Case Commentaries on Interrogation Issues for November-December 2022

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Keep in mind as you consider the following Case Commentaries for November 2022, that cases from the United States Supreme Court on the subject of interrogation set the federal constitutional minimum standards for law enforcement conduct. The states, through decisions of their highest courts of review, can interpret state constitutional provisions in a manner further restricting law enforcement conduct on the subject. They can do this by ruling that state constitutional provisions give defendants greater rights than those that exist under federal constitutional provisions. Interrogators, **whether in the public or private sectors**, must also be aware of cases in their state that involve state provisions similar to the Fifth and Sixth Amendments.

In addition, there are various department and local prosecution policies that may have an impact on law enforcement conduct. **Consultation with your legal advisor is always advisable to be aware of any state law provisions or court cases that might apply to interrogation in your jurisdiction.**

Note: Cases in this issue are edited by Professor Manak to eliminate non-interrogation issues in order to focus on distinct interrogation questions, usually involving *Miranda* and voluntariness points of interest to interrogators. For the full and unedited court opinion, the reader is directed to pull up the case citation.

***Miranda*: What Constitutes "Custody"; Effect of Patting Down a Suspect; Factors for Determining *Miranda* Custody; Body Camera Footage; Effect of Frisking the Arrestee and Informing Him He Is Under Arrest; Effect of Interrogating a Suspect at His Place of Work; Effect of Restraining Movement of Suspect; Telling the Suspect He Is Free to Leave or Can Refuse to Answer Questions**

United States v. Jason Zabel, No. 21-5766, United States Court of Appeals for the Sixth Circuit (2022).
https://law.justia.com/cases/federal/appellate-courts/ca6/21-5766/21-5766-2022-05-23.html

SUMMARY, FACTS AND PROCEDURAL HISTORY

Defendant committed abusive sexual contact with a female National Park Service employee—a crime for which he pled guilty and received a sentence of 18 months' imprisonment, followed by a life term of supervised release. On appeal, Zabel argues that the district court erred in denying his pre-guilty-plea motion to suppress incriminating statements he made to park rangers. . . . For the following reasons, we affirm the district court's judgment and sentence.

I.

United States Park Ranger William Jaynes responded to an incident report at Mammoth Cave. When he arrived at the parking lot, he encountered a "slightly out of breath" female archaeology technician whose job was to monitor a trail restoration project inside the cave. She explained that Jason Zabel, one of the contractors working on the restoration project, had just pinned her against a wall and attempted to kiss her, grabbed her buttocks and breasts, and exposed his penis to her without her consent while she was leaving the cave. Armed with a description of Zabel's appearance and location, Ranger Jaynes and another park ranger who arrived on the scene entered the cave to find him.

The park rangers used an elevator to enter the cave and then walked approximately 25 minutes through its dark, narrow passages until they heard a group of workers speaking. Ranger Jaynes recorded the ensuing encounter from his body camera, which began with the park rangers introducing themselves to the group as law enforcement officers. They then asked: "Is there somebody here named Jason?" When Zabel raised his hand and confirmed his identity, the rangers said: **"Come this way and chat with us for a few minutes."**

Zabel followed the park rangers around the corner for less than 2 minutes where his coworkers could not hear their conversation. There, Zabel asked if he could use the restroom, and the park rangers replied: "Is there a bathroom around here?" Zabel stated there was a restroom near the cave's entrance, but the rangers responded that "we're quite a ways from there" and "you're going to have to hold it for a few minutes."

Before the park rangers told Zabel about the accusations made against him, they explained that he was "not under arrest," that he was "free to go," that he had "no warrants," that he did not have to talk to them, that it was his "option" to do so, and that they would much rather he be quiet than lie to them. As an alternative to using the restroom near the cave's entrance, Zabel requested to walk to a nearby location where there were "a couple of empty buckets" because he was unsure how "much further than that [he'd] be able to make it." The park rangers responded "alright, first," and then proceeded to question Zabel about what happened with the female employee that morning.

Zabel made several incriminating statements during the interview, including that he had grabbed the female employee's butt in the elevator, asked to kiss her, and showed her his penis, during which he "may have been a little" erect or excited. **The interview lasted less than 20 minutes, after which the park rangers told Zabel he would need to exit the cave with them.** The rangers frisked Zabel for weapons and eventually allowed him to use the restroom, but they did not handcuff him until they reached the cave's surface due to the potentially dangerous nature of

the walk out.

Zabel was later indicted for knowingly engaging in sexual contact with another person without that other person's permission, in violation of 18 U.S.C. § 2244(b). Zabel moved to suppress his incriminating statements, **arguing that the park rangers improperly solicited those statements during a custodial interrogation without first advising him of his *Miranda* rights. The magistrate judge recommended that the motion be denied in relevant part because Zabel was not "in custody" for purposes of *Miranda* until the park rangers patted him down and told him to exit the cave.** The district court adopted the recommendation over Zabel's objections, agreeing that the park rangers were not required to provide Zabel the *Miranda* warnings because, under the totality of the circumstances, he was not in custody during the interview. After failing to suppress his incriminating statements, Zabel pled guilty, without a plea agreement, to the single charge in the indictment, and admitted that he "intentionally grabbed the victim's buttocks and clothing with an intent to gratify his own sexual desire, all without the victim's consent."

The probation office circulated a Presentence Investigation Report ("PSR") describing the offense conduct above based on Zabel's admissions and what the victim told Ranger Jaynes in the Mammoth Cave parking lot. On July 6, 2021, more than two weeks before Zabel's sentencing date, the probation office circulated a revised PSR that contained "more detailed information regarding the victim's account of the offense" than was included in the initial report, indictment, or factual basis presented at the guilty-plea hearing. Zabel's counsel indicated that he discussed these "previously unknown allegations" from the revised PSR with Zabel sometime on or before July 14, 2021, and that Zabel denied some of those allegations.

* * *

As the district court noted at the sentencing hearing, the victim's recorded statement did not contradict anything in the indictment or the factual basis for the guilty plea, but it certainly "paint[ed] a much more serious picture" of what happened in the cave. In it, the victim described in detail that as she was attempting to leave the cave, Zabel (who she had only seen in passing a few times) followed her, grabbed her arm, and made suggestive comments towards her, including that he wanted to see her in a bikini. When the victim made it halfway out of the cave, Zabel asked to touch her buttocks, asked where she lived, and said he wanted to wake up next to her in the morning. Zabel then ran ahead of the victim, and his persistent advances quickly turned physical. And before the victim could surface from the cave, Zabel had cornered her against a wall, attempted to kiss her, placed his arm around her, grabbed her buttocks, breasts, and pubic area over her clothes, asked for oral sex, exposed his penis, and masturbated in front of her, all while making repeated sexual comments. She said she felt trapped in the cave and that Zabel's advances were "very unwanted." Ranger Jaynes included a summary of these statements in his written report.

Before proceeding with sentencing, the district court recessed for over an hour so that Zabel and his counsel could review the victim's video-recorded statements. The district court also provided Zabel an opportunity to testify if he disagreed with anything the victim said, but Zabel declined

to do so. **As a result, the district court relied on the victim's statements and sentenced Zabel to 18 months' imprisonment due to his background, the severity of his crime and its impact on the victim, the need to punish him for the offense, and the need to deter others from engaging in similar conduct.** The criminal judgment reflected that this sentence was both an upwards departure under U.S.S.G. § 5K2.8 and an upwards variance. The district court also imposed a life term of supervised release following Zabel's release from custody.

On appeal, Zabel challenged: (1) the district court's denial of his pre-guilty-plea motion to suppress; (2) the procedural and substantive reasonableness of both his custodial sentence and term of supervised release; and (3) whether his lifetime supervision violated the Eighth Amendment's prohibition against cruel and unusual punishment. This summary deals only with the issue of what constitutes *Miranda* "custody."

FACTORS FOR DETERMINING *MIRANDA* CUSTODY

Zabel appealed the district court's denial of his motion to suppress incriminating statements he made to park rangers while in Mammoth Cave, claiming he was in custody during their interview and was not informed of his *Miranda* rights.

* * *

Where, as here, the district court denies a defendant's motion to suppress, we review the court's findings of fact (viewed in the light most favorable to the government) for clear error and its conclusions of law *de novo*. *United States v. Young*, 847 F.3d 328, 342 (6th Cir. 2017) (citations omitted). Whether Zabel was "in custody" during the park rangers' interview is a mixed question of law and fact that we review *de novo*. *United States v. Levenderis*, 806 F.3d 390, 399 (6th Cir. 2015) (citation omitted).

The Fifth Amendment requires law enforcement officers to advise a person of their so-called *Miranda* rights, including the right to remain silent, before interrogating them while they are "in custody." See *United States v. Panak*, 552 F.3d 462, 465 (6th Cir. 2009); *Miranda*, 384 U.S. at 444-45. ***Because there is no dispute that park rangers questioned Zabel without advising him of his Miranda rights, the only issue is whether Zabel was "in custody" when he made incriminating statements.*** In determining whether someone is "in custody" for purposes of *Miranda*, courts focus on "the objective circumstances of the interrogation" and "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Panak*, 552 F.3d at 465 (citation omitted). **"The ultimate inquiry is whether, under the totality of the circumstances, the interviewee's freedom of movement was restrained to a degree associated with formal arrest."** *United States v. Luck*, 852 F.3d 615, 621 (6th Cir. 2017) (citing *Panak*, 552 F.3d at 465). ***We have identified four, non-exhaustive factors to help guide this inquiry*:** "**(1)** the location of the interview; **(2)** the length and manner of the questioning; **(3)** whether there was any restraint on the individual's freedom of movement; and **(4)** whether the individual was told that he or she did not need to answer the questions." *United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010).

Having reviewed the body camera footage of the encounter, we agree with the district court that the circumstances surrounding Zabel's interview would not lead a reasonable person to believe that he was in custody *until* the park rangers frisked him and informed him that he would be placed under arrest. To start, the location of the interview was inside Mammoth Cave—Zabel's place of employment for the prior 6-7 months. Zabel was also familiar with the exact location of the interview, as it was only a short walk from where he was speaking with his coworkers, and he knew about a couple of buckets that were nearby. **We have noted that "police questioning taking place in the suspect's . . . place of work is likely to be less intimidating than questioning taking place at the police station,"** *United States v. Protsman*, 74 F. App'x 529, 533 n.6 (6th Cir. 2003), where the goal is to "isolat[e] the suspect in unfamiliar surroundings 'for no purpose other than to subjugate the individual to the will of his examiner,'" *Beckwith v. United States*, 425 U.S. 341, 346 n.7 (1976) (quoting *Miranda*, 384 U.S. at 457). **That the interview took place at Zabel's jobsite weighs against him being "in custody."** See *United States v. Crossley*, 224 F.3d 847, 861-62 (6th Cir. 2000); *United States v. Mahan*, 190 F.3d 416, 421-22 (6th Cir. 1999).

The length and manner of the interview also weigh against a finding of custody. For example, the park rangers questioned Zabel for less than 20 minutes, and we have held that suspects questioned for longer lengths of time were not in custody. See *Levenderis*, 806 F.3d 390, 400 (6th Cir. 2015) (suspect not in custody during 30-minute interview and second, shorter interview); see also *Mahan*, 190 F.3d at 420 (suspect not in custody during 90-minute interview). The park rangers may have occasionally interrupted Zabel when he was speaking, but, as the district court noted, **their questioning and demeanor was not hostile.** At one point during the interview, a group of Zabel's coworkers walked by and the park rangers—at Zabel's request—even stopped asking questions until those coworkers were out of earshot. Consistent with the respectful nature of the interview, Zabel also asked if he could shake the park rangers' hands when the questioning was over.

Zabel nonetheless argues that he was in custody during the interview because the park rangers physically restrained his freedom of movement on several occasions. He claims that when the rangers first contacted him and said "come this way and chat with us for a few minutes," they limited his movement by ordering (not requesting) him to follow them to a new location away from his coworkers. **While we agree with Zabel about what the rangers said, we also note that they did not place Zabel in handcuffs during the interview and they "at no time made any show of force or brandished a firearm or handcuffs, or any other equipment ordinarily associated with formal arrest or custody" until after he made incriminating statements.** See *Mahan*, 190 F.3d at 422. It also appears that the rangers wanted to separate Zabel from his coworkers before asking questions due to the sensitive subject of the interview and to avoid letting his coworkers hear about the victim's then-unsubstantiated allegations, not out of a desire to restrain him physically. See *United States v. Salvo*, 133 F.3d 943, 951 (6th Cir. 1998).

The strongest factor in Zabel's favor is that the park rangers did not immediately allow him to use the restroom upon request. It appears that when Zabel first asked to relieve himself, the rangers said "you're going to have to hold it for a few minutes" because the nearest restroom was

25-30 minutes away by the cave's entrance. But distance could not have been the only factor because they also ignored his second request to use the restroom in some nearby buckets. **After being twice denied the ability to use the restroom, it is entirely possible that a reasonable person in Zabel's position may have felt temporarily restrained in their freedom of movement.**

Although there are factors that both support and undermine the custodial nature of the interview, **what undoubtedly tips the scales against Zabel is that the park rangers explicitly told him that he was not under arrest and did not have to talk to them before describing the allegations against him. No one factor is dispositive, *but "[w]hether investigators inform a suspect that he is free to leave or to refuse to answer questions is the most important consideration in the Miranda custody analysis."*** *United States v. Martinez*, 795 F. App'x 367, 371 (6th Cir. 2019) (citing *Howes v. Fields*, 565 U.S. 499, 515 (2012)). In fact, we have held that when law enforcement officers provide clear assurances that a person is free to leave or terminate questioning, those assurances "likely would . . . guarantee[] the noncustodial nature" of the interview. See *Panak*, 552 F.3d at 468. **Thus, even if a reasonable person in Zabel's position may have felt restrained when the park rangers denied his requests to use the restroom, their repeated assurances that he was free to leave and was not required to speak with them negated any notion he was restrained to a degree associated with formal arrest or that the interview was custodial in nature,** See *Protsman*, 74 F. App'x at 535.

THE COURT'S CONCLUSION ON *MIRANDA* CUSTODY

In sum, the totality of the circumstances indicate that Zabel was not "in custody" for purposes of *Miranda* when he made incriminating statements to park rangers before his formal arrest, and therefore the district court properly denied his motion to suppress.

PRACTICE POINTER

The fact that the defendant was denied an opportunity to use a restroom was a factor that he was not free to leave the presence of the officers and was in *Miranda*-type custody requiring recitation of the *Miranda* warnings. However, the court looked at **all the facts of the setting,** including a most important one, namely a statement that the defendant ***was free to leave and could refuse to answer questions*.** This was considered by the court to be the most important consideration in the *Miranda* custody analysis.

This is not to say that this type of statement by interrogators will guarantee a finding of "no *Miranda* custody." In some cases it is clear from the facts that a suspect is **not** free to simply walk away. This would be the case where the suspect has been placed under arrest or the facts are clear that the subject is **not** going to be released. In that case a clear statement that the suspect is free to refuse to answer questions will be a "most important consideration in the *Miranda* custody analysis." **Interrogators always have the option of stating that the suspect is free to decline to answer questions.**

As indicated in this case, courts look at all the circumstances in determining whether a person is

in *Miranda*-type custody. **Much of what a reviewing court will consider will be the language used by the law enforcement officer.**

***Miranda*: What Constitutes Non-Custodial Encounter for *Miranda* Purposes; Reasonable Person Test; Factors to Determine *Miranda* Custody; Advising Suspect That He Need Not Answer Questions**

United States v. Dickson, No. 21-6176, United States Court of Appeals, Sixth Circuit (2022). https://law.justia.com/cases/federal/appellate-courts/ca6/21-6176/21-6176-2022-06-29.html

SUMMARY, FACTS AND PROCEDURAL HISTORY

Defendant claimed that law enforcement agents violated the Fifth Amendment when they questioned him at his home about possession of child pornography without giving him *Miranda* warnings and violated the Fourth Amendment when they seized his cell phone without a warrant. The court ruled that because defendant was not subjected to custodial interrogation and because exigent circumstances justified seizing his phone, the trial court's denial of his motions to suppress evidence would be affirmed.

A state agency sent information about a Louisville resident's involvement in a child pornography investigation to a police detective, a member of a cyber crimes unit. Detective Michael Littrell obtained a warrant to search the house where the suspect lived. By the time the officers executed the warrant defendant had moved out. An agent found evidence that potentially pointed to defendant's new address. The officers went to the new location to see if he lived there and to see if he would answer their questions.

At roughly11:30 a.m., six agents arrived at the new address. Two of them, Detective Littrell and Agent Brad Hutchinson, went to the door and knocked. Defendant answered. The officers wore plain clothes and did not display any weapons. They showed defendant their credentials, offered a "high-level overview of the[ir] investigation," and asked if they could come in and ask him some questions. Defendant invited them inside. Because defendant's brother was there, the officers asked defendant if they could speak in a more private area given the sensitive nature of the investigation. At defendant's suggestion, they moved to the living area in the basement, an approximately 1,200 square-foot open space.

Detective Littrell, Agent Hutchison, and Agent Heather D'Hondt accompanied Dickson downstairs. The interview lasted about an hour. Detective Littrell, Agent Hutchison, and defendant initially sat on defendant's furniture. Agent D'Hondt, who was "very new" to the cyber crimes unit, stood against the wall by the stairs to observe the interview. During the conversation, defendant smoked cigarettes, moved freely about the room, and went to the bathroom. He was not handcuffed or otherwise restrained. **The officers did not advise defendant of his *Miranda* rights.**

Defendant at first denied any involvement with the activities under investigation. He told the agents that he accessed the internet using a cell phone but that he did not have it with him.

After 20 or 30 minutes, defendant got up to use the restroom. At that point, Agent D'Hondt noticed the outline of a cell phone in defendant's pocket. She asked him about it. Defendant pulled the phone out of his pocket and began "manipulating the screen." Concerned that defendant was deleting evidence, Detective Littrell grabbed the phone. The screen displayed an image of a naked baby. Detective Littrell kept the phone and put it in "airplane mode" to prevent the deletion of any content.

At this, defendant became upset. After he calmed down, Detective Littrell asked if defendant was willing to look through the phone with the officers. Defendant agreed. The phone contained images of "naked babies, and toddlers, and teenagers." Defendant explained that he downloaded the images so that he could report the people who created them.

After a few more minutes of conversation, Detective Littrell consulted with Agent Hutchison and decided to arrest defendant for possessing child pornography. Additional police officers arrived at the residence a few minutes later, handcuffed defendant, and transported him to a detention center.

A grand jury indicted defendant for producing, possessing, distributing, and attempting to produce child pornography. He moved unsuccessfully to suppress the statements he made to police at his home and the evidence gathered from his cell phone. Defendant entered a conditional guilty plea, reserving his right to appeal the denial of his motions to suppress. The trial court sentenced him to 384 months.

WHAT CONSTITUTES A NON-CUSTODIAL ENCOUNTER

In assessing a district court's ruling on a suppression motion, we give a fresh look to the court's legal conclusions and clear-error review to its factual findings. *United States v. Salvo*, 133 F.3d 943, 948 (6th Cir. 1998). We view the evidence in the light most favorable to the district court's decision, here its decision to deny the motions. *United States v. Coffee*, 434 F.3d 887, 892 (6th Cir. 2006).

Fifth Amendment. A person may not be "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To protect that right against self-incrimination, police officers must give certain warnings, including the right to remain silent, before conducting a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).In deciding whether a person is **"in custody" for *Miranda* purposes, we consider all of the "objective circumstances...to determine how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action."** *United States v. Luck*, 852 F.3d 615, 621 (6th Cir. 2017) (quoting *United States v. Panak*, 552 F.3d 462, 465 (6th Cir. 2009)). The "ultimate inquiry is whether...the interviewee's freedom of movement was restrained to a degree associated with formal arrest." *Id.* ***Familiar factors guide the assessment: "the location of the interview; the length and manner of questioning; whether the individual possessed unrestrained freedom of movement during the interview; and whether the individual was told she need not answer the questions."*** *Panak*, 552 F.3d at 465.

Gauged by these considerations and the circumstances facing defendant, he was not in custody during the interview. The officers questioned him in his ***home***,"a fact that typically weighs against being 'in custody.'" *Luck*, 852 F.3d at 621 (quotation omitted). **The *manner* and length of questioning** do not raise any red flags either. **The conversation was "*pretty laid back*."** R.42 at 9. ***And an hour-long interview is "not lengthy"* by conventional standards.** *Luck*, 852 F.3d at 621; see *Panak*, 552 F.3d at 467. **He also was *free to move* and do what he wished.** During the interview, defendant moved around the basement, smoked cigarettes, and used the bathroom. The officers "did not handcuff" defendant or "physically restrain" him, and ***"they did not otherwise limit [his] freedom of movement."*** *Panak*, 552 F.3d at 467. **All signs considered, a reasonable person in defendant's position would not think the officers had restrained his freedom of movement to a degree associated with a formal arrest.**

We appreciate the contrary arguments, but they do not change things. ***The officers, sure enough, did not tell defendant that he did not need to answer their questions—one of the Miranda warnings. But that does not make the encounter custodial.*** The officers knocked on the door, introduced themselves, "asked [defendant] if he would answer a few questions regarding an investigation," and entered at his invitation. R.42 at 35. They never restrained defendant or told him that he could not move about the room or leave. ***Advising an individual that he need not answer an officer's questions is"one factor among many," and "we have never held that it is a necessary condition...before officers may question an individual in a non-custodial setting."*** *Panak*, 552 F.3d at 467. Else, the decision not to give this *Miranda* warning would always mean it should have been given, a conclusion at odds with the whole point of the custody inquiry.

Defendant claimed that he refused to let the officers enter his home when they knocked on the door and that they barged in anyways. But the district court did not find Dickson's testimony credible, noting his admissions that he "was doing a little bit of drugs" at the time and that the drugs affected his memory. We cannot embrace defendant's version of events when the district court accepted the officers' contrary telling and had ample credibility-based reasons for doing so. *United States v. Garrido*, 467 F.3d 971, 977–79 (6th Cir. 2006).

Defendant added a few other weights to the custody side of the scale, noting his **proximity to the three officers, his lack of experience with the police, and the officers' intent to elicit incriminating statements from him.** But these arguments do not alter our conclusion either. The presence of three officers does not"transform one's castle into an interrogation cell." *Panak*, 552 F.3d at 466. In other cases featuring in-home encounters with officers, such "questioning" likewise "did not rise to the level of custodial interrogation." *Id.* at 468. That's especially so here **because the agents did not restrain defendant's freedom of movement in any way within the house or even limit him from leaving the house.** Nor does defendant's lack of experience with law enforcement or the officers' subjective intentions alter the "objective"in custody determination. See *Yarborough v. Alvarado*, 541 U.S. 652, 667–68 (2004) ("We do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights."); *California v. Beheler*, 463 U.S. 1121, 1124 & n.2 (1983) (per curiam) (rejecting the notion that the "in custody" requirement is satisfied "merely because the police interviewed a person who was the 'focus' of a criminal investigation").

What of defendant's suggestion that the questioning became custodial after the officers took his phone and told him "[w]e need to talk about this and figure out what's going on"? R.42 at 13.The pertinent question, though,"is not whether the individual felt pressure to speak to the officers but whether she was forced to stay with them." *Panak*, 552 F.3d at 471.That the officers asked Dickson if he would talk about the phone, incriminating though it might have been, did not suddenly make a non-custodial interview custodial.

THE COURT'S CONCLUSION ON THE NATURE OF THE POLICE QUESTIONING

The issue is not whether the defendant subjectively thought he was about to be caught for committing a crime; it is whether he objectively was free to leave. *Nothing prohibited him from ending the conversation then and there.* *Even prime suspects in investigations may be"free to come and go until the police decide to make an arrest." Stansbury v. California*, 511 U.S. 318, 325 (1994). And even after taking defendant's phone, the officers did not restrict his activity. **So far as his admissions go, this was a non-custodial encounter from beginning until his formal arrest at the end.**

PRACTICE POINTER

The court in this case places little value on telling a suspect that he is not required to answer questions, in order to determine admissibility of a confession. Yet doing so is considered by many courts to be an element in determining whether *Miranda* warnings have been adequately given. Many courts in fact consider that particular warning a key element in determining admissibility of incriminating statements.

Miranda: Invocation of the Right to Remain Silent; Defendant's Repeated Statements That He Wanted to Go Home Were Not Evidence That He Invoked His Right to Remain Silent; Lack of Evidence That Defendant's Will Was Overborne; Reasonable Person Test

United States v. Simpson, No. 21-2463, United States Court of Appeals, Eighth Circuit (2022). https://law.justia.com/cases/federal/appellate-courts/ca8/21-2463/21-2463-2022-08-15.html

SUMMARY, FACTS AND PROCEDURAL HISTORY

Ramon Simpson was convicted of kidnapping resulting in death and conspiracy to commit kidnapping. On appeal, Simpson challenged several rulings of the district court and the sufficiency of the evidence in support of the convictions.

The crime at issue occurred on November 4, 2018. On that date, Simpson and Joseph James traveled with a friend to a bar in Yankton, South Dakota. The men then decided to drive to a strip club in Lesterville, South Dakota. On the way to Lesterville, they stopped near a farm, where Simpson and James got out of the car.

The farm was owned by Phyllis Hunhoff's mother. Simpson and James encountered Phyllis Hunhoff as she was driving home from the farm. The prosecution's theory at trial was that the

two men kidnapped Ms. Hunhoff and drove with her toward Simpson's house in Norfolk, Nebraska. The prosecution alleged that the perpetrators then physically and sexually assaulted, strangled, and disemboweled Ms. Hunhoff. James purchased gasoline, drove to a remote dirt access road, and attempted to burn Ms. Hunhoff's body and car. After an investigation, James pleaded guilty to first-degree murder and was sentenced to life imprisonment.

A grand jury charged Simpson with kidnapping resulting in death (as well as aiding and abetting that offense), 18 U.S.C. §§ 2, 1201(a) (1), and conspiracy to commit kidnapping, *id.* § 1201(c). Before trial, Simpson moved to suppress statements made during conversations with an FBI agent on November 8 and 21, 2018. **The district court denied the motion after concluding that Simpson was not in custody during the conversations, did not invoke his right to remain silent in any event, and made the statements voluntarily.** Simpson also moved to exclude photographs and a video of Ms. Hunhoff's body at the crime scene and during her autopsy on the ground that they were unfairly prejudicial. The court granted the motion in part, but allowed the prosecution to introduce some of the photographs and the video.

A jury convicted Simpson of both offenses. The district court imposed concurrent sentences of life imprisonment on each count.

THE COURT'S FINDING THAT THERE WAS NO *MIRANDA* VIOLATION

Simpson's first argument on appeal is that the district court erred by denying his motion to suppress statements from the interviews on November 8 and 21, 2018. **He contends that investigators subjected him to custodial interrogations without advising him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).**

According to the district court's findings, Agent Howard visited Simpson at his residence on November 8, four days after the kidnapping. Howard had attempted to contact Simpson earlier that day. Simpson returned the call and invited Howard to meet at the home. Simpson admitted Howard into the residence, and they spoke at the dining room table, with Simpson's wife seated on a couch nearby. Howard was dressed in plain clothes with no weapon visible. Simpson was not handcuffed or otherwise restrained during the interview. **Howard never said that Simpson would be arrested, and when the twelve-minute interview concluded, Howard departed.**

In determining whether a defendant was in custody, the critical inquiry is"whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *United States v. Williams*, 760 F.3d 811, 814 (8thCir. 2014) (internal quotations omitted); see *California v. Beheler*, 463 U.S. 1121,1125 (1983) (*per curiam*). We consider "the circumstances surrounding the questioning and whether, given those circumstances, a reasonable person would have felt free to terminate the questioning and leave." *United States v. Ferguson*, 970 F.3d895, 901 (8th Cir. 2020).

We conclude that there was no custodial interrogation of Simpson on November 8. Simpson responded to the FBI agent's request for a conversation and agreed to let the agent come to his house for the meeting. The agent did not display a weapon or restrain Simpson in any way. The

agent was dressed in plain clothes and allowed Simpson's wife to sit nearby for the interview. The questioning was conducted in Simpson's living room, on his "own turf." See *United States v. Helmel*, 769 F.2d 1306, 1320 (8th Cir. 1985). **Under these circumstances, a reasonable person would have felt free to terminate the interview and have the agent depart if he did not wish to speak further. It was not necessary for the agent to state affirmatively that the questioning was voluntary and that Simpson was free to leave. *Miranda* warnings were not required.**

Regarding November 21, 2018, the district court found that Simpson agreed to meet the FBI agent at a police station and drove there voluntarily. At the outset, the agent and Simpson spoke for about twenty-five minutes. **Although this interview took place on law enforcement's "home turf," the plain-clothed agent informed Simpson that he was not under arrest and that he was free to leave at any time. The provision of this guidance is a strong objective indicium that a reasonable person would feel free to leave.** *Williams*, 760 F.3d at 814-15.

Simpson was not restrained, the agent did not block the exit, and Simpson was offered a bathroom break during the short meeting. The agent did not raise his voice, threaten Simpson, or display a weapon. ***Simpson complains that the room was small and the door was closed, but these factors are not sufficient to place Simpson in custody*.** The agent told Simpson that he was free to leave, so he could have risen, opened the door, and departed as he wished. The district court correctly determined that Simpson was not in custody when meeting with the agent, and **no *Miranda* warnings were required.**

After the initial questioning on November 21, a polygraph examiner advised Simpson of his *Miranda* rights and obtained his consent to conduct a polygraph examination. **The polygraph examiner spoke with Simpson for approximately five hours, during which time he was offered breaks to smoke and use the restroom.** At that point, however, Simpson had been warned under *Miranda*, so it is immaterial whether he was in custody, and we need not consider the point further.

After the polygraph examiner was finished, the FBI agent resumed questioning Simpson for about fifty minutes. **During this period, Simpson answered questions but stated repeatedly that he wanted to go home. Simpson maintains that his repeated requests to go home constituted an invocation of his right to remain silent, and that the agent was required under the *Miranda* rule to cease questioning.** See *Miranda*, 384 U.S. at 473-74. Even assuming for the sake of analysis that Simpson was in custody, however, a suspect's invocation of his right to remain silent must be clear and unequivocal. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010); *United States v. Adams*, 820 F.3d 317, 323 (8th Cir. 2016).

Simpson's repeated statements that he wished to go home were not unambiguous invocations of his right to remain silent*.** "[T]he prospect of going home would naturally be of great interest to any suspect undergoing interrogation," but like the Eleventh Circuit, ***we are not persuaded that a statement about wanting to go home "evidences a refusal to talk further." *Moore v. Duggar*, 856 F.2d 129, 134 & n.1(11th Cir. 1988). That Simpson reiterated the wish many times does not transform his expression of a desire to be elsewhere into an unambiguous assertion of

the right to remain silent. Simpson was informed in the *Miranda* warnings that he had a right to remain silent, but he never asserted that right, and **he continued to answer questions for more than fifty minutes after first stating that he wanted to go home.** The district court did not err in concluding that the questioning complied with the *Miranda* rule.

Simpson also claims that his statements on both dates were involuntary and should be suppressed based on the Due Process Clause. "A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant's will and critically impair his capacity for self-determination." *Simmons v. Bowersox*, 235 F.3d 1124, 1132 (8th Cir. 2001). Simpson has not made that showing here. **There were no threats or promises that might have overborne Simpson's will. There is no indication that Simpson is particularly susceptible to undue influence:** he is an adult of average intelligence who has earned an associate's degree and is familiar with the protections afforded by the legal system due to an extensive criminal history. See *Yarborough v. Alvarado*, 541U.S. 652, 667-68 (2004); *United States v. LeBrun*, 363 F.3d 715, 726 (8th Cir. 2004) (*en banc*). The court properly denied the motion to suppress.

* * *

THE COURT'S CONCLUSION

The court ruled that the trial court properly denied the motion to suppress, and based on the evidence, a reasonable jury could have concluded that Ms. Hunhoff was seized and held against her will, that Simpson knowingly and actively participated in the kidnapping, that Simpson conspired to participate in a kidnapping, and that the kidnapping resulted in Ms. Hunhoff's death. There was sufficient evidence to support the convictions.

PRACTICE POINTER

The court used the "reasonable person" test for determining whether the defendant was in *Miranda* custody. A reasonable person who is questioned in his own home and not told that he can leave the presence of the interrogator is not in *Miranda*"custody," and therefore is not entitled to the full warnings and effects contemplated by *Miranda*. By the same token a person who is interrogated in a police station but informed that he is not under arrest and told that he is free to leave at any time is also not in *Miranda* custody and not entitled to the full effects contemplated by *Miranda*. Additionally, the person who is in a police station and simply states that he wants to go home does not illustrate an invocation of the right to remain silent and a refusal to talk further to the police. The court noted that there were no threats or promises that would overbear the subject's will to not answer questions and there was no evidence that the defendant was susceptible to undue influence.

In short, defendant was not in *Miranda* custody during the conversations at the police station that would trigger a right to be informed of the *Miranda* warnings.

***Miranda*: Custody; Questioning a Suspect in a Police Vehicle; Defendant's Ability to Leave**

the Presence of the Police; Officer's Statement That Police Needed to Talk to Defendant Did Not Imply That the Defendant Was Required to Talk to the Officers; Factors to Determine *Miranda* Custody

United States v. Johnson, No. 21-3565, United States Court of Appeals, Eighth Circuit (2022).. https://law.justia.com/cases/federal/appellate-courts/ca8/21-3565/21-3565-2022-07-13.html

SUMMARY, FACTS AND PROCEDURAL HISTORY

After a jury trial, defendant was convicted of sexually abusing an incapacitated individual. He appealed, challenging the district court's denial of his motion to suppress statements made to law enforcement.

On May 6, 2019, J.W.S. reported to law enforcement that Johnson, her half-brother, had performed a sex act on her the previous day while she was asleep at his home after a night of drinking. J.W.S. explained that she awoke as Johnson was completing the sex act.

Later that day, three law enforcement agents went to Johnson's home and knocked on the door. Johnson opened the door, and the agents said that "[they] needed to talk with him about allegations" against him. The agents "asked if he would come out with [them] and talk." **Johnson agreed and accompanied the agents to their vehicle.** Agent Cavanaugh sat in the driver's seat, Johnson sat in the front passenger seat, and Agent Vivier sat in the back. At no point did the agents place Johnson in handcuffs or otherwise physically restrain him.

Once inside the vehicle, the agents informed Johnson that his half-sister had reported that he had sexually assaulted her. Johnson denied the allegation. He explained that J.W.S. and a friend had visited Johnson's home the night before the alleged assault and that J.W.S. had been drinking. Eventually, the friend left, but J.W.S. remained and slept in one of the home's bedrooms. **According to Johnson, "he was never around" J.W.S. after she went to bed. Johnson specifically denied having sex with J.W.S.**

The agents then asked Johnson if he had any questions for them. Johnson indicated that he did not. Johnson opened the passenger-side door, which had remained unlocked throughout the interview, and exited the vehicle. Before the agents left, they requested a DNA sample, and Johnson agreed to provide one.

The agents sent Johnson's DNA sample as well as vaginal swabs collected from J.W.S. to a crime lab for testing. The vaginal swabs tested positive for the presence of semen, and the DNA in the semen matched the DNA in Johnson's sample.

After receiving the DNA test results, Agents Cavanaugh and Vivier asked Johnson for a *follow-up interview*. Johnson agreed. Again, the interview took place in the agents' vehicle, with Agent Cavanaugh in the driver's seat, Johnson in the front passenger seat, and Agent Vivier in the back. The agents did not place Johnson in handcuffs or otherwise physically restrain him. **The vehicle's doors and windows remained unlocked, and at one point Johnson rolled**

down the passenger-side window.

The agents informed Johnson about the DNA test results. Johnson acted "surprised" and "denied that . . . it could be him." Once again, the agents gave Johnson an opportunity to ask them questions. When the interview ended, Johnson exited the vehicle on his own accord.

Johnson was charged with "knowingly . . . engag[ing] in a sexual act with another person if that other person is . . . physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." Johnson pleaded not guilty and moved to suppress the statements he made during his two interviews with the agents. The district court denied the motion.

At trial, J.W.S. repeated under oath her allegation that she awoke to Johnson completing a sex act on her. Johnson testified that he did have sex with J.W.S. but that it was "consensual" and that, "[i]n fact, she initiated the entire act." By the time Johnson testified, the jury had already heard the recordings of the interviews where Johnson denied having sex with J.W.S. **Johnson explained that he lied during the interviews because he was "embarrassed" and did not want his girlfriend to learn that he had sex with J.W.S.** The jury found Johnson guilty, and the district court denied Johnson's motion for a judgment of acquittal. Johnson appealed, arguing that he was in *Miranda* custody when he was interrogated by the police and was not given *Miranda* warnings. On appeal Johnson challenged the denial of his suppression motion.

THE COURT'S FINDING THAT DEFENDANT WAS NOT IN *MIRANDA* CUSTODY AND THEREFORE, *MIRANDA* WARNINGS WERE NOT REQUIRED

We review the denial of a suppression motion *de novo* as to legal conclusions and for clear error as to factual findings. *United States v. Thompson*, 976 F.3d 815, 821 (8th Cir. 2020). Where, as here, law enforcement officers interrogated the defendant without providing him *Miranda* warnings, the defendant is generally entitled to suppression of his responses if the interrogation was "custodial." *See id.* at 823-24. ***Whether the interrogation was custodial depends on "whether a reasonable person in the [defendant's] shoes would have felt free to end the interview."*** *United States v. Roberts*, 975 F.3d 709, 716 (8th Cir. 2020). **We look to the totality of the circumstances to determine whether a reasonable person would have felt free to end the interview, *id.*, including:**

FACTORS TO DETERMINE *MIRANDA* CUSTODY

> **(1)** whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; **(2)** whether the suspect possessed unrestrained freedom of movement during questioning; **(3)** whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; **(4)** whether strong arm tactics or deceptive stratagems were employed during questioning; **(5)** whether the atmosphere of the questioning was police dominated; [and] **(6)** whether the suspect was placed under arrest at the termination of the questioning,

United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990).

Applying these factors here, we conclude that Johnson was not in custody during his interviews with Agents Cavanaugh and Vivier. True, the first factor weighs in Johnson's favor because the agents never informed him that he was free to leave or that he was not under arrest. And the fifth factor—whether the atmosphere of the questioning was police dominated—is mixed. **On the one hand, the interviews were two-way discussions in which Johnson had an opportunity to ask questions,** *see United States v. Axsom*, 289 F.3d 496, 502 (8th Cir. 2002) (concluding that the atmosphere was not police dominated in part because "[c]ommunication between the agents and [the defendant] consisted of two-way questioning"); **on the other hand, the interviews occurred in the agents' vehicle.** (concluding that the atmosphere was not police dominated in part because it took place "in the comfort and familiarity of [the defendant's] home).

But the other factors weigh in the Government's favor. **Johnson retained freedom of movement throughout the interviews: the agents did not handcuff him, the doors remained unlocked, and he entered and exited the front seat of the vehicle on his own.** *See United States v. Soderman*, 983 F.3d 369, 377 (8th Cir. 2020) (concluding that the defendant "retained a degree of free movement" in a police car because he "was neither handcuffed nor forced to sit in the back seat"); *United States v. Hoeffener*, 950 F.3d 1037, 1046 (8th Cir. 2020) (holding that the defendant was not in custody in the front seat of a police car because he "was not handcuffed or otherwise restrained"). **In addition, Johnson voluntarily acquiesced to both interviews.** *See United States v. Sanchez-Velasco*, 956 F.3d 576, 581 (8th Cir. 2020) (concluding that there was no custodial interrogation in part because the defendant "entered . . . and answered [the officer's] questions voluntarily"); *Hoeffener*, 950 F.3d at 1046 (holding that the defendant was not in custody in part because, when "asked if he would sit in the front seat [of the police car] to talk," he "willingly and voluntarily did so"). **Furthermore, the agents did not employ strong-arm or deceptive tactics but simply were candid with Johnson about the evidence against him.** *Cf. Axsom*, 289 F.3d at 497, 502 (concluding that agents did not use strong-arm or deceptive tactics when they were candid about the crime that the defendant was suspected of committing and asked "straightforward questions"). **Finally, Johnson was not arrested at the conclusion of either interview.**

Johnson argues that he was nonetheless in custody because the agents stated that they "needed to talk with him." We disagree. When they said that they "needed to talk" with Johnson, **the agents were merely offering a truthful explanation for their appearance at Johnson's home:** their duties as criminal investigators required them to speak with Johnson. **The agents never implied that the law or anything else required Johnson to speak with them.** *See United States v. Braxton*, 112 F.3d 777, 781 (4th Cir. 1997) (en banc) (concluding that despite the "officers' use of the colloquial phrase 'we need to talk to you,' . . . [t]here is absolutely no evidence that the officers told [the suspect] that he was obligated to speak with them").

THE COURT'S CONCLUSION

In sum, considering the *Griffin* factors together in light of the totality of the circumstances, **we**

conclude that Johnson was not in custody during his interviews with Agents Cavanaugh and Vivier. *See Hoeffener*, 950 F.3d at 1046 (reaching the same conclusion on similar facts). Therefore, the district court properly denied Johnson's suppression motion.

PRACTICE POINTER

When police officers wish to speak to a suspected perpetrator of a crime, they may be able to do so without the situation becoming "custody," and requiring the giving of *Miranda* warnings and taking a waiver. They may do so if the person is not restrained and is free to leave the presence of the officers. This may be a difficult scenario to create since the surroundings and language used by the police may – and probably **will** – turn out to be one of – real or implied – restraint, and therefore *Miranda* type "custody." Unless the officers are realistically certain that the scenario is not likely to be interpreted as *Miranda*-type custody, the choice of warnings may be the better course to pursue.

In any case, the entire scenario – place – number of officers – language used – would determine whether the encounter constituted *Miranda* custody. In this case, based on the facts, giving the *Miranda* warnings would have been a good choice for the officers, in spite of the fact that this court viewed the scenario differently. It is not difficult to imagine that many courts would have ruled for giving the warnings, based on similar facts.