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APPLICABILITY REQUIREMENTS (PRIMARY)—CUSTODY

CASES

Relevant cases include: *State v. Torkelson*, 2007 WI App 272, ____ Wis.2d ____, 743 N.W.2d 511; *State v. Kramer*, 2006 WI App 133, 294 Wis.2d 780, 720 N.W.2d 459; *State v. Morgan*, 2002 WI App 124, 254 Wis.2d 602, 648 N.W.2d 23; *State v. Goetz*, 2001 WI App 294, 249 Wis.2d 380, 638 N.W.2d 386; *State v. Griffith*, 2000 WI 72, ¶ 69, 236 Wis.2d 48, 75-76 n.14, 613 N.W.2d 72; *State v. Zanelli*, 223 Wis.2d 545, 569-71, 589 N.W.2d 687 (Ct. App. 1998); *State v. Armstrong*, 223 Wis.2d 331, 353-56, 371, 588 N.W.2d 606 (1999), *modified*, 225 Wis.2d 121, 591 N.W.2d 604 (1999); *State v. Mosher*, 221 Wis.2d 203, 584 N.W.2d 553 (Ct. App. 1998); *State v. Gruen*, 218 Wis.2d 581, 582 N.W.2d 728 (Ct. App. 1998); *State v. Buck*, 210 Wis.2d 115, 565 N.W.2d 168 (Ct. App. 1997); *State v. Schambow*, 176 Wis.2d 286, 500 N.W.2d 362 (Ct. App. 1993); *State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991); *State v. Pheil*, 152 Wis.2d 523, 449 N.W.2d 858 (Ct. App. 1989); *State v. Koput*, 142 Wis.2d 370, 418 N.W.2d 804 (1988); *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140 (2004).

INTRODUCTION

In the discussion of what is custody for *Miranda* purposes that follows, I have concentrated on *Miranda* custody cases rather than Fourth Amendment "was the person under arrest" cases. Fourth Amendment arrest cases, although not always dispositive of the *Miranda* custody issue, are however relevant in most situations to the *Miranda* custody issue.

GENERAL LAW

A *Miranda* Applicability Requirement

Since *Miranda* and its progeny are aimed at dispelling the compulsion inherent in custodial surroundings, the *Miranda* safeguards apply only to custodial interrogations—one of the conditions that must be present for the *Miranda* requirements to be applicable/required is that the person is "in custody" as that term is defined for *Miranda* purposes—*Miranda* requires "custodial" interrogation. *Kramer*, 2006 WI App at ¶ 9, 294 Wis.2d at 787; *State v. Hassell*, 2005 WI App 80, ¶ 9, 280 Wis.2d 637, 641, 696 N.W.2d 270; *Goetz*, 2001 WI App 294 at ¶ 10, 249 Wis.2d at 384; *Armstrong*, 223 Wis.2d at 351-52.

Definition Of/Determining Custody—General Law

In *Alvarado*, the Court reiterated the *Miranda* custody test that it set forth in *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457 (1995):

> Two discrete inquiries are essential to the determination: first, what were the circumstance surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

541 U.S. at 663, 124 S.Ct. at 2149.

In numerous cases the Wisconsin courts have stated that the ultimate inquiry when determining whether a person has been placed in custody for *Miranda* purposes is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Goetz*, 2001 WI App 294 at ¶ 11, 249 Wis.2d at 384; *Pounds*, 176 Wis.2d at 321. The ultimate inquiry is also stated as a suspect is in custody when the suspect's freedom of action is curtailed to a degree associated with the formal arrest. *Torkelson*, 2007 WI App at ¶¶ 13, 17, ____ Wis.2d at ____; *Morgan*, 2002 WI App 124 at ¶ 10, 254 Wis.2d at 611-12.

The analyses that are used to determine if a person is in custody for Fifth Amendment *Miranda* purposes and if a person has been arrested for Fourth Amendment probable cause purposes are not the same—a person can be in custody for *Miranda* purposes and not be under arrest for Fourth Amendment purposes. *Morgan*, 2002 WI App 124 at ¶¶ 13-16, 254 Wis.2d 613-618.

The test to determine the moment of custody for *Miranda* purposes is an objective reasonable person test. *Goetz*, 2001 WI App 294 at ¶ 11, 249 Wis.2d at 384.

In making the determination of whether a person is in custody for *Miranda* purposes, the only relevant inquiry is how a reasonable person in the person's position would have understood the situation/perceived his circumstances—would a reasonable person in the suspect's situation have considered himself or herself to be in custody given the degree of restraint under the circumstances. *Torkelson*, 2007 WI App at ¶ 13, ____ Wis.2d at ____ (Custody is determined from the perspective of a reasonable person in the suspect's position); *Morgan*, 2002 WI App at ¶¶ 10, 16-17, 254 Wis.2d at 612, 617-18; *Goetz*, 2001 WI App at ¶ 11, 249 Wis.2d at 384; *State v. Leprich*, 160 Wis.2d 472, 479, 465 N.W.2d 844 (Ct. App. 1991); *Alvarado*, 541 U.S. at 662, 124 S.Ct. at 2148.

In *Morgan*, 2002 WI App at ¶¶ 22-25, 254 Wis.2d at 621-24, the Court addressed the applicability and meaning of the "innocent person" concept when a court decides if a reasonable person would believe himself or herself to be in custody for *Miranda* purposes.

> Although no Wisconsin court has specified that the reasonable person for *Miranda* analysis is the 'reasonable innocent person,' we view the addition of 'innocent' as a clarification rather than a change in the 'reasonable person' standard. The court in *Corral-Franco*, 848 F.2d at 540, was relying on an earlier Fifth Circuit decision, *United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988),

> which explained that the reasonable person through whom we view the situation for *Miranda* purposes 'must be neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances.' *Bengivenga*, 845 F.2d at 596. This is simply another way of saying that the standard is the objective one of the reasonable person, not the subjective one of the suspect in the particular case, who may assume he or she is being arrested because he or she knows there are grounds for an arrest.
>
> However, although we agree with the State that for purposes of *Miranda*, we should consider a reasonable innocent person in Morgan's situation, we do not agree with the implication of its argument that our inquiry here is whether a reasonable innocent person would understand that if that person answered Officer Whyte's questions, and the answers showed he or she was innocent, the person would be allowed to leave . . . .
>
> . . . These cases do not suggest that when we are deciding whether a person is in custody for *Miranda* purposes and the situation is not a routine traffic stop, we are to assume a reasonable person is one who is innocent and answers the question in an exculpatory manner.

2002 WI App at ¶¶ 23-25, 254 Wis.2d at 621-24.

Under the objective test, the circumstances of the situation, including what has been communicated by the police officers by their words or actions, are controlling. *Swanson*, 164 Wis.2d at 447. The determination of custody depends on the objective circumstances of the questioning, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Mosher*, 221 Wis.2d at 211. Therefore, an officer's unarticulated plan or subjective intentions are irrelevant in determining the issue of custody—the views or beliefs of an officer that are not manifested to the defendant are irrelevant in determining whether the person is in custody for *Miranda* purposes. *Mosher*, 221 Wis.2d at 215-18; *Swanson*, 164 Wis.2d at 447. In *Mosher*, 221 Wis.2d at 214-16, the Court held that deception in not informing a suspect about an arrest warrant does not affect the determination of whether the suspect was in custody if the suspect did not know of the deception. An officer's opinion on whether a suspect is free to leave, if not communicated to the suspect, is not relevant in determining whether a person is in custody for *Miranda* purposes. *Mosher*, 221 Wis.2d at 217. However, an officer's knowledge or beliefs may bear upon the issue of custody if they are conveyed, by word or deed, to the person being questioned. *Mosher*, 221 Wis.2d at 216-17.

A court must consider the totality of the circumstances when it makes the determination whether an individual is in custody for *Miranda* purposes. *Morgan*, 2002 WI App 124 at ¶¶ 12, 21, 254 Wis.2d at 612, 621.

The fact that the investigation has focused on the defendant does not create custody for purposes of *Miranda* warnings. *Koput*, 142 Wis.2d at 378 n.6.

The reasonableness of the police officer's conduct is relevant insofar as it has a bearing on how a reasonable person in the suspect's situation would perceive his or her situation, but it is not dispositive. *Morgan*, 2002 WI App 124 at ¶ 16, 254 Wis.2d at 617.

The conditions of custody or other deprivation of freedom requiring *Miranda* warnings are those caused or created by the authorities. *Buck*, 210 Wis.2d at 123; *Schambow*, 176 Wis.2d at 293.

The issue of constructive custody was discussed in *Pheil*.

Custody for *Miranda* purposes does not result merely because an individual is questioned in a "coercive" environment. *Phiel*, 152 Wis.2d at 531.

In *Mosher*, the officer did not tell the defendant that she had an arrest warrant for the defendant on a charge unrelated to the subject of the questioning. The Court rejected the defendant's contention that the officer's knowledge of the warrant was a coercive factor that made the defendant's situation custodial.

Events that happen <u>after</u> the questioning (such as handcuffing the person) have no effect on the determination of whether the person was in custody for *Miranda* purposes during the questioning. *Goetz*, 2001 WI App 294 at ¶¶ 14-16, 249 Wis.2d at 386.

In *Alvarado*, 541 U.S. at 661-663, 124 S.Ct. at 2147-49, the Court summarized several United States Supreme Court cases that addressed the issue of *Miranda* custody.

<u>Determining Custody-Specific Factors</u>

The courts have developed a list of factors to consider when determining whether a person is in custody for *Miranda* purposes. These factors include: (1) the defendant's freedom to leave; (2) the purpose of the interrogation; (3) the place of the interrogation; (4) the length of the interrogation; (5) the degree of restraint. *Torkelson*, 2007 WI App at ¶ 17, ____ Wis.2d at ____; *Morgan*, 2002 WI App 124 at ¶ 12, 254 Wis.2d at 612.

When considering the degree of restraint, a court considers: (1) whether the suspect was handcuffed; (2) whether a weapon was drawn; (3) whether a frisk was performed; (4) the manner in which the suspect was restrained; (5) whether the suspect was moved to another location; (6) whether questioning took place in a police vehicle; (7) the number of officers involved. *Torkelson*, 2007 WI App at ¶ 17, ____ Wis.2d at ____; *Morgan*, 2002 WI App 124 at ¶ 12, 254 Wis.2d at 612-13.

In *Torkelson*, 2007 WI App at ¶ 18, ____ Wis.2d at ____, the Court stated:

> This test is not, however, a matter of simply determining how many factors add up on each side. Rather, these factors are reference points that help to determine whether *Miranda* safeguards are necessary. In other words, we use the factors relevant in a given case to determine whether the circumstances present a risk that police may 'coerce or trick captive suspects into confessing,' or show that a suspect is subject to 'compelling pressures generated by the custodial setting itself.' *Berkemer*, 468 U.S. at 433, 104 S.Ct. 3138 (citation omitted).

In *Alvarado*, the Court, in a habeas corpus proceeding under the Antiterrorism & Effective Death Penalty Act of 1996 (AEDPA), addressed two *Miranda* test/analysis issues: whether a person's age and experience/inexperience with law enforcement can be considered in determining whether that person was in custody as that term is defined for *Miranda* purposes. Can a person's prior experience/history with law enforcement be considered in a *Miranda* custody analysis? Based on the position of the lead opinion (it is not relevant since it is a subjective factor) and the fact that neither the dissent nor the concurrence took issue with this position, I believe that the answer to this question is no. *See also Morales v. United States*, 866 A.2d 67, 73 (D.C. 2005) (*Alvarado* held that a suspect's prior history with law enforcement is a subjective factor that must be disregarded in determining whether suspect was in custody). As to whether a person's age be considered in a *Miranda* custody analysis, an argument can be made that the answer is no. However, an argument can also be made that the answer is—it depends.

In *Torkelson*, 2007 WI App at ¶ 23, ____ Wis.2d at ____, the Court addressed the defendant's contention that he was in custody because the officer never told him he was not in custody.

> Finally, Torkelson argues he was in custody because Walrath never told him any differently. However, as explained above, under the totality of the circumstances a reasonable person in Torkelson's position would not believe he was in custody. While an explicit statement might have been a further indication that Torkelson was not in custody, it was not necessary.

In *Torkelson*, the defendant argued that an ultimatum from his wife that he must go to the police station was a factor that supported his position that he was in *Miranda* custody when he gave his statement. In rejecting the defendant's position, the Court stated:

> Torkelson lists several factors he contends show he was in fact in custody. He first argues his decision to come to the police station in the first place was not voluntary because he came in response to an 'ultimatum' from his wife Carrie. However, the fact that a decision was made while facing personal pressure, such as pressure from a family member, does not mean the decision was involuntary. *Craker v. State*, 66 Wis.2d 222, 229, 223 N.W.2d 872 (1974). Nothing in Carrie's demand would lead a reasonable person in Torkelson's position to believe he was in the custody of the State while at the police station.

2007 WI pp at ¶ 21, ____ Wis.2d at ____. In footnote 5 the Court also stated:

> Torkelson argues a marriage is similar because 'one ignores the ultimatums of one's wife at one's peril.' However, a parent-child relationship is hierarchical, while a marriage involves two adults with equal authority relative to one another. Torkelson's attempt to analogize Carrie's 'ultimatum' to demands by police is also unavailing, for the same reason.

2007 WI App at ¶ 21 n.5, ____ Wis.2d t ____.

Burden Of Proof

See the discussion under **HEARING** below.

SPECIFIC SITUATIONS

An Incarcerated Person—Questioned As A Defendant

In Wisconsin a person who is incarcerated and interrogated on an offense not related to his incarceration offense is in custody for *Miranda* purposes—a person who is incarcerated is *per se* in custody for purposes of *Miranda*. *Armstrong*, 223 Wis.2d at 353-56.

The Wisconsin *per se* rule and the reasoning behind it has been rejected by the vast majority of jurisdictions that have addressed the situation where a person is incarcerated on other charges at the time of interrogation. *Lindsey v. United States*, 911 A.2d 824, 829-33 (D.C. App. 2006).

An Incarcerated Person—Questioned As A Witness

In *Smiley v. McCaughtry*, 495 F. Supp. 2d 948 (E.D. Wis. 2007), the Court, in the context of the issue of whether a person was in *Miranda* custody when that person was interrogated, addressed the situation where a person is in custody for a reason other than the crime under investigation and the person is questioned as a witness rather than as a defendant. The Court held that this type of situation is *Miranda* custody. In so holding, the Court rejected the state Court's reasoning that this is not a *Miranda* situation since the questioning was not *Miranda* interrogation and the officers did not know that their questions were reasonably likely to elicit an incriminating response.

In *State v. Holt*, 132 Ohio App.3d 601, 725 N.E.2d 1155 (1997), the Court came to the same conclusion as the Court did in *Smiley*.

Detention During The Execution Of A Search Warrant

In *Goetz* and *United States v. Burns*, 37 F.3d 276 (7th Cir. 1994), the courts discussed whether a person is in custody for *Miranda* purposes when the person is detained during the execution of a search warrant pursuant to *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587 (1981). In both cases the Court answered the question in the negative. *See* the discussion below under **SPECIFIC SITUATIONS**.

Defendant Is On Probation, Parole, Extended Supervision

A defendant on probation is not in custody for *Miranda* purposes solely because of the person's probationary status. *Minnesota v. Murphy*, 465 U.S. 420, 430-31, 104 S.Ct. 1136, 1144 (1984).

In *United States v. Ollie*, 442 F.3d 1135 (8th Cir. 2006), the defendant's probation officer ordered the defendant to go to the police station after his regularly scheduled probation meeting at the request of the police. The defendant was then interviewed at the police station without being given the *Miranda* warnings. The Court found that the defendant was in custody for *Miranda* purposes.

Traffic Stops

Persons temporarily detained during ordinary traffic stops are not in custody for *Miranda* purposes. *Torkelson*, 2007 WI App at ¶¶ 14-16, ____ Wis.2d at ____. However, if a detained motorist is treated in such a manner that he or she is rendered "in custody" for practical purposes, *Miranda* warnings are required prior to questioning. *State v. Griffith*, 2000 WI 72, ¶ 69 n.14, 236 Wis.2d 48, 75-76, 613 N.W.2d 72.

Terry Stops

Even during a *Terry* stop, a defendant may be considered "in custody" for *Miranda* purposes and entitled to *Miranda* warnings prior to questioning. *Griffin v. United States*, 878 A.2d 1195, 1199 (D.C. 2005); *Gruen*, 218 Wis.2d at 593. The issue of when *Miranda* warnings are required during a *Terry* stop has been discussed in *Morgan*, *Gruen*, and *State v. Pounds*, 176 Wis.2d 315, 500 N.W.2d 373 (Ct. App. 1993). In *Morgan* and *Pounds* the Court found that the defendant was in custody for *Miranda* purposes. In *Gruen*, the Court found that the defendant was not in custody for *Miranda* purposes. In *Griffin*, the Court, after a brief review of cases from other jurisdictions that have recognized that in some *Terry* stop situations *Miranda* warnings are required, held that *Miranda* warnings were not required under the facts of the case.

Customs Inspections

Whether a person is in custody when questioned during customs inspections is discussed below under **SPECIFIC SITUATIONS**.

Hospitals

Generally questioning in hospitals is not custodial when the suspect is not under formal arrest. *Schambow*, 176 Wis.2d at 293.

In *Schambow* and *State v. Clappes*, 117 Wis.2d 277, 344 N.W.2d 141 (1984), the Court found that the defendant was not in custody for *Miranda* purposes in a hospital setting. In *State v. Buck*, 210 Wis.2d 115, 565 N.W.2d 168 (Ct. App. 1997), the defendant was involved in a

traffic accident. After the accident the officer told the defendant that he was under arrest when the defendant was being placed in an ambulance that transported him to the hospital. The defendant was subsequently transferred to another hospital. At the second hospital he gave a statement. The State argued that when he was transferred to the second hospital he was released from custody. The Court found that the defendant was in custody for *Miranda* purposes when his statement was obtained at the second hospital.

A Standoff/Hostage Situation

See the discussion below under **SPECIFIC SITUATIONS**.

Police Station—Wisconsin

A defendant is not automatically seized anytime he or she is taken to a police station for questioning. *State v. Farias-Mendoza*, 2006 WI App 134, ¶ 23, ____ Wis.2d ____, ____, 720 N.W.2d 489.

Numerous Wisconsin cases have addressed custody for *Miranda* purposes in the police station setting. In *Zanelli, Mosher, Koput, and Mikulovsky v. State*, 54 Wis.2d 699, 196 N.W.2d 748 (1972), the Court found that the defendant was not in custody for *Miranda* purposes. In *Phiel* the Court, for *Miranda* purposes, found that the defendant was in custody for one statement (the June 18 statement) and was not in custody for another statement (the June 21 statement). In *La Tender v. State*, 77 Wis.2d 383, 253 N.W.2d 221 (1977), the Court found that the defendant was in custody for *Miranda* purposes. In *State v. Reichl*, 114 Wis.2d 511, 339 N.W.2d 127 (Ct. App. 1983), the Court, in the context of whether probable cause to arrest the defendant existed, found that the defendant was not under arrest. In *State v. Fillyaw*, 104 Wis.2d 700, 312 N.W.2d 795 (1981), *cert. denied*, 455 U.S. 1026 (1982), the Court, in the context of both probable cause to arrest and custody for *Miranda* purposes, found that the defendant was not under arrest or in custody.

Police Station—Federal

In *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711 (1977) (*per curiam*), a police officer contacted the suspect after a burglary victim identified him. The officer arranged to meet the suspect at a nearby police station. At the outset of the questioning, the officer stated his belief that the suspect was involved in the burglary but that he was not under arrest. During the 30-minute interview, the suspect admitted his guilt. He was then allowed to leave. The Court held that the questioning was not custodial. The Court noted that the suspect had come voluntarily to the police station, that he was informed that he was not under arrest, and that he was allowed to leave at the end of the interview.

In *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517 (1983) (*per curiam*) the police interviewed Beheler shortly after the crime occurred; Beheler had been drinking earlier in the day; he was emotionally distraught; he was well known to the police; and he was a parolee who knew it was necessary for him to cooperate with the police. The Court, in finding that the defendant was not in *Miranda* custody, found the case indistinguishable from *Mathiason*. It

noted that how much the police knew about the suspect and how much time had elapsed after the crime occurred were irrelevant to the custody inquiry.

In *Alvarado*, the four person lead opinion and the concurring opinion (in finding that the defendant was not in *Miranda* custody) set forth/weighed numerous facts/factors in determining if the defendant was in custody (some supported a conclusion that the defendant was in custody and some supported the opposite conclusion). Facts/factors supporting custody included: (1) the interview occurred at a police station; (2) the interview lasted two hours; (3) the defendant was not told that he was free to leave; (4) the defendant was brought to the police station by his legal guardians rather than arriving on his own accord; (5) the defendant's parents asked to be present at the interview but were rebuffed. Facts/factors supporting a finding that the defendant was not in custody included: (1) the police did not transport the defendant to the station or require him to appear at a particular time; (2) the police did not threaten the defendant or suggest that he would be placed under arrest; (3) the defendant's parents remained in the lobby during the interview (suggesting that the interview would be brief); (4) the police focused on another person's crimes rather than the defendant's; instead of pressing the defendant with the threat of arrest and prosecution, the police appealed to the defendant's interest in telling the truth and being helpful to a police officer; (5) the defendant was asked twice if he wanted to take a break; (6) the defendant went home at the end of the interview.

Police Station—State

In *United States v. Ollie*, 442 F.3d 1135 (8th Cir. 2006), the Court discussed the situation where a defendant on probation is ordered by his probation officer to go to the police station.

Miranda-Part 1(excerpt)
(Main)