[Cite as *State v. Barker*, 2017-Ohio-596.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
BRANDON BARKER	:	Case No. 16CA49
	:	
Defendant - Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 16-CR-92D
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT:	February 2, 2017

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
DANIEL M. ROGERS Richland County Prosecutor's Office 38 S. Park Street Mansfield, Ohio 44902	WILLIAM C. FITHIAN, III 111 N. Main Street Mansfield, Ohio 44902

Baldwin, J.

STATEMENT OF THE FACTS AND CASE

{¶1} On August 31, 2015, Mansfield police investigated a break-in at the NAPA auto parts store in Mansfield. A cigarette lighter recovered at the scene was submitted to the crime lab for DNA testing. On October 2, 2015, a DNA analysis report identified appellee as the source of the major DNA profile recovered from the lighter.

{¶2} Appellee was sentenced to prison on unrelated charges on October 12, 2015. He began serving his sentence at the Belmont Correctional Institution in St. Clairsville, Ohio. Det. Ronald Packer of the Mansfield Police Department contacted the institutional inspector and asked to set up an appointment with appellee, "if Mr. Barker was agreeable to it." Tr. 5.

{¶3} On December 4, 2015, Det. Packer traveled to the prison to interview appellee. He was escorted to a conference room by prison guards. Appellee was issued a pass which was sent to his housing unit. With the pass, appellee was free to come to the administrative building to meet with Det. Packer.

{¶4} Appellee arrived alone and was not shackled or restrained. He sat at the conference table across from Det. Packer. Det. Packer did not read appellee his *Miranda* rights prior to questioning appellee. Appellee denied ever being inside the NAPA auto parts store. Det. Packer asked appellee if he could explain his DNA being found on a cigarette lighter recovered at the scene. Appellee then confessed to throwing a rock to break the glass door of the store. When Det. Packer asked appellee why he broke into the store, appellee responded that he had a drug habit.

{¶5} Appellee refused to provide a taped statement, telling Det. Packer, "Why give a taped statement when you know I did it?" Tr. 8. Appellee ended the questioning by telling Det. Packer that he thought he should have an attorney. Det. Packer told appellee that he was free to go, and followed appellee from the conference room. The interview lasted 15-20 minutes.

{¶6} Appellee was indicted by the Richland County Grand Jury on February 10, 2016, with one count of breaking and entering in violation of R.C. 2911.13(A). He filed a motion to suppress the statements he made to Det. Packer on the basis that he was not Mirandized prior to the interview. Following a hearing, the trial court granted the motion, finding that the detective did not tell appellee that he could leave whenever he wanted to, and the detective confronted appellee with DNA evidence of his guilt. Based on these factors, the court concluded that the questioning of appellee resulted in some additional restriction of appellee's freedom inside the prison, and *Miranda* warnings were required.

{¶7} The State appeals the ruling on the motion to suppress, assigning a single error:

{¶8} "THE TRIAL COURT ERRED IN GRANTING APPELLANT'S [SIC] MOTION TO SUPPRESS APPELLANT'S [SIC] STATEMENTS TO DETECTIVE PARKER AT BELMONT CORRECTIONAL INSTITUTION ON DECEMBER 4, 2015."

{¶9} The State argues that the court erred in suppressing the statements appellee made to Det. Packer. The State argues that appellee was not in custody and therefore *Miranda* warnings were not required.

{¶10} Before a suspect may be subjected to a custodial interrogation, he must be advised that he has the right to remain silent, that his statements can be used against

him and that he has the right to consult with or have an attorney present. *Miranda v. Arizona*, 384 U.S. 436, 467–471, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Custodial interrogation is "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." *Id*. at 444. A person is considered in custody for purposes of *Miranda* when he is placed under formal arrest or his freedom of action is restrained to a degree associated with a formal arrest. *Minnesota v. Murphy*, 465 U.S. 420, 434, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). When determining whether an individual is in custody, the relevant inquiry is whether a reasonable person in the individual's position would have believed that he or she was not free to leave given the totality of the circumstances*. Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

{¶11} Imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*. *Howes v. Fields*, 132 S.Ct. 1181, 1190, 182 L.Ed.2d 17 (2012). When a prisoner is questioned, the determination of whether the prisoner is in custody should focus on all of the features of the interrogation. *Id.* at 1192. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. *Id.* An inmate who is removed from the general prison population for questioning and is subjected to treatment in connection with the interrogation "that renders him 'in custody' for practical purposes ... will be entitled to the full panoply of protections prescribed by Miranda." *Id.*

{¶12} In determining that the prisoner in *Howes* was not in custody for purposes of *Miranda,* the United States Supreme Court examined the totality of the circumstances surrounding his interrogation:

The record in this case reveals that respondent was not taken into custody for purposes of Miranda. To be sure, respondent did not invite the interview or consent to it in advance, and he was not advised that he was free to decline to speak with the deputies. The following facts also lend some support to respondent's argument that Miranda's custody requirement was met: The interview lasted for between five and seven hours in the evening and continued well past the hour when respondent generally went to bed; the deputies who questioned respondent were armed; and one of the deputies, according to respondent, "[u]sed a very sharp tone," App. to Pet. for Cert. 76a, and, on one occasion, profanity, see id., at 77a.

These circumstances, however, were offset by others. Most important, respondent was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted. See *id.,* at 89a–90a ("I was told I could get up and leave whenever I wanted"); *id*., at 70a–71a. Moreover, respondent was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was "not uncomfortable." *Id.,* at 90a; see *id*., at 71a, 88a–89a. He was offered food and water, and the door to the conference room was sometimes left open. See *id.,* at 70a, 74a. "All of these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave." *Yarborough, supra,* at 664–665, 124 S.Ct. 2140.

{¶13} *Id.* at 1192-93.

{¶14} Ohio courts have considered four factors in determining whether there is an additional restriction on a prisoner's movement so as to render him "in custody" for purposes of *Miranda*: (1) the language used to summon the individual, (2) the physical surroundings of the interrogation, (3) the extent to which he is confronted with evidence of his guilt, and (4) the additional pressure exerted to detain him. *State v. Simpson,* 10th Dist. Franklin No. 01AP-757, 2002-Ohio-3717, ¶36, citing *Cervantes v. Walker,* 589 F.2d 424, 428 (9th Cir. 1978). While these factors may be relevant to the analysis of whether a prisoner is in custody for purposes of *Miranda*, pursuant to the United States Supreme Court's later decision in *Howes, supra*, they are merely a part of the totality of the circumstances analysis and not a comprehensive checklist of factors to be used in determining whether the interrogation of an inmate is custodial.

{¶15} In the instant case, Det. Packer requested an interview with appellee through the Belmont Correctional Institution "if [appellee] was agreeable to it." Tr. 5. When the detective came to the prison, he interviewed appellee in a conference room with a door, sitting across the table from appellee. Appellee was not restrained in any way, and arrived alone, having been issued a pass giving him the freedom to come to the administrative building. While appellee was confronted with evidence that his DNA was found on a cigarette lighter in the NAPA auto parts store, such evidence was not necessarily evidence of guilt, but was merely an indicator that he had most likely been inside the store at some point in time. The interview lasted only 15-20 minutes, and ended when appellee told the detective that he thought he should have an attorney. At that point, appellee freely left the room, followed by the detective. Under the totality of the

circumstances surrounding the interrogation, appellee was not in custody, and the trial court therefore erred in granting the motion to suppress.

{¶16} The assignment of error is sustained. This judgment of the Richland County Common Pleas Court is reversed, and this case is remanded to that court for further proceedings according to law and consistent with this opinion. Costs are assessed to appellee.

By: Baldwin, J.

Gwin, P.J. and

Hoffman, J. concur.