

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1590-CR

Cir. Ct. No. 2005CF616

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NATHANIEL STASIOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 WEDEMEYER, P.J. Nathaniel Stasiowski appeals from a judgment entered after a jury found him guilty of one count of second-degree reckless homicide, contrary to WIS. STAT. § 940.06(1) (2003-04).¹ Stasiowski

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

contends the trial court erred in denying his motion seeking to suppress his confession. He argues that the confession should have been suppressed because he was not timely read his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). He also claims that his statement was not voluntary. Because Stasiowski was not “in custody” at the time he confessed, there was no violation of *Miranda*; and because the record does not demonstrate any coercion, the confession was voluntary. Accordingly, we affirm.

BACKGROUND

¶2 On September 17, 2004, Latasha Wishman left her home at about 10:20 a.m. to help a friend. Wishman and Stasiowski lived together and parented the two-month old victim in this case, Anastasia. Wishman asked Stasiowski to care for Anastasia while she was gone.

¶3 At approximately 12:45 p.m., Stasiowski checked on Anastasia and believed she was not breathing. He had other individuals in the home call 911 and a rescue team arrived at the home. Anastasia was transported to the hospital via ambulance, but she was declared dead on arrival.

¶4 The police initially interviewed Stasiowski at the hospital on September 17, 2004. Stasiowski did not want to finish talking to police at that time, so it was arranged that the interview would be continued on September 22nd. On that date, a police officer picked Stasiowski up at his home and transported him to the police station. The officer advised Stasiowski that he was not under arrest and that he would be driven home after the interview. The interview lasted two hours, and Stasiowski was then driven home. Stasiowski was told that when the autopsy report was completed, they would call to discuss that with him and Wishman.

¶5 On January 25, 2005, the police phoned the Wishman/Stasiowski home and told them the autopsy report was ready. The police advised Wishman on the phone that the police would send a transport car to the home the next day to bring both Wishman and Stasiowski back to the police station to go over the autopsy results.

¶6 On January 26th, the police transported Wishman and Stasiowski to the police station. When they arrived, they were taken to separate rooms. The detectives interviewing Stasiowski told him that he did not have to answer questions and he was free to leave. They then started to discuss the autopsy report. During the interview, Stasiowski said something about placing his hand on Anastasia, and then he began to cry. At this point, the detectives read Stasiowski his *Miranda* rights. Stasiowski acknowledged that he understood his rights and that he was willing to answer questions. He then made further inculpatory statements indicating that he pressed down on Anastasia's chest with his hand to stop her from crying. Stasiowski was left alone to write down, in his own words, what happened on the day Anastasia died.

¶7 Subsequently, Stasiowski was charged with one count of second-degree reckless homicide. He pled not guilty and filed a motion seeking to suppress the January 26th confession. The trial court conducted a hearing on the motion and found that prior to the reading of the *Miranda* rights, Stasiowski was not "in custody" and therefore no constitutional violation occurred. The trial court also found that the statement given was voluntary. As a result, the trial court denied the motion seeking to suppress the January 26th statements.

¶8 The case was tried to a jury, which found Stasiowski guilty. He was sentenced to twenty years, consisting of ten years' initial confinement, followed

by ten years' extended supervision. Judgment was entered. Stasiowski now appeals.

DISCUSSION

A. *In Custody.*

¶9 The first issue in this case is whether Stasiowski was “in custody” prior to the time the detectives decided to read him his *Miranda* rights. The trial court found that he was not. We agree.

¶10 We review a motion to suppress in two steps. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We uphold the trial court’s factual findings unless clearly erroneous, but we apply constitutional principles to the facts *de novo*. *Id.* The safeguards of *Miranda* apply only when a suspect is “in custody.” A person is “in custody” for *Miranda* purposes when one’s “freedom of action is curtailed to a ‘degree associated with formal arrest.’” *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (citation omitted); *State v. Pounds*, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993). Because “custody” is determined by an objective standard, the subjective belief of the suspect and the subjective intent of the police are irrelevant. *Stansbury v. California*, 511 U.S. 318, 323-24 (1994). We review the historical facts determination of the trial court by the clearly erroneous standard but independently address the legal constitutional question of whether the suspect was in custody. *Pounds*, 176 Wis. 2d at 323.

¶11 In assessing whether a person is “in custody,” a court should consider the totality of the circumstances, including: whether the person is free to

leave; the purpose, place and length of interrogation; and the degree of restraint. *State v. Morgan*, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

¶12 Stasiowski argues based on these factors that he was in custody. He claims the detectives would not have let him leave despite telling him that he could. He claims that the detectives' statements saying he did not have to talk to them at all were simply a pretextual attempt to get him to confess. He points out that he was taken to the police station in a police car and that he did not have transportation home if he had asked to leave. The trial court concluded, based on the totality of the circumstances, that Stasiowski was not in custody when he was first brought to the police station for questioning. The circumstances of this case were such that Stasiowski and Wishman were advised that when the autopsy report was completed, the police would discuss the results with them. It was arranged that this discussion would take place on January 26, 2005. The two were transported to the police station in a police vehicle to talk to the officers. Stasiowski admits that the officers told him he did not have to answer questions and he was free to leave. This was the same thing he was told several months earlier when he was previously transported to the police station for questioning.

¶13 Based on the foregoing, we agree with the trial court's conclusion that during the first phase of the questioning on January 26, 2005, Stasiowski was not in custody. He was specifically told he was free to leave and did not have to answer questions. Stasiowski did not attempt to leave or tell the officers he did not want to talk. He stayed voluntarily and talked voluntarily. Although he argues now that any attempt to leave would have been futile, there are no facts in the record to support that allegation.

¶14 Stasiowski contends that the police here used a “question first” technique, where the police question a suspect into a confession before giving the required *Miranda* warnings and then after the warnings are given, the police solicit the confession again so it can be admitted at trial. *See Missouri v. Seibert*, 542 U.S. 600, 604 (2004). We are not convinced that the Court’s concerns about what happened in *Seibert* are applicable to this case. In *Seibert*, the suspect was *arrested* and interrogated regarding an arson death. *Id.* at 604-05. Thus, the police questioning was *after arrest* but *before* advising the suspect of *Miranda* rights. *Id.* Stasiowski’s factual scenario is distinctly different. He was not arrested by the police and then questioned before being *Mirandized*. Rather, he voluntarily came in to discuss the autopsy report. Thus, we conclude that *Seibert* does not apply to this case.

¶15 Accordingly, we agree with the trial court’s determination that Stasiowski’s pre-*Miranda* statement on January 26th was given while he was *not* in custody. Therefore, *Miranda* warnings were not required at that point and there was no constitutional violation.

B. Voluntary Statement.

¶16 Stasiowski also contends that his statement was coerced and therefore involuntary. He contends that the officers isolated him, confronted him with the details of Anastasia’s abuse, and pressured him about the possible cause of the abuse. He contends that this police questioning, together with his long history of emotional problems and compromised mental state, resulted in a coerced confession. The trial court found the statement was voluntary. We agree. “In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured via coercive means or whether it was the

product of improper pressures exercised by the police.” *State v. Clappes*, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987) (citations omitted). The State has the burden of proving the statement was voluntary. *Id.* at 225. In reviewing this issue, we defer to the trial court’s findings, but whether those facts satisfy the constitutional standard of resulting in a voluntary statement is a question subject to independent analysis. *State v. Hoppe*, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407.

¶17 The record reflects that the trial court found the State satisfied its burden. There was no physical compulsion of any kind. There were no threats or promises. Stasiowski answered questions willingly and voluntarily after acknowledging that he understood his rights. Stasiowski wrote the confession in his own words while he was alone in a room. He signed the statement. He never asked for a lawyer. He was not denied nourishment or sleep. The interrogation was not lengthy. Finally, with respect to any mental competency issues, Stasiowski’s psychological evaluation resulted in finding him mentally capable under WIS. STAT. §§ 971.14 and 971.16.

¶18 Accordingly, based on the record before us, we must agree with the trial court’s assessment that Stasiowski’s confession was voluntarily made, and therefore, the trial court did not err in denying the motion seeking to suppress it.

By the Court.—Judgment affirmed.

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