

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
DAVE LUCERO JIM, SR.,
Respondent.

No. 76145-COA

FILED

JUL 17 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

The State appeals from a district court order granting in part and denying in part a pretrial motion to suppress evidence. First Judicial District Court, Carson City; James E. Wilson, Judge.

Dave Lucero Jim, Sr., was arrested for suspicion of driving under the influence of alcohol after he responded in the affirmative to a sheriff's deputy's question as to whether he had been drinking and driving, failed a field sobriety test, and failed a preliminary breath test. Jim moved to suppress his statements admitting to drinking and driving on the ground that they were the result of custodial interrogation without the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court conducted an evidentiary hearing, concluded Jim's detention was a *Terry*¹ stop that ripened into custody, and granted Jim's motion as to his oral statements.²

¹*Terry v. Ohio*, 392 U.S. 1 (1968).

²The district court denied Jim's request to suppress test results of physical evidence collected after he was arrested. That portion of the order is not at issue in this appeal.

The State contends the district court erred because Jim was not “in custody” for *Miranda* purposes. The State had the “heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination.” *Miranda*, 384 U.S. at 475. We review “[t]he district court’s purely historical factual findings pertaining to the ‘scene- and action-setting’ circumstances surrounding an interrogation” for clear error but review its determination of whether a person was in custody *de novo*. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

To protect the privilege against self-incrimination, statements made by a suspect during custodial interrogation are inadmissible at trial unless the police have provided a *Miranda* warning. *See Miranda*, 384 U.S. at 478-79; *State v. Taylor*, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998). Even if he has not been formally arrested, a defendant is in custody under *Miranda* if his “freedom has been restrained to the degree associated with a formal arrest so that a reasonable person would not feel free to leave.” *Carroll v. State*, 132 Nev. 269, 282, 371 P.3d 1023, 1032 (2016) (internal quotation marks omitted).


The district court made the following findings of fact. Although Jim first came to a deputy’s attention because of a traffic violation, he was not detained pursuant to a traffic stop. He was detained after he exited his vehicle at a gas station, because he matched the description of a person of interest deputies had been looking for. Two deputies contacted Jim inside the gas station store and determined he was not the person of interest. The deputies escorted him outside to another deputy to whom they relayed that they smelled alcohol on Jim’s breath. The deputy to whom they relayed the information also observed Jim’s bloodshot, glassy eyes and overall slowed and depressed manner, and he then began a standard investigation into

whether Jim had been driving under the influence of alcohol, including asking Jim if he had been driving and drinking. There was no evidence Jim consented to being taken out of the store. Although Jim was not physically restrained in any way, there were five deputies on the scene, and no one told Jim he was not under arrest.

The district court's findings of fact are supported by substantial evidence in the record and are not clearly erroneous. From these findings, the district court concluded Jim's freedom had been restrained to the degree associated with a formal arrest so that he would not feel free to leave and that the officer's treatment of him rendered him in custody for practical purposes. We cannot conclude the district court erred. *See id.* at 282-85, 371 P.3d at 1032-34. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. James E. Wilson, District Judge
Attorney General/Carson City
Carson City District Attorney
State Public Defender/Carson City
Carson City Clerk