to search form which Severt signed. Officer Young then arrested Severt for theft and placed him in the back of a marked police cruiser parked behind Severt's vehicle in the mall parking lot. At this point, Officer Young testified that he and Officer Ratay performed a search of Severt's vehicle. The search did not reveal any stolen merchandise; however, Officer Young discovered an empty syringe, an empty cap, and an elastic band. Officer Young then informed Severt that he was under arrest for drug abuse and possession of drug paraphernalia, and Severt was transported to the Miami Township Police Department.

{¶ 6} At the police station, Officer Young advised Severt of his *Miranda* rights. Severt signed a waiver of his *Miranda* rights, after which Severt told Officer Young that he had used heroin earlier in the morning, at about 9:00 a.m.

{¶ 7} On March 1, 2010, Severt was indicted for one count of possession of heroin, in violation of R.C. 2925.11(A), a felony of the fifth degree. At his arraignment on March 16, 2010, Severt stood mute, and the trial court entered a plea of not guilty on his behalf. Severt filed a motion to suppress on March 24, 2010. After a hearing was held on April 15, 2010, the trial court issued a written decision sustaining the motion to suppress. As stated previously, the court issued a subsequent decision which expanded the scope of its earlier decision thereby suppressing all of Severt's statements to Officer Young, as well as any physical evidence discovered in Severt's vehicle. In its second decision, the court stated

that Severt's consent to search his vehicle was "the fruit of the poisonous tree" because it was tainted by Officer Young's failure to give Severt the requisite *Miranda* warnings prior to interrogating him.

{¶ 8} It is from this judgment that the State now appeals.

II

{¶ 9} The State's sole assignment of error is as follows:

{¶ 10} "THE TRIAL COURT ERRED WHEN IT SUSTAINED SEVERT'S MOTION TO SUPPRESS BECAUSE SEVERT'S CONSENT TO SEARCH HIS VEHICLE WAS VOLUNTARY."

{¶ 11} In its sole assignment, the State contends that the trial court erred when it sustained Severt's motion to suppress and found that Severt's consent to search his vehicle was involuntary. Specifically, the State argues that *Miranda* warnings were unnecessary when Severt volunteered that he had illegal items in his vehicle because Severt was not in custody at the time he made the incriminating statements to Officer Young. Additionally, the State asserts that even if Severt was in custody for the purposes of *Miranda*, Severt's inculpatory statements were not the result of interrogation by Officer Young. Rather, the State argues that Severt's statements were voluntarily made without any coercion from Officer Young such that *Miranda* warnings were unnecessary.

{¶ 12} In regards to a motion to suppress, "the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653. The court of appeals must

accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac*, Montgomery App. No. 20662, 2005-Ohio-3733, citing *State v. Retherford* (1994), 93 Ohio App.3d 586. Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. Id.

{¶ 13} The warnings identified in *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, do not apply whenever police question a person. *State v. Biros*, 78 Ohio St.3d 426, 1997-Ohio-204. Rather, Miranda warnings apply only when a person is subjected to custodial interrogation. *Miranda* at 478-479; *Oregon v. Mathiason* (1977), 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714. In *Miranda*, the U.S. Supreme Court held the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates 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. Steers*, Greene App. No. 89-CA-38.

{¶ 14} In *State v. Estepp*, Montgomery App. No. 16279, we reiterated the controlling standard for deciding whether an individual is in custody:

{¶ 15} "The determination whether a custodial interrogation has occurred requires an inquiry into 'how a reasonable man in the suspect's position would have understood his situation.' *** [T]he ultimate inquiry is simply whether there is a

'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Citing *State v. Biros* (1997), 78 Ohio St.3d 426. Neither an officer's subjective intent nor the defendant's subjective belief is relevant to this analysis. *State v. Hopfer* (1996), 112 Ohio App.3d 521, 546. Thus, whether Wilson felt free to leave and whether the police officers considered the interaction an interview rather than an interrogation are irrelevant considerations. In *Estepp*, supra, we noted that the following factors have been used to assess how a reasonable person in the defendant's situation would have reacted to the questioning:

{¶ 16} "1) Where did the questioning take place, i.e. was the defendant comfortable and in a place one would normally feel free to leave?

{¶ 17} "2) Was the defendant a suspect at the time the questioning began (bearing in mind that *Miranda* warnings are not required simply because the investigation had focused);

{¶ 18} "3) Was the defendant's freedom to leave restricted in any way;

{¶ 19} "4) Was the defendant handcuffed or told he was under arrest;

{¶ 20} "5) Were threats made during the interrogation;

{¶ 21} "6) Was the defendant physically intimidated during the questioning;

{¶ 22} "7) Did the police verbally dominate the interrogation;

{¶ 23} "8) What was the defendant's purpose for being at the place where the questioning took place;

{¶ 24} "9) Were neutral parties present at any point during the questioning;

{¶ 25} "10) Did the police take any action to overpower, trick, or coerce the defendant into providing any statement?" See, *State v. Smith*, Franklin App. No.

96AP10-1281, *State v. Evins*, Montgomery App. No. 15827, and *State v. Brown* (1993) 91 Ohio App.3d 427.

{¶ 26} The State argues that Severt was not in police custody since he was initially stopped and detained by Ainsley, a loss prevention officer employed by Macy's, rather than a police officer. In support of its argument, the State relies on *State v. Bolan* (1971), 27 Ohio St.2d 15, 18, wherein the Ohio Supreme Court held that the duty of giving *Miranda* warnings is limited to employees of governmental law enforcement agencies or those acting at the direction of governmental agencies. Employees of private businesses or organizations have no duty to provide *Miranda* warnings to individuals suspected of having committed a crime who have been detained on their premises.

{¶ 27} At issue in *Bolan* were the incriminating statements made by the suspect to the private security guard who had initially detained him, not the police officer who arrived at the scene after the questioning had ended. The private security guard was not required to provide the suspect with *Miranda* warnings prior to questioning him. Pursuant to the Ohio Supreme Court's decision in *Bolan*, Agent Ainsley was not required to provide Severt with *Miranda* warnings when he stopped and detained him for shoplifting.

{¶ 28} *Bolan*, however, is distinguishable from the facts in the instant case since the incriminating statements made by Severt were given in response to questioning from Officer Young, not Agent Ainsley. In fact, the record establishes that once he arrived at the detention room where Severt was being held, Officer Young took over the interview, and Agent Ainsley did not participate in any further

questioning. Severt was handcuffed and not free to leave the small detention area. Accordingly, we conclude that upon Officer Young's arrival and questioning of Severt in the holding room, Severt was "in custody" for the purposes of *Miranda*.

{¶ 29} Next, we must determine whether Officer Young's questioning of Severt constituted an "interrogation" for the purposes of *Miranda*. In that circumstance, any police interrogation must be preceded by *Miranda* warnings and the subject's waiver of the rights those warnings involve. *State v. Wagonner*, Montgomery App. No. 21245, 2006-Ohio-844.

{¶ 30} In *Rhode Island v. Innis* (1980), 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, the U.S. Supreme Court pointed out that in order to constitute "interrogation" the police conduct "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id*., at 300. The U.S. Supreme Court further stated:

{¶ 31} "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to

interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." *Id*., at 301-302 (Emphasis in the original).

{¶ 32} Officer Young provided the following testimony regarding his questioning of Severt in the detention room:

{¶ 33} "The State: All right. Now, at that point when you first encounter Mr. Severt, this is going to be a misdemeanor, felony, what information and intentions do you have when you first encounter Mr. Severt?

{¶ 34} "Officer Young: It was a misdemeanor theft that I had prior knowledge that he was known as a thief in the area and that he was a known drug user.

{¶ 35} "Q: All right. And he's cuffed.

{¶ 36} "A: Right.

{¶ 37} "Q: What do you say to him?

{¶ 38} "A: I asked him if I could have consent to search his vehicle?

{¶ 39} "Q: And why did you want consent to search his vehicle?

{¶ 40} "A: To see if there was more stolen merchandise in the vehicle since he had been down at Elder-Beerman's and was trying to steal down there also.

{¶ 41} "Q: With as much detail as you can recall, what did Mr. Severt say back to you, if anything?

{¶ 42} "A: He asked me why I wanted to search his vehicle?

{¶ 43} "Q: And what did you say?

{¶ 44} "A: I said I wanted to check for some stolen merchandise and see if there was any other illegal (sic) in the car that shouldn't be in the car.

{¶ 45} "Q: What, if anything, did Mr. Severt say back?

{¶ 46} "A: He hesitated and then he said that there was some illegal items in the car."

{¶ 47} Initially, we note that a police officer's request to a defendant for consent to search his vehicle does not constitute an interrogation. *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631. Thus, *Miranda* warnings were not necessary before the request to search was made. We are not persuaded that Officer Young's response to Severt's question that he wanted to search the vehicle in order to check for stolen merchandise and/or other illegal items was a statement designed to elicit an incriminating response from Severt regarding the contents of his vehicle.

{¶ 48} Moreover, Severt's admission regarding the presence of contraband in his vehicle made immediately after being asked for consent supplied Officer Young with probable cause to search the vehicle. Probable cause has been defined as a "fair probability" that criminal activity is afoot. *State v. George* (1989), 45 Ohio St.3d 325. In the instant case, Severt's statement that "there was some illegal items in the car," gave Officer Young the necessary probable cause to search the vehicle for evidence of a crime. Thus, the trial court erred when it sustained Severt's motion to suppress.

{¶ 49} The State's sole assignment of error is sustained.

IV

{¶ 50} The State's sole assignment having been overruled, the judgment of the trial court is reversed, and this matter is remanded for proceedings consistent with this opinion.

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FAIN, J. and FROELICH, J., concur.

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