

Trial court did not abuse its discretion by denying motion to suppress statement because juvenile was not in custody when the statement was made.[In the Matter of C.M.](12-3-8A)

On February 22, 2012, the Waco Court of Appeals held that the juvenile was not considered in custody when officer took him to an unmarked police car, where a recording device had been activated, to discuss what had happened in an armed robbery.

¶ 12-3-8A. **In the Matter of C.M.**, MEMORANDUM, No. 10-10-00421-CV, 2012 WL 579540 (Tex.App.-Waco, 2/22/12)

Facts: An armed robbery of a convenience store committed with a shotgun took place a short distance from the place C.M. was residing with his cousin, Charles, and Charles's wife, Laura. At this time, C.M. was fifteen years old. Shortly after the robbery, a neighbor called the police to report a suspicious person attempting to enter Charles and Laura's residence through the back door. Multiple officers had been dispatched to the scene to attempt to locate the robber, some of whom were in uniform and some were not. An officer came to the residence and asked to search the residence because of the neighbor's report to make sure that no one had broken into the residence. Laura was the only person at home and gave consent.

At one point during the search for the robber, a suspect was spotted and chased, but that person escaped. A short time later, an officer spotted C.M. in an alley a short distance away peering around a corner of a building. When he saw an officer and a deputy constable, C.M. turned and tried to walk away. The officers took off running after C.M. and told him to stop, which he did. C.M. was frisked for weapons and walked back with the officers to the residence.

At the residence, C.M. was told not to leave and to wait next to Charles's vehicle. C.M. sat down on the back of Charles's truck and waited. Hines, a detective, and at least one other officer stood with CM. and had a conversation with CM. about what he had been doing that day and why he was not in school. During this time other officers were in the vicinity of CM. and were armed, although the officers testified that no weapon was pointed at CM. at any time and the weapons were unholstered only during the protective sweep of the residence. Additionally, some of the officers at the scene carried patrol rifles but the officers testified that they were pointed at the ground in a safety circle position and not at CM. While sitting on Charles's truck, the officers observed that CM. seemed to be very nervous and shaking. He was dressed in a t-shirt and shorts, which the officers believed was odd for the weather that day, which was cool. CM. was not handcuffed at any time prior to the conclusion of the second statement made in the patrol car.

C.M.'s initial story regarding his whereabouts that day were shown to be untrue, and after a short conversation of approximately five to ten minutes, Hines confronted C.M. by telling him that they knew what had happened that morning and that CM. might as well be truthful with the officers. At this point, CM. admitted that he had robbed a store with a shotgun. He had stolen a shotgun from a friend in Dallas and had hidden it under his bed wrapped in a towel. CM. committed the robbery so he could get the money to return to Dallas, his hometown. CM. contended

that he had thrown down the money and shotgun while he was being chased. This is the first statement of which C.M. complains.

Hines then took CM. to an unmarked police car so they could discuss what had happened in a quieter environment. Hines got into the driver's side and CM. got into the passenger side front seat. Another officer had already activated a recording device in the vehicle. Hines asked CM. similar questions except in more detail and CM. again confessed to stealing the shotgun and committing the robbery with the shotgun that was loaded. CM. stated that if the store clerk had resisted that he would have shot the clerk. CM. did not seem overly nervous or upset during this interview but was calm and matter-of-fact. After this discussion, Hines told CM. that he was under arrest and that he would be taken to juvenile detention. This was the second statement of which CM. complains. CM. was then left in the vehicle for a short time when another officer came and asked him to exit the vehicle, at which time he was then handcuffed.

Multiple officers spoke with Charles and Laura during this time. Laura consented to a search of C.M.'s room and the residence. Charles and Laura both testified that they asked to speak to C.M., but were not allowed to do so. Both stated that if they had been allowed to speak to CM. they would have advised him against making any statements until after speaking with an attorney and that they believed that CM. would have listened to their advice. Charles asked to accompany CM. to the police station but the officers told him no and that he could not speak with CM. until he was taken to juvenile detention. CM. did not have any prior adjudications as a juvenile; however, Charles testified that CM. had been in trouble before but had not been caught when he lived in Dallas.

C.M. was taken to the Bryan Police Department to see a magistrate. C.M. was in an interview room for approximately an hour waiting for the magistrate to arrive. There is no dispute that C.M. was in custody at this time. Gore, a magistrate, arrived and met with C.M. in the interview room. She reviewed the required warnings and advised C.M. of his rights as required by section 51.095(a)(5)(A) of the Family Code. C.M. signed an acknowledgment that he had been read and had his rights explained to him by the magistrate, that he understood them, and had asked any questions he had regarding them. This was electronically recorded both visually and aurally. The magistrate asked C.M. if he still wanted to talk with the detectives and C.M. responded affirmatively. Gore also testified at the suppression hearing that she believed that C.M. understood his rights and that he voluntarily wanted to speak with the officers. C.M. was interviewed by Hines and another detective and made a statement similar to the statement recorded in the police vehicle. This statement by C.M. is the third statement of which C.M. complains.

C.M. filed a motion to suppress each of these statements, which was denied after a hearing by the trial court. C.M. did not testify at the suppression hearing. After the motion was denied, C.M. pled true to the offenses of aggravated robbery and possession of a prohibited weapon, a sawed-off shotgun. In the disposition phase, the trial court accepted the disposition of a determinate sentence of fifteen years' confinement to be served in the custody of the Texas Youth Commission for the aggravated robbery which had been agreed-upon by the State and C.M.

Held: Affirmed

Memorandum Opinion: In determining whether or not the statements should have been suppressed, the initial inquiry is at what time C.M. was in custody of the police because the protections of the 5th and 14th Amendments of the United States Constitution, article 1, sections 9 and 10 of the Texas Constitution, and relevant sections of the Family Code concerning the admissibility of statements of a juvenile do not apply if the juvenile is not in custody when the statement was made.^{FN1} See TEX. FAM.CODE ANN. § 51.095(d); *Roquemore v. State*, 60 S.W.3d 862, 866 (Tex.Crim.App.2001).

FN1. Although C.M. complains that the statements were made in violation of the Texas Constitution, he makes no further arguments regarding what protections the Texas Constitution provides that differ from those of the United States Constitution; therefore we will not address that portion of his issue. See TEX.R.APP. P. 38.1(i); see also *Johnson v. State*, 853 S.W.2d 527, 533 (Tex.Crim.App.1992) (declining to address appellant's arguments regarding his state constitutional rights when the appellant did not make a distinction between the United States Constitution and the Texas Constitution).

Custodial interrogation is questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. See *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 1528–30, 128 L.Ed.2d 293 (1994); *Cannon v. State*, 691 S.W.2d 664, 671 (Tex.Crim.App.1985); *Martinez v. State*, 131 S.W.3d 22, 32 (Tex.App.-San Antonio 2003, no pet.). “A custodial interrogation occurs when a defendant is in custody and is exposed ‘to any words or actions on the part of the police ... that [the police] should know are reasonably likely to elicit an incriminating response’” *Roquemore v. State*, 60 S.W.3d at 868 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689–90, 64 L.Ed.2d 297 (1980)). A child is in custody if, under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was significantly restricted. *In re U.G.*, 128 S.W.3d 797, 799 (Tex.App.-Corpus Christi 2004, pet. denied); *Jeffley v. State*, 38 S.W.3d 847, 855 (Tex.App.-Houston [1st Dist.] 2001, pet. ref'd).

We employ a two-step analysis in a juvenile delinquency proceeding to determine whether a child is in custody. *In re M.R.R.*, 2 S.W.3d 319, 323 (Tex.App.-San Antonio 1999, no pet.). First, we examine all the circumstances surrounding the interrogation in order to determine whether there was a formal arrest or restraint of freedom of movement to the degree associated with a formal arrest. *Stansbury*, 511 U.S. at 322, 114 S.Ct. at 1528–29; *In re M.R.R.*, 2 S.W.3d at 323. This initial determination focuses on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the child being questioned. *Stansbury*, 511 U.S. at 322, 114 S.Ct. at 1529; *In re M.R.R.*, 2 S.W.3d at 323. Second, we consider whether a reasonable child would have felt he or she was at liberty to terminate the interrogation and leave in light of the given circumstances. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 465, 133 L.Ed.2d 383 (1995); *In re M.R.R.*, 2 S.W.3d at 323.

The four factors relevant to a determination of custody include (1) probable cause to arrest; (2) focus of the investigation; (3) subjective intent of the police; and (4) subjective belief of the defendant. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex.Crim.App.1996); *In re J.A.B.*, 281 S.W.3d at 65; *In re M.R.R.*, 2 S.W.3d at 323. Because the determination of custody is based on primarily objective circumstances, whether the law enforcement officials had the subjective intent to arrest is irrelevant unless that intent is somehow communicated to the suspect. *Stansbury*, 511 U.S. at 323, 114 S.Ct. at 1529; *Dowthitt*, 931 S.W.2d at 254; *Jeffley*, 38 S.W.3d at 855; *In re M.R.R.*, 2 S.W.3d at 323.

The following situations generally constitute custody: (1) when the child is physically deprived of his freedom of action in any significant way; (2) when a law enforcement officer tells the child that he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; or (4) when there is probable cause to arrest and law enforcement officers do not tell the child that he is free to leave. *Dowthitt*, 931 S.W.2d at 255; *Jeffley*, 38 S.W.3d at 855.

However, merely being the focus of an investigation does not amount to being in custody. *Meek v. State*, 790 S.W.2d 618, 621 (Tex.Crim.App.1990); *Martinez*, 131 S.W.3d at 32. “Words or actions by the police that normally attend an arrest and custody, such as informing a defendant of his *Miranda* rights, do not constitute a custodial interrogation.” *Roquemore*, 60 S.W.3d at 868. When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at that time. *Dancy v. State*, 728 S.W.2d 772, 778–79 (Tex.Crim.App.1987); *Martinez*, 131 S.W.3d at 32.

“The mere fact that an interrogation begins as non-custodial, however, does not prevent it from later becoming custodial; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation.” *Dowthitt*, 931 S.W.2d at 255; *Jeffley*, 38 S.W.3d at 856.

First Statement

C.M. complains that he was in custody at the time he made the first statement to Hines while he was sitting on the back of Charles's truck. Although the officer who initiated contact with C.M. and brought him back to the residence told him he could not leave, no other indicia of an arrest were present. C.M. was not handcuffed or otherwise restrained, nor did the officers make any threats that he would be forcibly taken if he attempted to leave. At that time, C.M. was at most a suspect but there was no probable cause to believe that he had committed the robbery. The shotgun and money from the robbery were found under Charles's porch stairs after C.M. had made his first two incriminating statements but not because of C.M.'s statements. C.M. stated that he had thrown them away while hiding from the police. There was no other evidence regarding whether C.M. subjectively felt he was in custody or not. Viewing the evidence in the light most favorable to the trial court's ruling, we find that C.M. was not restrained to the degree asso-

ciated with a formal arrest. He was not in custody and therefore, the officers were not required to give the required warnings and admonishments. The trial court did not abuse its discretion in denying the motion to suppress the first statement made by C.M.

Second Statement

Hines testified that because of the noise and activity at the residence that he took C.M. to an unmarked police vehicle so that he could speak with him with fewer distractions. Hines testified that he told C.M. on the way to the vehicle that he was not under arrest. C.M. willingly followed Hines to the vehicle and got in the passenger side front seat to speak with Hines. The audio recording demonstrates that C.M. was calm and apparently wanted to tell his story to Hines. There were no threats or other statements that indicated that C.M. was not free to leave or was forced to make the statement on the audio recording. After the statement was given, Hines told C.M. at that time that he was under arrest. During the time of the making of this statement, the only other evidence connecting C.M. to the robbery was a resemblance between C.M. and the individual shown on the video recording of the robbery from the convenience store. There was no other evidence regarding C.M.'s subjective beliefs regarding whether he was in custody or free to leave when he made the second statement. Viewing the evidence in the light most favorable to the trial court's ruling and giving deference to the trial court's determinations of fact, we find that C.M. was not in custody until after he made the second statement. The trial court did not abuse its discretion by denying the motion to suppress the second statement because C.M. was not in custody when the statement was made. We overrule issue one.

Conclusion: Having found no error in the trial court's denial of the motion to suppress the statements, we affirm the trial court's orders of adjudication and disposition.