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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GLEN KEITH McCULLOUGH,

Defendant and Appellant.

F061999

(Super. Ct. No. F10904064)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Dale Dombkowski, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Cornell, J. and Kane, J.

Glen Keith McCullouch was convicted of violating Penal Code section 12021, subdivision (a)(1) (unlawful possession of a firearm)<sup>1</sup> and two counts of violating section 12316, subdivision (b)(1) (unlawful possession of ammunition). He was sentenced to a total term of five years four months, which included sentencing on two unrelated charges for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and an enhancement because he had served a prior prison term (Pen. Code, § 667.5, subd. (b)).

McCullouch argues his conviction must be reversed because the trial court erroneously denied his motion to suppress a statement he gave to police. McCullouch asserts he was in custody when he was interviewed, and, since he was not advised of his constitutional rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), any statements he made were inadmissible. We agree with the trial court that McCullouch was not in custody when he was interviewed, and thus *Miranda* advisements were not required. Accordingly, we affirm the judgment.

#### **FACTUAL AND PROCEDURAL SUMMARY**

The facts surrounding the offenses are not relevant to the issues on appeal and will be only briefly summarized.

McCullouch was released on bail after being charged with two counts of possession of methamphetamine, in violation of Health and Safety Code section 11377, subdivision (a). While the charges were pending, McCullouch was shot three times in the chest. He attempted to drive himself to the hospital but apparently lost consciousness and crashed his vehicle. He was transported from the crash site to the hospital by ambulance. His vehicle was impounded. During the search incident to the impound, officers located a shotgun and two types of ammunition in the vehicle. McCullouch was a convicted felon prohibited from possessing firearms or ammunition.

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<sup>1</sup>All statutory references are to the Penal Code unless otherwise stated.

McCullouch was interviewed after he was released from the hospital. During the interview he admitted he possessed the firearm and ammunition. He was charged with one count of possession of a firearm by a felon and two counts of possession of ammunition by a felon. His interview was admitted at trial. The jury found him guilty as charged. In a bifurcated proceeding, the jury found true the allegation that McCullouch was on bail at the time the crimes were committed. McCullouch also admitted he had served a prior prison term within the meaning of section 667.5, subdivision (b) and apparently pled guilty to the possession charges in the other case.

McCullouch argues the trial court erred when it overruled his motion to suppress the statements he made in the interview. An Evidence Code section 402 hearing was held before the trial court ruled on McCullouch's motion. The only witness to testify was the interviewing detective, Conrado Martin.

Martin testified he first learned of McCullouch when McCullouch had been the victim of a shooting and Martin attempted to interview him while he was in the hospital. McCullouch was unable to speak because of his injuries, but Martin left a card and requested that McCullouch call him.

McCullouch called and left several messages for Martin. When Martin returned the phone call, McCullouch said he wanted to retrieve his personal property (wallet and cellular phone) from the vehicle he had been driving before he was transported to the hospital. Martin asked McCullouch to come to the police station to speak about the personal property.

When McCullouch arrived at the police station, Martin and McCullouch had a short conversation at Martin's desk about McCullouch's personal property. Martin then asked McCullouch if he could speak to him about another incident. McCullouch was taken to an interview room. The room was approximately eight feet wide by 10 feet long and contained a table and two chairs. Martin sat next to the door, but, because the door

was left open, he would have to close the door before he could leave the room.

McCullough sat across from Martin and had an unobstructed path to the door.

Martin advised McCullough at least three times that (1) he was not under arrest, (2) he was free to leave at any time, and (3) he could choose which questions to answer, a so called *Beheler*<sup>2</sup> admonishment. Martin made an audio and video recording of the interview. At one point in the interview, Martin left the room for a short time to demonstrate to McCullough that he could leave at any time. Martin also informed McCullough at the end of the interview that he would see about returning his personal property. After the interview concluded, McCullough was escorted out of the police station and left the area.

The trial court denied McCullough's suppression motion, concluding that Martin was not required to advise McCullough of his *Miranda* rights because he was not in custody.

## DISCUSSION

The only issue is whether McCullough was in custody when he was interviewed by Martin.

“Before being subjected to “custodial interrogation,” a suspect “must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” [Citation.] ...

“An interrogation is custodial when ‘a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.’ [Citation.] Whether a person is in custody is an objective test; the pertinent inquiry is whether there was ““a “formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest.”” [Citation.]

“Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court's

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<sup>2</sup>*California v. Beheler* (1983) 463 U.S. 1121 (*Beheler*).

determination that a defendant did not undergo custodial interrogation, an appellate court must ‘apply a deferential substantial evidence standard’ [citation] to the trial court’s factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, ‘a reasonable person in [the] defendant’s position would have felt free to end the questioning and leave’ [citation].” (*People v. Leonard* (2007) 40 Cal.4th 1370, 1399-1400.)

The United States Supreme Court has made clear that the only relevant inquiry is whether a reasonable person in the defendant’s position would have understood he or she was in custody when the incriminating statements were made. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442.) The fact the interview took place in a police station is not, by itself, sufficient evidence to find the defendant was in custody. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) Nor is the fact that a defendant is a suspect in a crime sufficient, by itself, to establish the defendant was in custody. (*Stansbury v. California* (1994) 511 U.S. 318, 319; *Beheler, supra*, 463 U.S. at p. 1125.) Instead, we objectively look at all of the circumstances to determine whether there was a restraint on freedom of movement of the degree associated with a formal arrest. (*Stansbury*, at p. 322.)

Since there is no dispute about what transpired in this case, Martin’s testimony establishes the facts on which we must exercise our independent judgment to decide if McCullouch was in custody.

The circumstances described in Martin’s undisputed testimony do not suggest that any restrictions were placed on McCullouch’s freedom of movement. McCullouch came to the police station voluntarily, was advised he could leave at any time, was interviewed in a room with an open door, and was not restrained in any manner. At the end of the interview he was allowed to leave the police station. At no time did he request to leave or was he told that he could not leave. These facts, when viewed objectively, confirm that McCullouch was not in custody.

McCullouch argues, however, that he was in custody because his wallet and cellular phone were both in the custody of the police. As we understand McCullouch’s

argument, he asserts that because Martin would not return these items, he was compelled to participate in the interview.

We disagree. We need not decide whether McCullough would have been in custody for purposes of *Miranda* if Martin told McCullough that he would not return his personal property unless McCullough participated in an interview *because there was no evidence that Martin made such a statement*. Martin admitted he discussed McCullough's personal property with him and that he told McCullough he would see about returning the personal property at the end of the interview. However, Martin did not testify to any attempt to use the personal property to force McCullough to participate in the interview. In the absence of such testimony, a reasonable person would not believe his or her freedom of movement was curtailed in any manner.

Moreover, the case on which McCullough relies provides no support for his argument. *Prince George's County v. Longtin* (2011) 419 Md.App. 450 (*Longtin*) was a civil action brought by Longtin after he was detained for over eight months in violation of his constitutional rights. Longtin was charged with the rape and murder of his estranged wife. Shortly after he was arrested, DNA evidence exonerated him. He was not provided with this evidence and was not released until another man was arrested for the murder many months later.

The primary issues on appeal related to various provisions of Maryland's version of a government tort claims act. McCullough cites to a portion of the *concurring* and *dissenting* opinion that addresses the issue of when Longtin's cause of action for false arrest accrued. In discussing the issue, the dissenting justice noted several arguments were made relating to the date of accrual, including one position that the cause of action accrued when Longtin was arrested or shortly thereafter. The justice noted that while Longtin was detained for questioning, "police took Longtin's belt, wallet, shoelaces, and cell phone." (*Longtin, supra*, 419 Md.App. at p. 508, fn. 7 (conc. & dis. opn. of Harrell,

J.) According to the dissenting justice, taking these items suggested Longtin was in custody. (*Ibid.*)

This statement is not authority for any legal proposition. First, the statement was made in a footnote in the concurring and dissenting opinion. Second, the dissenting justice cited no authority to support his statement. Instead, it appears the statement was made while discussing various arguments by the parties, but was not considered significant to the dissenting justice.

Most significantly, even if we were to accept this statement as authority for the cited proposition, *Longtin* is factually distinguishable. Longtin's personal property had been taken from him during his police interview. No property was taken from McCullough during his police interview. Instead, McCullough's personal property had been found inside his vehicle several weeks before he was interviewed after he was transported to the hospital. Not surprisingly, the property found inside his vehicle was retained as possible evidence since McCullough apparently was the victim of an attempted murder.

Since McCullough found himself in a much different position than Longtin, the dissenting justice's statement does not support McCullough's argument.

### **CONCLUSION**

We are required to review all of the evidence objectively to determine if a reasonable person in McCullough's position would have concluded that he or she was deprived of his or her freedom of movement in any manner. The fact that McCullough was motivated to go to the police station because he wanted to retrieve his personal property does not, by itself, establish custody. Martin's undisputed testimony establishes that a reasonable person would have understood he or she was free to refuse to answer any questions and was free to leave the police station at any time. In fact, McCullough left the police station after the interview. Moreover, nothing in the record suggests that McCullough was told that his personal property would not be returned to him unless he

answered Martin's questions. Simply stated, there was no evidence that McCullouch was in custody when he was interviewed.

**DISPOSITION**

The judgment is affirmed.