IN THE COURT OF APPEALS OF IOWA

No. 6-295 / 95-0639

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DENNIS GRESS,

Defendant-Appellant.

FILED
JUN 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Gene Needles and Joel D. Novak, Judges.

Dennis Gress appeals the judgment and sentence entered upon his conviction of first-degree murder in violation of Iowa Code sections 707.2(1) and 707.2(2) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Melodee Hanes and Jim Ward, Assistant County Attorneys, for appellee.

Heard by Cady, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

Defendant Dennis Gress appeals the judgment and sentence of the trial court on two counts of murder in the first degree in violation of Iowa Code sections 707.2(2) and 707.2(2) (1995) following a jury trial in the Iowa District Court for Polk County.

The trial record includes the following evidence. Sometime between 10 p.m. and 10:30 p.m. on August 31, 1994, Theresa Barraclough and her friend Anthony Pruitt were killed when a gunman fired twenty .22 rounds into the car in which they were sitting parked on 31st Street in Des Moines. Barraclough was the former girlfriend of defendant Dennis Gress. Pruitt was a man whom Barraclough was dating.

Shortly after 11:00 p.m. on the same night, Trooper Brian Thompson was on routine patrol on Interstate 35 approximately forty miles south of Des Moines. Thompson stopped a Ford Ranger truck driven by Gress after he clocked Gress going approximately seventy-seven miles per hour in a sixty-five miles per hour zone. Thompson intended to write Gress a speeding ticket and check for an expired registration. After asking Gress for his license and registration, Thompson, noting the truck's Texas license plates, asked Gress what brought him up north. Gress responded he had just been to Minneapolis because he had heard it was a nice place to visit. The response by the defendant later proved to be false.

Thompson returned to his patrol car to prepare a speeding citation and a citation for an expired registration. He also called the Iowa State Patrol dispatch office to run a license and registration check. After running the license and registration check, the dispatcher asked Thompson if the vehicle was a dark pick-up with Texas plates and if the driver had a ponytail and was heavy set. Upon answering "yes" to both questions, Thompson was informed the driver matched a description of a person wanted in connection with a homicide in Des Moines. This was the first Thompson had heard of the homicide in Des Moines. At that point, Thompson took the defendant into custody on suspicion of murder.

On February 1, 1995, Gress filed a motion to suppress alleging his fifth amendment rights had been violated by police questioning during the traffic stop. The motion was overruled and the case proceeded to trial. Later, the statements made to Thompson during the traffic stop were introduced by the State at trial. On March 21, 1995, the defendant was found guilty of two counts of first degree murder and was sentenced to life in prison.

On appeal, Gress contends the district court erred when it denied his motion to suppress. He argues that under Iowa law he was in custody during the traffic stop and, therefore, he had the right to be informed of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). He argues Thompson's failure to give him *Miranda* warnings necessitates suppression of the statements he made regarding his reason for being in Iowa. The State argues

investigatory questioning during a routine traffic stop does not constitute custodial interrogation, and accordingly Gress's *Miranda* rights were not implicated.

The motion to suppress raises a Fifth Amendment challenge under the United States Constitution to the admissibility of statements made by Gress during a routine traffic stop. Our review of constitutional issues is de novo. *State v. Riley*, 501 N.W.2d 487, 488 (Iowa 1993); *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993).

The duty to give *Miranda* warnings is not triggered until a defendant is in custody and is subject to interrogation. *State v. Kasel*, 488 N.W.2d 706, 708 (Iowa 1992); *Miranda*, 384 U.S. at 444-45, 86 S. Ct. at 1612, 16 L. Ed. at 706-07.

> In determining whether an individual [is] in custody, a court must examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there was a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."

Stansbury v. California, 511 U.S. ___, ___, 114 S. Ct. 1526, 1528-29, 128 L. Ed. 2d 293, 298 (1994) (citation omitted). We apply an objective standard when making this determination. *Id.* at ___, 114 S. Ct. at 1529, 128 L. Ed. 2d at 299-30.

The temporary detention of a motorist in an ordinary traffic stop is not considered custodial for *Miranda* purposes. *Berkemer v. McCarty*, 468 U.S. 420, 437-39, 104 S. Ct. 3138, 3148-50, 82 L. Ed. 2d 317, 333-34 (1984). Citing this principle, the Iowa Supreme Court has held that the "right to interrogate during a 'stop' is the essence of a *Terry* stop and its progeny." *State v. Scott*, 518 N.W.2d 347, 350; *accord, United States v. Oates*, 560 F.2d 45, 63 (2nd Cir. 1977). The defendant

in *Scott* was stopped by police because the car he was riding in had been reported leaving an area where gunshots had been fired. *Id.* at 348. During the pat-down search, the officer discovered an object that appeared to be narcotics. The officer asked the defendant what he had in his pocket to which he responded the object was marijuana. The court concluded Scott was not in custody for *Miranda* purposes when he was asked about the object in his pocket. *Id.* at 350.

Thompson testified at the suppression hearing and at trial he only intended to issue Gress a citation for speeding and possibly a citation for an expired registration. After that, it was his intention to allow Gress to leave. He did not know at the time of the stop that Gress was wanted on suspicion of murder. We conclude Gress was not in custody when he made the challenged statement and that neither his Fifth Amendment rights nor the *Miranda* rules were violated. We accordingly affirm on this issue.

Gress also challenges the district court's jury instructions regarding felony murder. The defendant concedes that the district court correctly instructed the jury in accordance with current Iowa law. However, he urges the court to reexamine its prior decision interpreting Iowa Code sections 707.2(2) and 702.11 (1995) and essentially to overrule *State v. Beeman*, 315 N.W.2d 770, 775-77 (Iowa 1982). We are not inclined to reinterpret the statute in the manner suggested and decline this invitation to disturb the supreme court's holding in *Beeman*.

AFFIRMED.