

A recent case reminds us that telling a person during an investigatory stop that he is not under arrest does not mean the person is not in custody.

A state trooper clocked a car driven by the defendant exceeding the speed limit by 20 m.p.h. He activated his lights and followed him. The car pulled into the parking lot of a convenience store. The defendant exited the car and hurried inside, followed by the trooper, who caught up with him just outside the restrooms. The trooper asked him for identification. The defendant said he was not feeling well and needed to use the restroom. He was patted down for weapons and allowed to use the restroom. The defendant came out shortly thereafter and went with the trooper to his car but was unable to find his identification. He was told to sit in the front passenger seat of the patrol car. The trooper informed him that he had exceeded the speed limit. The defendant didn't have his driver's license but gave the trooper his name and date of birth. The trooper discovered the defendant's driver's license was suspended and observed that his car had an expired Kansas temporary license plate.

The trooper told him that he was issuing him citations for speeding, driving with an expired plate, and driving while suspended, but that he was not going to arrest him. 30 minutes into the stop, he told the defendant that his car would be towed. He observed that the defendant was acting "very nervous and agitated," and that he "wouldn't sit still and moved around a lot." When the trooper got out of his patrol car to get the defendant's VIN for the towing form, he told the defendant to stay in the car but he would not stay. Because the defendant tried to exit the patrol car when the trooper did, he decided to wait for backup officers to arrive. Meanwhile, the tow truck had arrived, and the trooper asked the driver to "stall" with the towing preparations until the backup officers arrived.

When the backup officers arrived, the trooper placed the defendant in handcuffs and "advised him he wasn't under arrest, but he was putting on these handcuffs . . . to detain him until I could find out more about the situation, and why he was acting the way he was." The trooper then asked the defendant for permission to search his car. The defendant told him to "go ahead." During the search, the trooper discovered a cigarette pack in the front passenger seat. Inside the pack were three small packets of a white substance. He went back to the patrol car and questioned the defendant, who admitted that the substance was methamphetamine.

The issue was whether the defendant's consent to search was valid. The law is that "a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent." The person in custody "must be informed of the right to consult with counsel before a valid consent to search can be given." The defendant can waive this right, but the State must prove that the waiver was explicit.

There is no hard and fast test to determine when an investigatory stop becomes custodial. In determining whether a person is in custody, courts apply an objective test: "whether a reasonable person under the same circumstances would believe that he was under arrest or not free to resist the entreaties of the police." The objective test is that of a reasonable innocent person.

The court held that "without question" the defendant was in custody, despite the fact he was told he wasn't under arrest. By the time the trooper asked for consent to search, the defendant had already been patted down for weapons, detained roughly 45 minutes, and told repeatedly to stay in the patrol car. Finally, he was handcuffed but not *Mirandized*. He was clearly in custody.