FILED
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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 5-346 / 94-1314

**STATE OF IOWA,**

Appellee,

vs.

**MARK L. STEINMETZ,**

Appellant.

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Appeal from the Iowa District Court for Winneshiek County, Walter Rothschild, District Associate Judge.

Steinmetz challenges his conviction, following a bench trial, of third-offense operating while intoxicated. **AFFIRMED.**

Roger L. Sutton of Sutton & Troge's Law Office, Charles City, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Karl G. Knudson, County Attorney, and Chris Clauson, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

**HAYDEN, J.**

The State charged appellant, Mark L. Steinmetz, by trial information, with third-offense operating while intoxicated. The matter proceeded to a hearing on Steinmetz's motion to suppress. He claimed he had been denied the right to counsel, precluding admission of the incriminating evidence including the results of a breath test. The parties agreed that if Steinmetz's motion was unsuccessful, the matter would proceed to a trial on the minutes.

The evidence at the suppression hearing indicated Steinmetz injured himself in a one-car accident and left the scene. Deputy Sheriff Jeff Berns arrived at the scene to investigate and was told Steinmetz had gone to the hospital. While at the hospital, Cresco Police Officer Tim Smith told Berns that Steinmetz had gone to his parents' home. Berns, Smith, and Iowa Highway Patrol Officer Gregg Rude went to the Steinmetzes' home and found Steinmetz sitting at the kitchen table bleeding from his forehead.

The officers questioned Steinmetz regarding whether he had been involved in an accident. Steinmetz claimed he had driven his pickup off of the road after hitting a patch of ice. The officers asked him if he had been drinking, and he said he had a "couple of beers." Steinmetz also stated he had not been drinking since the accident. He was then arrested and placed in handcuffs

Steinmetz asked his mother to phone an attorney, and she handed him the phone book. Officer Rude testified Steinmetz pushed the phone book away, indicating he no longer wished to call an attorney. Steinmetz and his parents claimed the officers indicated he would be able to talk to an attorney once they arrived at the law enforcement center. Neither Steinmetz nor his parents phoned an attorney that night.

After getting Steinmetz into the police vehicle, Officer Rude administered a horizontal gaze nystagmus test. Steinmetz failed the test, and he was taken to the Howard County law enforcement center.

While at the center, Officer Rude administered an intoxilyzer test, indicating Steinmetz had a blood alcohol content of .228. Steinmetz was then read his *Miranda* rights.

The district court denied the motion to suppress. The court found the officers' version of events more credible than Steinmetz's or his parents' and determined he had not been denied the opportunity to call an attorney. On the minutes, the district court found Steinmetz guilty as charged. It sentenced him to up to five years. Steinmetz appeals.

On appeal, Steinmetz challenged the order denying his motion to suppress. He claims the officers denied him his Fifth Amendment, Sixth Amendment, and statutory right to counsel. He asserts he was in custody while at his home, and had not been read

his *Miranda* rights. He also argues he invoked his right to counsel while at his parents' home.

**I. Standard of Review.**

The standard of review for a ruling on an alleged violation of a constitutional right is de novo. *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993). The district court's findings on the credibility of witnesses, nevertheless, are entitled to considerable deference. *Id.; State v. Farris*, 359 N.W.2d 190, 192 (Iowa 1984).

**II. Clarification of the Issue.**

The issue presented in this case is whether appellant was deprived of his right to counsel under the Fifth Amendment, Sixth Amendment, and Iowa Code section 804.20 (1993). Appellant concedes his right to counsel incident to performing the field sobriety test and the breath test is not at issue. As appellant states, requests such as these are not considered interrogation. *State v. Mannion*, 414 N.W.2d 119, 122 (Iowa 1987) (citing *South Dakota v. Neville*, 459 U.S. 553, 564, n.15, 103 S. Ct. 916, 923, n.15, 74 L. Ed. 2d 748, 759, n.15 (1983)). Therefore, for purposes of appeal, we must determine only if the appellant's right to counsel was denied during the conversation with police officers at his parents' home. We determine appellants' right to counsel under the Fifth and Sixth Amendments and Iowa Code section 804.20 was not denied. We affirm the trial court.

## III. Fifth Amendment Right to Counsel.

Appellant argues his Fifth Amendment right to counsel was violated because police officers questions him without *Miranda* warnings while at his parents' house and he was denied the right to contact an attorney while at his parents' home.

The order of events is vital to appellant's Fifth Amendment claim. The record reveals the following sequence of events: First, police officers arrived at the appellant's parents' home to question him about his involvement in an accident. While being questioned by police officers, appellant made incriminating statements. Next appellant was placed under arrest. Appellant then asked his mother to contact an attorney. Appellant's mother handed him a phone book in order to look up the name of an attorney. Depending on whether one believes police officers or appellant, either appellant pushed the phone book away in a gesture indicating he did not want an attorney or police officers pushed the phone book away to discourage appellant from calling an attorney. Finally, after the arrest was made, no questions were asked of the appellant and no evidence was acquired which appellant now seeks to suppress.

### A. Failure to Give *Miranda* Warnings before Questioning.

The protection of *Miranda* is triggered only during interrogations that are custodial in nature because of their inherently coercive effect. *Evans*, 495 N.W.2d at 762. Custodial interrogation is "questioning initiated by law enforcement officers after

a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Deases*, 518 N.W.2d 784, 789 (Iowa 1994) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966)). Custodial interrogation does not include investigatory questioning without custody, basic identification questioning, or general on-the-scene questioning. *Van Hoff v. State*, 447 N.W.2d 665, 672 (Iowa App. 1989).

Appellant argues, while being questioned by police officers in his parents' home, he was in custody because he *believed* he was in custody. Appellant provides weak support for this argument. He cites the following: *State v. Cain*, 400 N.W.2d 582, 584 (Iowa 1987) (held the defendant was not in custody during a hospital interrogation); *State v. Brown*, 341 N.W.2d 10, 16 (Iowa 1983) (held defendant not in custody where defendant not subjected to either physical or verbal restraint, was left entirely alone at various points during interview, and defendant believed he was free to leave whenever he chose); and, *State v. McDonald*, 190 N.W.2d 402, 404 (Iowa 1971) (officer questioning defendant at her home prior to time she was charged with any offense or taken into custody did not violate right to counsel).

Appellant's subjective belief he is not free to leave is not determinative of custody. *U.S. v. Jorgensen*, 871 F.2d 725, 727 (8th Cir. 1989) (defendant not in custody where defendant asserted that door buzzers, locking doors, agent with visible weapons, and other security devices and the FBI officers *made him feel as though he*

*were in custody*) (emphasis added); *U.S. v. Mottle*, 946 U.S. 1366, 1368 (8th Cir. 1991) (no custody was present despite defendant testifying he did not feel free to leave). The relevant inquiry in determining custody is how a *reasonable* person in the suspect's position would have understood the situation. *Van Hoff*, 447 N.W.2d at 672 (quoting *Berkemer v. McCary*, 468 U.S. 420, 422, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984)) (emphasis added). The suspect must subjectively *and reasonably* believe police officers curtailed his freedom of movement to a "degree associated with formal arrest." *Mottle*, 946 F.2d at 1368-69 (emphasis added). The ultimate inquiry focuses on whether there is an arrest or some other restraint on the accused's freedom of movement to the degree associated with formal arrest. *State v. Schwartz*, 467 N.W.2d 240, 245 (Iowa 1991); *Van Hoff*, 447 N.W 2d at 672.

When considering whether it is reasonable to believe a suspect is in custody, a court must consider the totality of the circumstances. *Jorgensen*, 871 F.2d at 728. The 8th Circuit has isolated six common indicia of custody. *Mottle*, 946 F.2d at 1369 (citing *U.S. v. Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990)). These include whether: (1) at the time of questioning, the suspect was informed the questioning was voluntary, he was free to leave or to request the officers leave, or he was not considered under arrest; (2) the suspect possessed unrestrained freedom of movement during questioning; (3) the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) strong arm tactics or deceptive stratagems were

employed during questioning; (5) the atmosphere of the questioning was police dominated; or, (6) the suspect was placed under arrest at the termination of the questioning. *Id.*

In addition to these factors, Iowa courts have examined several other factors in determining custody including: (1) Whether the person was subject to physical or verbal constraints, *Brown*, 341 N.W.2d at 16 (person subject to no physical or verbal constraints is less likely to be in custody); (2) Length of the interview, *id.* (the shorter the interview, the less likely custody is present); (3) Time of the interview, *id.* (interview during normal waking hours is less likely to be custodial); and, (4)Location of the interview. A finding of custody is less likely if the person is interviewed at some location other than the police station. *State v. Hansen*, 286 N.W.2d 163, 168 (Iowa 1979) (scene of crime); *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989) (home); *Cain*, 400 N.W.2d at 584 (hospital).

The record reveals, considering the above factors, a reasonable person in appellant's position would not have believed he was under arrest or in custody at the time police officers questioned appellant concerning his involvement in the accident. There are only two factors suggesting appellant was in custody. The first is police officers arrested appellant immediately after the interview. This fact, however, is not determinative of custody. *Schwartz*, 467 N.W.2d at 245 (defendants not in custody where they appeared voluntarily, atmosphere during the interviews was not coercive or

threatening nor were defendants' freedom restrained in any way, *defendants were not arrested or placed in custody until the initial interviews were complete*, and deputy had probable cause to do so) (emphasis added).

The only other factor indicating custody is the officers did not tell appellant the questioning was voluntary, or he was free to request the officers leave. Officers seldom specifically tell a person he or she is not in custody. Therefore, this factor is of little importance unless the suspect was actually told he could *not* leave. *State v. Little*, 421 N.W.2d 172, 173-74 (Iowa App. 1988) (defendant attempted to leave and was told to remain) (emphasis added). Since appellant was never ordered to stay, this factor has little effect on our decision.

The overwhelming number of factors indicate appellant was not in custody at the time of the interrogation. Nothing in the record indicates appellant was not free to leave or to refuse answering questions, and nothing in the record reveals appellant did not voluntarily acquiesce to the police officer's questions. There is no evidence the police used strong arm tactics, and no evidence the atmosphere was police dominated. Furthermore, the facts of the case indicate the interview was short and occurred during normal waking hours. The arrest report states appellant was first observed at his parents' home at 8:44 p.m. At 8:59 p.m., after the questioning was completed, he was transported to the Howard County Law Enforcement Center.

Although the aforementioned factors are strong indicators of custody, the most important factor in this case is the location of the interview. The police interrogation of the appellant occurred in his parents' home. Courts have generally held in-home interrogations are not custodial for purposes of *Miranda*. *Evans*, 495 N.W.2d at 762; *Beckwith*, 425 U.S. at 347, 96 S. Ct. at 1616-17, 48 L. Ed. 2d at 8; *Davis*, 446 N.W.2d at 788. The reasoning behind the rule is the "compelling atmosphere" giving rise to the rule is not present during in-home interrogations. *Evans*, 495 N.W.2d at 762. Applying *Miranda* to an interview in a suspect's home, under normal circumstances, would cut the *Miranda* holding loose from its explicitly stated rationale to protect persons from "incommunicado interrogation . . . in a police dominated atmosphere." *Evans*, 495 N.W.2d at 763 (quoting *Davis*, 446 N.W.2d at 788).

In *Davis*, our supreme court held the defendant was not in custody where he was interviewed in his own home, he was not placed under arrest, his freedom was not restrained in any way, and the atmosphere during the interview was not coercive or threatening. *Id.* Additionally, in *Evans*, an in-home interrogation was held noncustodial because there was no claim of coercion and no evidence of coercion appeared in the record. *Evans*, 495 N.W.2d at 763. *See also State v. McDonald*, 190 N.W.2d 402, 404 (Iowa 1971) (no custody found where defendant was interviewed at home); *State v. Cook*, 330 N.W.2d 306, 312 (Iowa 1983) (same); *U.S. v. Helmel*, 769 F.2d 1306, 1320 (8th Cir. 1985) (relevant defendant was "on his own turf").

The circumstances of the case at bar fall directly within the confines of the *Davis* and *Evans* holdings. At the time of questioning, appellant was in the security of his parents' home and was not placed under arrest until after the interrogation. The atmosphere at the home was not coercive or threatening, nor was appellant's freedom restrained. Although appellant was a suspect, such status does not trigger the *Miranda* requirements. *Schwartz*, 467 N.W.2d at 245. As such, it is clear appellant was not in custody when questioned by police officers, and, therefore, *Miranda* was not triggered.

In an attempt to suppress the statements made before his arrest, appellant places emphasis on the request for counsel made after his arrest. Invocation of Fifth Amendment right to counsel, however, only becomes relevant *after* custody occurs. *Evans*, 495 N.W.2d at 764 (defendant was never in custody during entire interrogation so his Fifth Amendment rights could not be violated); *State v. Newsom*, 414 N.W.2d 354, 357 (Iowa 1987) (Fifth Amendment guarantees a criminal suspect, *in custody*, the right to counsel) (emphasis added); *Edwards v. Arizona*, 495 U.S. 477, 485-86, 101 S. Ct. 1880, ---, 68 L. Ed. 2d 378, 387 (1981) ("The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that [the suspect] invoked . . ."). The fact appellant invoked the right to an attorney after being taken into custody does not affect the admissibility of statements made before he was taken into custody.

We find the interrogation of appellant was not custodial. Therefore, we affirm the district court's order finding the failure to give *Miranda* warnings did not violate appellant's Fifth Amendment rights.

**B. Denial of Right to Counsel.**

After the initial interrogation, appellant was immediately placed under arrest. Appellant was in custody. At this point, the failure to give the appellant *Miranda* warnings and the denial of the right to seek counsel before further questioning would have been a violation of appellant's Fifth Amendment rights.

The Fifth Amendment right to counsel, however, requires custodial *interrogation*. *Deases*, 518 N.W.2d at 789( citing *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706). Custodial interrogation is "*questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* (emphasis added). Since appellant was not questioned after arrested and taken into custody, his Fifth Amendment rights were not implicated. *Edwards v. Arizona*, 495 U S. at 485-86, 101 S. Ct. at ---, 68 L. Ed. 2d at 387 (absent custodial interrogation, there is no infringement of the right to counsel invoked by the suspect).

Furthermore, the Fifth Amendment right to counsel "is not an independent right; rather, it stems from the privilege against self-incrimination." *Hall v. State of Iowa*, 705 F.2d 283, 289 (8th Cir. 1983) (n.4). "Thus, the Fifth Amendment right to counsel

only protects a defendant's privilege against making incriminating statements against himself." *Id.* Since no incriminating statements were made by appellant after he was taken into custody, his invocation of the right to counsel is irrelevant. Appellant even admits in brief he is not seek to suppress any evidence acquired after he was taken by officers from the home. Without evidence to suppress, it is irrelevant whether or not appellant requested counsel after being taken into custody.

In the case at bar, the Fifth Amendment is not implicated because the officers did not interrogate the appellant *after* they took him into custody nor did appellant make any incriminating remarks *after* being taken into custody. *Cain*, 400 N.W.2d at 584 (where police interaction with defendant was not interrogation nor did defendant make any incriminating statements, defendant's allegation of constitutional deprivation was not supported by the record).

We affirm the district court's order finding the appellant's Fifth Amendment right to counsel was not violated.

**IV. Sixth Amendment Right to Counsel.**

If interrogation is conducted after attachment, the Sixth Amendment affords a right to counsel independent of the Fifth Amendment. *State v. Johnson*, 318 N.W.2d 417, 432 (Iowa 1982). The United States Supreme Court has held the constitutional right to counsel "attaches" only at or after the initiation of adversary proceedings against the defendant. *Evans*, 495 N.W.2d at 764. *United States v. Gouveia*, 467 U.S

180, 187, 104 S. Ct. 2292, 2296, 81 L. Ed. 2d 146, 153 (1984); *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed 2d 411 (1972). The right to counsel attaches after the initiation of adversary judicial criminal proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Id.* at 689, 92 S. Ct. at 1882, 32 L. Ed. 2d at 417. The point at which adversary judicial criminal proceedings commence is a question of federal constitutional law. *Johnson*, 318 N.W.2d at 432.

In state prosecutions, state law prescribes the manner of commencing criminal proceedings. *Id.* In Iowa, a criminal proceeding is commenced by filing a complaint before a magistrate. *State v. Nelsen*, 390 N.W.2d 589, 591 (Iowa 1986). It is not determinative to our present inquiry that the prosecution of an indictable offense actually proceeds on the later filed information or indictment. *Id.* Iowa courts have held the right to counsel may attach prior to the filing of trial information or indictment, depending, in part, on the level of prosecutorial involvement. *Evans*, 495 N.W.2d at 764-65.

Generally, Iowa cases have held attachment occurs when (1) a preliminary complaint is filed, and (2) prosecutorial forces have focused on defendant. *State v. Jackson*, 380 N.W.2d 420, 423 (Iowa 1986) (complaint and arrest warrant); *State v. Nelsen*, 390 N.W.2d at 591 (complaint and summons); *State v. Johnson*, 318 N.W.2d at 432 (complaint and arrest warrant).

In *Johnson*, the court found the Sixth Amendment right to counsel attached after defendant had been arrested pursuant to a warrant issued on a complaint of abandonment of a child by county attorney. *Id.* The issuance of a warrant and the arrest of the defendant constituted a "formal charge" with the supreme court's description of "adversary judicial criminal proceedings" which trigger the Sixth Amendment right to counsel. *Id.* The significant level of prosecutorial involvement showed the arrest could not be characterized as "purely investigatory in nature." *Id.* at 435.

In *Jackson*, the defendant had been arrested and confined in jail, and the initial appearance had been held and bail set. *Jackson*, 380 N.W.2d at 424. Under these circumstances, the court found the right to counsel had attached. *Id.* The *Jackson* court noted, "The teaching of *Johnson* is that the filing of a complaint and procuring of a warrant will constitute a formal charge against the defendant for purposes of the Sixth Amendment when the circumstances show a State commitment at that time to prosecute the individual." *Id.* at 423.

The court has made clear the same result would not necessarily follow if the prosecutorial involvement was less than in *Johnson* and *Jackson*. *Evans*, 495 N.W.2d at 765. Although *Jackson* is the only authority appellant cites for the proposition his Sixth Amendment right to counsel was triggered, both *Jackson* and *Johnson* are not applicable in his situation because there is insufficient prosecutorial involvement.

Appellant had not been confined in jail, no initial appearance had been held, no bail had been set, and neither a complaint was filed nor a warrant was obtained for his arrest. The case was still in the investigatory stages. all questioning of the appellant occurred before custody or arrest, and after the arrest, no interrogation took place. In fact, at the time appellant requested counsel, he had only been arrested. The Supreme Court has rejected the argument arrest alone is sufficient to invoke the Sixth Amendment right to counsel. *Evans*, 495 N.W.2d at 764; *Gouveia*, 467 U.S. at 188, 104 S. Ct. at 2297, 81 L. Ed. 2d at 154; *Kirby*, 406 U.S. at 690, 92 S. Ct. at 1882, 32 L. Ed. 2d at 418 (Sixth Amendment had not attached after arrest but prior to indictment.).

We affirm the order of the district court finding appellant's Sixth Amendment right to counsel had not attached.

**V. Statutory Right to Counsel under Iowa Code section 804.20 (formerly 755.17).**

Under the implied consent procedures, there is a limited statutory right to counsel. *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978). Iowa Code section 804.20 states,

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of the person's family or an attorney of the person's choice, or both. (Emphasis added.)

The plain language of the statute grants the right to counsel when an arrested person has arrived "*at the place of detention.*" Iowa Code § 804.20. The right has been interpreted to allow a suspect to consult or see either family members or an attorney or both *only in the event the defendant asks to do so.* *Victor*, 261 N.W.2d at 831 (emphasis added). The statute does not require an officer to tell a suspect he has the right to counsel. *Id.* It only forbids the officer from telling the suspect he does not have such a right. *Id.*

Appellant contends he requested to speak with his parents and to counsel while being questioned at his parents' home. These requests, however, were not made at the place of detention as required by the statute. Appellant offers no evidence to prove he asked to speak with his parents or counsel, and was denied the right, while in custody at the place of detention.

Furthermore, even if we found the statutory right to counsel applied to appellant's request to speak to his parents and to counsel, we would still uphold the decision of the trial court. Although our review is de novo, the district court's findings on the credibility of witnesses are entitled to considerable deference. *Farris*, 359 N.W.2d at 192. The district court explicitly found the officers' testimony more credible than appellant's or his parents' testimony. The court felt appellant and his father were not impartial witnesses because appellant was facing a third offense OWI charge and his father had experience with OWI conviction. The district court did not believe the

appellant was denied the opportunity to call an attorney. Rather, the district court concluded appellant, after initially asking his mother to call an attorney, changed his mind and decided not to call an attorney after arriving at the place of detention. The record supports these conclusions.

We affirm the district court's order finding appellant's statutory right to counsel was not violated.

**AFFIRMED.**