



Missouri Court of Appeals
Southern District

Division Two

STATE OF MISSOURI,)	
)	
Plaintiff-Respondent)	
)	
vs.)	No. SD28715
)	
TERRELL C. GAW,)	Filed November 7, 2008
)	
Defendant-Appellant)	

APPEAL FROM THE CIRCUIT COURT OF NEWTON COUNTY

Honorable Timothy W. Perigo, Circuit Judge

REVERSED AND REMANDED FOR NEW TRIAL

Terrell C. Gaw (defendant) was convicted, following trial by the circuit court without a jury, of felony driving while intoxicated. § 577.010.1.¹ Defendant was charged, found to be, and sentenced as a chronic offender. See §§ 577.023.1(2)(a) and 577.023.5. This court reverses and remands for new trial.

The same standard of review applies to criminal cases tried by the court without a jury as in cases tried by a jury. *State v. Hudson*, 154 S.W.3d 426, 429 (Mo.App. 2005).

“We accept as true all evidence tending to prove guilt together with all reasonable inferences that support the finding, and all contrary evidence and inferences are ignored. [*State v. Pollard*, 941 S.W.2d 831, 833 (Mo.App. 1977)]. We determine whether there was sufficient evidence

¹ References to statutes are to RSMo 2000.

from which a trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Phillips*, 940 S.W.2d 512, 520 (Mo.banc 1997). Moreover, this Court does not weigh the evidence or determine the reliability or credibility of witnesses. *State v. Frappier*, 941 S.W.2d 859, 861 (Mo.App. 1997).”

State v. Mayfield, 83 S.W.3d 103, 104-05 (Mo.App. 2002), quoting *State v. Matney*, 979 S.W.2d 225, 226 (Mo.App. 1998).

State v. Wirth, 192 S.W.3d 480, 481-82 (Mo.App. 2006).

Missouri Highway Patrol Sgt. Michael Frazier was dispatched to a one-vehicle accident on Route K west of Racine, Missouri. He observed fluids on the ground. Firefighters and other first responders were at the scene when he arrived.

Sgt. Frazier saw defendant rummaging through the pickup truck involved in the accident. Sgt. Frazier approached defendant and asked defendant if he owned the pickup. Defendant said it was his truck. Defendant’s eyes were glassy and bloodshot. He swayed when he walked and used vehicles to steady himself. Sgt. Frazier smelled intoxicants and the odor of burnt marijuana on defendant. Sgt. Frazier believed defendant was intoxicated.

Sgt. Frazier asked defendant to give him his marijuana. Defendant reached into his pant pocket, pulled out a small baggie, and handed it to the officer. Sgt. Frazier believed the baggie contained marijuana. Sgt. Frazier patted down defendant. He found a small pipe used to smoke marijuana in defendant’s other pant pocket. He arrested defendant for possession of marijuana. Defendant consented to take a portable breath test. The test results showed a high concentration of alcohol.

After administering the portable breath test, the officer asked defendant who was driving the truck. Defendant answered that it was either his girlfriend or a friend of hers. Sgt. Frazier told the trial court that defendant later stated that he was the driver. Sgt. Frazier was the only witness at trial.

Defendant asserts two points on appeal. Point I contends the trial court erred in admitting defendant's statements to Sgt. Frazier in evidence "in that [defendant] was subjected to custodial interrogation without being warned of his rights under *Miranda*."² Point I further argues that "statements made . . . after the *Miranda* warnings must also be excluded as improper tactics rendered the warnings ineffective in that a reasonable person in [defendant's] position could not have understood them to convey a message that he retained a choice about continuing to talk to the trooper."

The issue to which Point I is directed, the admissibility of defendant's statements to Sgt. Frazier regarding whether he had been driving the vehicle involved in the accident, was the subject of a pre-trial motion to suppress evidence. Sgt. Frazier testified at that hearing. In its review, this court considers the evidence presented at both the suppression hearing and at trial for purposes of considering the trial court's ruling denying the motion to suppress and admitting the evidence. *State v. Pike*, 162 S.W.3d 464, 472 (Mo.banc 2005).

Sgt. Frazier's testimony at the hearing on the motion to suppress evidence was consistent with his testimony at trial. It included testimony that defendant was placed under arrest when Sgt. Frazier confronted him about having marijuana, and defendant having produced a baggie of marijuana. Defendant was handcuffed. Prior to that time, when Sgt. Frazier had inquired about the accident, defendant told the officer he had not been driving the vehicle but that his girlfriend was driving. After defendant's arrest, Sgt. Frazier again brought up the subject of the accident. During the course of Sgt. Frazier's questioning, defendant admitted that he was the driver. Defendant had not been advised of his *Miranda* rights prior to his admitting he was the driver of the pickup.

² See *Miranda v. Arizona*, 384 U.S. 436 (1966).

Sgt. Frazier was asked if, following defendant's arrest, he asked defendant additional questions about the vehicle being driven off the road. He responded that he may have asked "a couple of questions for accident information." He was then asked if the *Miranda* warning was read to defendant when they were en route to the Newton County Jail. Sgt. Frazier said that was correct; that they were probably traveling down the highway when defendant was advised of his *Miranda* rights.

"A criminal suspect is entitled to *Miranda* warnings, consistent with their Fifth Amendment right against self-incrimination, once the suspect is subjected to a 'custodial interrogation.'" *State v. Taylor*, 109 S.W.3d 190, 192 (Mo.App. 2003), (quoting *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602). The prosecution cannot use statements obtained during custodial interrogation not preceded by *Miranda* warnings. *State v. Birmingham*, 132 S.W.3d 318, 322 (Mo.App. 2004). . . . "For an interrogation to be custodial, the questioning must occur 'after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Birmingham*, 132 S.W.3d at 322 (quoting *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602).

State v. Wilson, 169 S.W.3d 870, 877 (Mo.App. 2005). "In Missouri, 'custodial interrogation' is defined as questioning initiated by law enforcement officers after a person has been taken into custody" *State v. Glass*, 136 S.W.3d 496, 511 (Mo.banc 2004), *cert. denied*, 543 U.S. 1058 (2005).

Defendant's *Miranda* rights were violated by the initial series of questions asked after defendant was arrested; the questions that produced defendant's statement that he had been driving the pickup when it ran off the roadway. The state concedes this in its brief, but argues that defendant's subsequent statements made after his *Miranda* rights were explained rendered the earlier violation harmless.

The issue to which Point I is directed is similar to an issue in *State v. Wilson, supra*. The defendant in *Wilson* was a passenger in a vehicle that was stopped for speeding. The driver gave the officer permission to search the vehicle. The defendant in the case and the

driver were told to stand in front of the vehicle while it was being searched. They were told to face opposite directions and not communicate with one another. The officer making the search discovered two duffle bags in the car. He found marijuana inside one of the duffle bags. The defendant in the case, the passenger in the car that was searched, was handcuffed and placed in the officer's patrol car. The officer questioned him about the marijuana and the duffle bag. The defendant said he owned the duffle bag but was unaware of any marijuana. After questioning the driver of the vehicle, the officer returned to the defendant, told the defendant he needed to read defendant his *Miranda* warnings, then reviewed the previous statements the defendant made and had him confirm those statements. The trial court suppressed the statements, and the Western District of this court affirmed that decision.³

The court reviewed *Missouri v. Seibert*, 542 U.S. 600 (2004), and *Oregon v. Elstad*, 470 U.S. 298 (1985), and concluded that the situation in *Wilson* was akin to that in *Seibert*. The court in *Wilson* summarized the facts and holding of *Seibert* as follows.

In *Seibert*, the suspect was arrested and then interrogated for thirty to forty minutes at the station house. [*Seibert*, 124 S.Ct.] at 2606. At the time of this initial questioning, the suspect had not been provided her *Miranda* warnings. *Id.* During this questioning, the suspect confessed to crimes amounting to second-degree murder. *Id.* The police then gave the suspect a twenty-minute break. *Id.* Upon returning, the police obtained a *Miranda* waiver and resumed questioning, confronting the suspect with her previous statement. *Id.* The suspect repeated the information. *Id.* The Supreme Court, in a plurality opinion, suppressed the statement and condemned this form of questioning as detrimental to *Miranda*. *Id.* at 2613.

169 S.W.3d at 880-81.

³ Other statements were suppressed by the trial court. The trial court's order suppressing one of the other series of statements was reversed. That determination is not applicable to this case.

Wilson held that there had been virtually no break between the unwarned interrogation of the defendant and his continued interrogation after he was given the *Miranda* warning.

Wilson explained:

The settings of the two interrogations were the same and [the arresting officer] conducted both interrogations. There was a clear overlapping of the content of the two statements and [the arresting officer's] questions treated the second round of questioning as continuous with the first.

169 S.W.3d at 880. *Wilson* found that the defendant in that case was, as occurred in *Seibert*, “not ‘effectively advise[d] . . . that he had a real choice about giving an admissible statement.’”

Id. It concluded that the trial court did not err in suppressing the post-*Miranda* statements.

Here, as in *Wilson*, the same officer conducted both the pre-*Miranda* and the post-*Miranda* interrogations. Although the locations of the ongoing interrogation by Sgt. Frazier changed by reason of defendant being transported to the county jail, the continued control by Sgt. Frazier over defendant following defendant's arrest was no less coercive than if defendant had been kept at one location during his interrogation. The content of the statements defendant made while in Sgt. Frazier's patrol car and at the county jail overlapped sufficiently to be considered as responses to a continuous line of inquiry. Point I is granted. The method used to interrogate defendant rendered the untimely *Miranda* warning ineffective for purposes of conveying an understanding to defendant that he retained a choice as to whether to continue to talk to Sgt. Frazier. It was error to admit Sgt. Frazier's testimony that defendant said he was driving the pickup.⁴ The judgment must be reversed and remanded for new trial.

⁴ As noted previously, defendant filed a motion to suppress his statements to Sgt. Frazier prior to trial. Defendant's trial counsel renewed the objections in the motion and again argued the motion as part of his opening statement at trial. Defendant's trial counsel again moved to renew the motion to suppress at the close of Sgt. Frazier's testimony and in closing argument. Defendant's trial counsel, however, did not object during the course of Sgt.

Point II is directed to the trial court's denial of defendant's motions for judgment of acquittal at the close of the state's case and at the close of all the evidence. Point II is moot in that a new trial is required. Any motion that may be made during the course of that trial will be decided on the basis of the evidence that is then before the trial court.

The judgment is reversed. The case is remanded for new trial.

JOHN E. PARRISH, Judge

Lynch, C.J., and Burrell, P.J., concur

Appellant's attorney – Emmett D. Queener

Respondent's attorney – Jeremiah W. (Jay) Nixon, Shaun J. Mackelprang

Frazier's testimony when Sgt. Frazier related the statements defendant made to him. As a general rule, a specific objection must be made when evidence is offered at trial in order to preserve the issue of its admissibility for appellate review. *State v. Lloyd*, 205 S.W.3d 893, 900 (Mo.App. 2006); *State v. Fulliam*, 154 S.W.3d 423, 426 (Mo.App. 2005). The state's brief does not contest the preservation of this issue for appellate review. Consistent with *State v. Pike*, 162 S.W.3d 464, 472 (Mo.banc 2005), this court holds the objections defendant made throughout trial of this case were sufficient to preserve this issue for appeal.