[Cite as *State v. Chenoweth*, 2011-Ohio-1276.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2010 CA 14
v.	:	T.C. NO. 09CR458B
JASON M. CHENOWETH	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 18th day of March, 2011.

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BROGAN, J. (by assignment)

{¶ 1} Jason Chenoweth appeals from his conviction in the Miami County Common Pleas Court of burglary. Chenoweth entered a no contest plea to the charge when his pretrial motion to suppress his statement to the police was overruled.

{¶ 2} Chenoweth's prosecution resulted from an investigation into two separate burglaries of the residence of Kathleen and Meghan Shively in September 2009. Shortly after eight o'clock on the morning of September 10th , Detective Mike Noll of the Huber Heights Police Department and Detective Sergeant John Kissee went to Chenoweth's home. They were accompanied by two road patrol officers. Chenoweth invited the officers into his home. (T. 17, suppression hearing). Noll told Chenoweth he was looking for Peter Schwab who Meghan Shively had dropped off at Chenoweth's home. Noll asked Chenoweth where Meghan Shively's property was because Ms. Shively reported the burglar had stolen her diamond engagement ring and some other items and he suspected Chenoweth of some involvement. (T. 5). Chenoweth did not respond to Noll's question and denied knowing Schwab's whereabouts. Chenoweth told Noll to ask Schwab where the victim's property was.

{¶ 3} Noll testified that he and Chenoweth then moved to the kitchen and sat at the kitchen table. Noll testified he told Chenoweth that all he wanted was the truth. Noll testified Chenoweth told him that Schwab came to his home earlier that morning and told Chenoweth he was going to burglarize Meghan Shively's home since she was going to be gone for a brief time. Noll testified he asked Chenoweth to give him a written statement and Chenoweth obliged. Noll said he asked Chenoweth how Schwab got to Meghan Shively's house and Chenoweth stated he took him there. Noll testified, with this admission by Chenoweth, he arrested him.

{¶ 4} In overruling Chenoweth's suppression motion, the trial court found that Chenoweth was not in custody for purposes of *Miranda v. Arizona* (1966), 384 U.S. 436, at

the time he made his incriminating statements. The court noted that it considered the fact that Chenoweth was in his own home, the number of officers present, the length and nature of the questioning, and the fact there were no threats or other efforts of intimidation employed by the police.

{¶ 5} In his first assignment of error, Chenoweth argues that the trial court erred in concluding that he was not in custody when he was questioned and, therefore, the court erred in admitting his confession. Chenoweth argues that he was in custody for *Miranda* purposes because he was confronted by five police officers in the early morning hours and accused of committing a burglary. Chenoweth argues that the whole scenario was one of a show of force, shock and awe, intimidation and represented a custodial setting to any reasonable man. (Brief at 4).

{¶ 6} The State argues that the trial court's ruling was correct because Chenoweth could not reasonably believe he was under arrest prior to his admission of culpability in the burglary. The State notes that while four officers were present in Chenoweth's home, the record reveals only Detective Noll questioned Chenoweth about his home without officers making any display of weapons, threat, or force. See *State v. Holt*, 119 Ohio Misc. 2d 1, 13-14, 2002-Ohio-3345. The mere presence of police officers does not render a suspect powerless, particularly when the suspect is within the familiar surroundings of his own home. *State v. Hopfer* (1996), 112 Ohio App.3d 521.

{¶ 7} The facts in this case are not in dispute, the legal conclusion made by the trial court is. We find that the trial court appropriately found that appellant was not in custody for *Miranda* purposes at the time he made his admissions. The appellant was at home and

on familiar ground. The duty to advise a suspect of *Miranda* rights does not arise until questioning rises to the level of a "custodial interrogation." *State v. Roe* (1989), 41 Ohio St.3d 18, 21. The procedural safeguards adopted in *Miranda* become necessary once the suspect is taken into custody "or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, supra. The test is whether a reasonable person under the circumstances would believe that he is under arrest. *Berkemer v. McCarthy* (1984), 468 U.S. 420. The courts of this state have generally found that an individual is not in custody when questioning takes place in the individual's home and the individual is free to move about and is questioned by an officer over a brief period of time. There was no evidence of threats or intimidation made by the police officers toward appellant at anytime. The court could conclude that a person in appellant's situation would not have believed he was under arrest prior to his interrogation. The first assignment of error is overruled.

{¶ 8} In his second assignment of error, Chenoweth contends his trial lawyer was constitutionally ineffective for not objecting to leading questions of Detective Noll and by not calling Chenoweth to testify regarding his state of mind when the police entered his home and questioned him. Chenoweth fails to specifically refer us to where in the record the prosecutor improperly led his witness. He contends counsel should have objected to certain testimony but fails to be more specific. (See appellant's brief at page 4). The record does not disclose why Chenoweth did not testify and this record fails to disclose any prejudice to him by his failure to do so. In any event, appellant's state of mind is not critical, since the test for custody is an objective test, that is, whether a reasonable person in the defendant's shoes would have believed himself under arrest at the time of the

questioning. See *California v. Beheler* (1983), 463 U.S. 1121, 1125. The appellant's second assignment of error is overruled.

{¶ 9} The judgment of the trial court is affirmed.

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FROELICH, J. and HALL, J., concur.

(Hon. James A. Brogan, retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

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