

[Cite as *State v. Sell*, 2015-Ohio-1940.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO

*Plaintiff-Appellant*

V.

AMANDA L. SELL

*Defendant-Appellee*

.....

Appellate Case No. 26458

Trial Court Case No. 2014-CR-1726

(Criminal Appeal from  
Common Pleas Court)

## OPINION

Rendered on the 15th day of May, 2015.

MATHIAS H. HECK, JR., by ANDREW T. FRENCH, Atty. Reg. No. 0069384, Assistant  
Prosecuting Attorney, Montgomery County Prosecutor's Office, Appellate Division,  
Montgomery County Courts Building, 301 West Third Street, Dayton, Ohio 45402  
Attorney for Plaintiff-Appellant

CHARLES L. GROVE, Atty. Reg. No. 0029144, Assistant Public Defender, 117 South Main Street, Suite 400, Dayton, Ohio 45422  
Attorney for Defendant-Appellee

WELBAUM, J.

{¶ 1} Plaintiff-appellant, the State of Ohio, appeals from the judgment of the Montgomery County Court of Common Pleas sustaining, in part, defendant-appellee Amanda L. Sell's motion to suppress. The appeal is brought pursuant to R.C. 2945.67(A). The State contends the trial court erred in suppressing statements Sell made to police on the basis of a *Miranda* violation. Specifically, the State challenges the trial court's finding that Sell was subjected to a custodial interrogation. For the reasons outlined below, the judgment of the trial court will be reversed and remanded for further proceedings.

### **Facts and Course of Proceedings**

{¶ 2} On June 9, 2014, Sell was indicted on one count of aggravated possession of drugs in violation of R.C. 2925.11(A), a felony of the fifth degree. The charge arose from statements Sell made during a traffic stop of a vehicle in which she was the front-seat passenger. It is undisputed that during her encounter with police, Sell admitted to owning the contents of a purse that contained methylenedioxymethamphetamine ("MDMA").

{¶ 3} Following her indictment, Sell filed a motion to suppress arguing the police unlawfully stopped and searched the vehicle in which she was traveling. Sell also argued that the police unlawfully questioned her about the purse located in the trunk of the vehicle without first advising her of her *Miranda* rights. On October 6, 2014, the trial court held a hearing on Sell's motion to suppress. During the hearing, the State presented testimony from Officer Andrew DiSalvo and Officer John Jung of the Kettering

Police Department. The officers gave the following testimony about the events surrounding the traffic stop and Sell's eventual arrest.

{¶ 4} DiSalvo testified that on March 29, 2014 at 2:34 a.m., he was on patrol when he observed a vehicle on Stroop Road in Kettering, Ohio weaving through traffic lanes without signaling. In response, DiSalvo testified that he initiated a traffic stop and approached the vehicle. Upon approaching the vehicle, DiSalvo testified that he noticed the driver had bloodshot, glassy eyes, smelled of alcohol, and appeared intoxicated. DiSalvo also testified that he smelled the odor of marijuana emanating from the vehicle.

{¶ 5} After smelling what he believed to be marijuana, DiSalvo testified that he asked the driver: "How much marijuana is in the car?" to which the driver responded: "Not much." Trans. (Oct. 6, 2014), p. 8. DiSalvo then testified that he decided to administer a field sobriety test on the driver and to conduct a canine sniff on the vehicle. However, to save time, DiSalvo testified that he first called for back-up assistance. DiSalvo then checked the occupants' identifications while he waited for the other officers to arrive.

{¶ 6} Shortly after placing the call for back-up, Officers Jung, Schwarber, and Burke arrived at the scene. Upon the officers' arrival, DiSalvo testified that he had Sell, as well as the driver and two backseat passengers, exit the vehicle in order to conduct the canine sniff. During this time, DiSalvo testified that all of the passengers were told they were not free to leave. DiSalvo then testified that his canine partner gave a positive indication for marijuana in the vehicle.

{¶ 7} Following the positive identification on the vehicle, Officer Jung testified that he began to search the vehicle for drugs while DiSalvo performed a field sobriety test on the driver. While searching the vehicle, Jung testified that he found a purse in the trunk

containing a plastic baggie with a rock inside that looked like drugs. According to Jung, after he found the drugs, he walked over to DiSalvo and told him what he had found.

{¶ 8} Upon learning of the drugs found by Jung, DiSalvo asked the driver what it was. In response, the driver informed him it was “Molly,” a slang term for MDMA. The driver then told DiSalvo the drugs found in the purse were Sell’s and that she had purchased the drugs from his brother. DiSalvo testified that prior to asking the driver about the drugs, the driver had already been placed under arrest for OVI and waived his *Miranda* rights.

{¶ 9} After learning that the drugs may have belonged to Sell, DiSalvo asked Sell if the purse was hers. According to DiSalvo, Sell told him the purse, as well as everything inside the purse, was hers. Both officers testified that Sell was never advised of her *Miranda* rights. DiSalvo also testified that Sell was not free to leave when he asked her about the purse.

{¶ 10} Following the hearing, the trial court issued a written decision that sustained in part and overruled in part Sell’s motion to suppress. In so holding, the trial court found the traffic stop was constitutionally valid and that Sell was lawfully detained during the stop. The trial court also found the search of the vehicle was valid and that the evidence seized from the vehicle, including the purse and drugs, were admissible. Therefore, the portion of Sell’s motion that sought to suppress the physical evidence was overruled.

{¶ 11} In contrast, the portion of Sell’s motion that sought the suppression of her statements to police was granted. Specifically, the trial court determined that Sell should have been given *Miranda* warnings because she was in custody at the time the officers questioned her about the purse. In so holding, the trial court relied on the fact that

Officers DiSalvo and Jung testified that Sell was not free to leave when they asked whether she owned the purse. Accordingly, the trial court ruled that Sell's statements were obtained in violation of her constitutional rights and inadmissible.

{¶ 12} Pursuant to R.C. 2945.67(A), the State now appeals from the trial court's decision suppressing Sell's statements, raising one assignment of error for review. The State's sole assignment of error is as follows:

BECAUSE SELL WAS NOT "IN CUSTODY" FOR *MIRANDA* PURPOSES WHEN SHE WAS DETAINED DURING A TRAFFIC STOP, POLICE WERE NOT REQUIRED TO ADVISE HER OF HER RIGHTS BEFORE QUESTIONING HER ABOUT THE PURSE THAT WAS FOUND IN THE TRUNK OF THE VEHICLE. THE TRIAL COURT ERRED, THEREFORE, IN FINDING OTHERWISE AND IN SUPPRESSING SELL'S STATEMENTS.

{¶ 13} Under its single assignment of error, the State contends the trial court erred in suppressing Sell's statements regarding her ownership of the purse and its contents on the basis of a *Miranda* violation. Specifically, the State claims the trial court incorrectly determined Sell was subject to a custodial interrogation requiring *Miranda* warnings because she was not in custody when questioned by the police.

{¶ 14} Appellate review of a decision on a motion to suppress presents a mixed question of law and fact. A court of appeals reviews de novo a trial court's legal conclusions with respect to a motion to suppress, but defers to its factual findings so long as the findings are supported by competent, credible evidence. *State v. Rhines*, 2d Dist. Montgomery No. 24203, 2011-Ohio-3615, ¶ 16; *Columbus v. Montgomery*, 10th Dist.

Franklin No. 09AP-537, 2011-Ohio-1332, ¶ 33.

{¶ 15} “The right to [*Miranda*] warnings is grounded in the Fifth Amendment’s prohibition against compelled self-incrimination.” *State v. Strozier*, 172 Ohio App.3d 780, 2007-Ohio-4575, 876 N.E.2d 1304, ¶16 (2d Dist.), citing *Moran v. Burbine*, 475 U.S. 412, 420, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). “The procedural safeguards prescribed by *Miranda* apply only when persons are subjected to ‘custodial interrogation.’” *State v. Thomas*, 2d Dist. Montgomery No. 20643, 2005-Ohio-3064, ¶ 27, citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). “ ‘Custodial interrogation’ means questioning initiated by the police after the person has been taken into custody or otherwise deprived of his freedom to the degree associated with a formal arrest.” (Citations omitted.) *State v. Vineyard*, 2d Dist. Montgomery No. 25854, 2014-Ohio-3846, ¶ 32.

{¶ 16} “In order to determine whether a person is in custody for purposes of receiving *Miranda* warnings, courts must first inquire into the circumstances surrounding the questioning and, second, given those circumstances, determine whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave.” *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 27, citing *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). “Once the factual circumstances surrounding the interrogation are reconstructed, the court must apply an objective test to resolve ‘the ultimate inquiry’ of whether there was a ‘ “formal arrest or restraint on freedom of movement” ’ of the degree associated with a formal arrest.” *Id.*, quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983), quoting *Oregon v. Mathiason*, 429 U.S. 492,

495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

{¶ 17} “The factors a court should consider in applying this reasonable person test include whether the encounter takes place in surroundings that are familiar to the suspect; the number of law enforcement officers present, as well as their conduct and demeanor; the degree of physical restraint imposed; and the duration and character of the interrogation.” (Citation omitted.) *State v. Farrell*, 2d Dist. Miami No. 99-CA-24, 1999 WL 812249, \*3 (Oct. 8, 1999). We note that “a police officer’s subjective intent to arrest a suspect is immaterial to the issue of whether the suspect is in custody for *Miranda* purposes, unless and until that intent is communicated to the suspect.” (Citation omitted.) *State v. Cross*, 2d Dist. Montgomery No. 25838, 2014-Ohio-1534, ¶ 13. Rather, the issue is whether a reasonable person in the suspect’s situation would have understood that he was in custody. *Id.*

{¶ 18} Individuals are not “in custody” for purposes of *Miranda* during a typical investigatory detention such as a routine traffic stop. *State v. Cundiff*, 2d Dist. Montgomery No. 24171, 2011-Ohio-3414, ¶ 60, citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). “An individual is subject to an investigatory detention when, in view of all the circumstances surrounding the incident, by means of physical force or show of authority, a reasonable person would have believed that he was not free to leave or was compelled to respond to questions.” (Citations omitted.) *State v. Hardy*, 2d Dist. Montgomery No. 24114, 2011-Ohio-241, ¶ 34. During an investigatory detention, “the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions” without the need to first advise the detainee of his

*Miranda* rights. *Berkemer* at 439-440. “However, if the individual is, during the course of the detention, ‘subjected to treatment that renders him “in custody” for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.’ ” *State v. Keggan*, 2d Dist. Greene No. 2006 CA 9, 2006-Ohio-6663, ¶31, citing *Berkemer* at 440. (Other citation omitted.)

{¶ 19} In this case, the trial court determined Sell was in custody for purposes of *Miranda* because Officer DiSalvo and Officer Jung testified that she was not free to leave when they asked her about the purse. This, however, is an insufficient basis for finding that Sell was in custody, as the testimony relied upon by the trial court does not demonstrate that Sell was placed under arrest or that Sell’s freedom was restrained in a manner that would have led a reasonable person in her position to believe they were under arrest. See *Vineyard*, 2d Dist. Montgomery No. 25854, 2014-Ohio-3846 at ¶ 32; *Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48 at ¶ 27.

{¶ 20} While the record indicates that both officers testified that Sell was neither physically detained nor under arrest when they asked her about the purse, see Trans. (Oct. 6, 2014), p. 15, 32, and 40, Sell points to the following conflicting testimony given by DiSalvo during his direct examination:

STATE: Okay. Now during the K-9 sniff, none of the occupants of the vehicle were free to leave the scene, correct?

DISALVO: *The driver and the front seat passenger, they were all told they were under arrest. I told them what was going on. And I told the two occupants in the back who claimed they did not know the two in the front. They were just getting a ride. I*



said, “Okay. Whatever we find in the vehicle, you know, once everything works out here if we don’t find anything you’re free to leave. So if you want to start calling a ride now, you can.” But while we’re doing a sniff of the vehicle, no, they’re not free to leave because we have to make sure we don’t find anything illegal or dangerous in the vehicle.

(Emphasis added.) Trans. (Oct. 6, 2014), p. 11-12.

{¶ 21} As the trier of fact, it was incumbent upon the trial court to resolve this conflict in the testimony. *State v. Davis*, 2d Dist. Clark No. 2947, 1993 WL 65756, \*4 (Mar. 10, 1993); *State v. King*, 2d Dist. Montgomery No. 18463, 2002 WL 1332565, \*3 (June 14, 2002). The trial court, however, failed to resolve the conflict, as it made no factual finding as to when Sell was informed of her arrest. Without a factual finding as to the time of arrest, we cannot determine whether Sell was in custody for purposes of *Miranda*.

{¶ 22} If Sell was told she was under arrest during the canine sniff, which was before the officers questioned her, the *Miranda* protections would clearly apply and her statements should be suppressed. On the other hand, if Sell was not informed of her arrest until after she was questioned about the purse, the *Miranda* protections would apply only if, prior to the questioning, Sell’s freedom was restrained in a manner that would have led a reasonable person in her position to believe they were under arrest.

{¶ 23} In analyzing the issue of whether a reasonable person in Sell’s position would believe they were under arrest, we note that Sell was the front-seat passenger of a vehicle that was initially stopped for a traffic violation. Upon Officer DiSalvo smelling

marijuana in the vehicle, and once the driver admitted to having some marijuana in the vehicle, DiSalvo called for back-up and three more officers arrived on the scene. Sell, as well as the driver and the two back-seat passengers, were then ordered out of the vehicle so that a canine sniff could be conducted. Thereafter, Sell stood off the road in a nearby yard with the other occupants while the canine sniff and subsequent search of the vehicle was conducted. During this time, Sell was not handcuffed or physically restrained in anyway; however, the officers instructed Sell to sit on the curb for safety purposes because she was intoxicated and kept falling over. Assuming Sell had not been told she was under arrest prior to being questioned about the purse, nothing in the record would have led a reasonable person in her situation to believe they were under arrest. Accordingly, the custody determination hinges on when the officers informed Sell of her arrest, and we have no finding of fact on that issue and conflicting testimony in the record.

{¶ 24} In light of the foregoing, because the trial court suppressed Sell's statements on insufficient grounds the judgment is reversed. However, because the trial court did not make a necessary factual finding to determine whether Sell was in custody for purposes of *Miranda*, the matter is remanded for the trial court to make the necessary finding and render its decision accordingly.

.....

FAIN, J., concurs.

DONOVAN, J., dissenting:

{¶ 25} I disagree. In my view, the trial court resolved the contested facts and determined Sells was in custody when questioned. There is ample evidentiary support for this conclusion in the record. I would affirm.

.....

Copies mailed to:

Mathias H. Heck, Jr.  
Andrew T. French  
Charles L. Grove  
Hon. Barbara P. Gorman