

STATE OF VERMONT
RUTLAND COUNTY

State of Vermont

vs.

Jessica Anctil

District Court of Vermont
Unit II, Rutland Circuit
Docket No. 920-6-03Rdcr

Filed
OCT - 4 2006
Rutland District Court

**FINDINGS OF FACT, OPINION AND ORDER ON DEFENDANT'S
MOTION TO SUPPRESS**

This matter came before the court for hearing on the defendant's Motion to Suppress on April 26, 2006. On June 1, 2006 the State filed its proposed Findings of Fact and legal memoranda; the defendant filed same on June 15, 2006. At the hearing, the defendant was present with her counsel Robert W. Katims, Esq; James P. Mongeon, Rutland County State's Attorney and Matthew I. Levine, Assistant Attorney General, appeared on behalf of the State.

Based on the credible evidence the court makes the following Findings of Fact:

Findings of Fact

¶1. On June 10, 2003 at approximately 8:00 p.m., the Vermont State Police received a 911 emergency call regarding the discovery of the body of Charles Shlosser at his residence in Benson, Vermont. The 911 call was made by the defendant, Jessica Anctil.

¶2. When Vermont State Police Troopers first responded to the Shlosser residence, Jessica Anctil, her parents, and Ken Barber were at the house. Jessica Anctil advised the first responding Trooper that she had discovered the body. Ms. Anctil, her parents and Ken Barber then left the Shlosser residence with the agreement of law enforcement. They were told that a Vermont State Police detective would contact them later for an interview. It was law enforcement's understanding that Jessica Anctil would be at her parents house. Ms. Anctil, her

parents, and Ken Barber were not present when homicide detectives later arrived at the Shlosser residence.

¶3. Detective Lieutenant Covell (hereinafter "Covell") supervises Vermont State Police detectives out of the Rutland, Middlebury and Shaftsbury barracks. During an investigation, he determines which detectives will be assigned, supervises the investigation, and is responsible for its coordination and logistics. He held these responsibilities in this investigation.

¶4. Detective Davidson (hereinafter "Davidson") first responded to the scene. He was assigned as the case officer or lead detective. Detectives Crossman and Capogrossi also responded to the scene. Covell arrived at the scene at 10:19 p.m. He assigned Detectives Crossman (hereinafter "Crossman") and Capogrossi to interview Ms. Anctil. They also conducted an interview with a neighbor.

¶5. Davidson conducted a preliminary examination of the scene. The interior of the house was in disarray, apparently in connection with Mr. Shlosser's death: items were scattered about the residence, a shelf in the living room with train collectibles was missing, and some other items were found outside the residence.

¶6. Detectives wanted to interview Jessica Anctil because she reported having discovered the body, and they hoped that she could provide information about the position of the victim's body, the condition of the residence, and whether she had moved anything. Detectives knew that she had a close relationship with the victim, and that she might have information about Mr. Shlosser's habits or associates and might know what was missing from his residence.

¶7. Crossman was not able to locate Jessica Anctil or Kenneth Barber at the Anctil residence. Crossman interviewed Jessica Anctil's mother and learned that Jessica and Kenneth

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Barber had left the Anctil residence in Jessica's motor vehicle. Mrs. Anctil did not know where they were but advised Crossman where Jessica worked.

¶8. Crossman spoke with Kenneth Barber, Sr. who advised that his son was staying with Jessica Anctil. Crossman also interviewed Denise Bates and determined that neither Jessica Anctil nor Kenneth Barber were at her residence.

¶9. At approximately 5:00 a.m., Crossman contacted Jessica Anctil's workplace. He learned that she had contacted her employer during the early afternoon of June 10, informing them that she would not be working because her grandfather had been murdered. The 911 call was received at 8:00 p.m. on June 10.

¶10. On June 11, 2003 at 5:27 a.m., the Vermont State Police issued one of three so-called "Be on the Lookout" alerts ("BOLs") to area law enforcement. These BOLs were a particular type of BOL called a "stop and hold" BOL. The BOL's were issued directing the following response/action by any regional law enforcement agency:

- a. 5:27 a.m. Description of defendant's motor vehicle, plate number and date of birth of defendant and Kenneth Barber. "If located stop and hold for Detective Joel Davidson of Vermont State Police Troop C Rutland... Please do not air due to pending investigation."
- b. 5:36 a.m. "BOL for possible stolen goods [description of goods]. The listed items may have been taken during a suspected homicide in Vermont. If in contact with any of these items please contact Detective Joel Davidson of the Vermont State Police Troop C Rutland."
- c. 6:09 a.m. "Updated information on BOLO out of the State of Vermont regarding suspects of suspected homicide in the Benson Vt. Area. There is no known direction of travel and at this point their [sic] is no information available on weapons that may be with the vehicle operators/occupants. Approach vehicle with due caution. Any further involvements will be issued as necessary/available."

¶11. On June 11, 2003, Detective LaChance of the Rutland City Police Department was on duty in an unmarked non-police vehicle. At approximately 8:00 a.m. he received the third BOL which was transmitted by the Rutland City Police Department dispatcher. Within moments of receiving the third BOL, and while on Woodstock Avenue in Rutland, he observed a vehicle and registration which matched the BOL description and saw a male and female enter the vehicle with the female driving. Detective LaChance contacted his dispatcher to inform other police units that he had identified the motor vehicle described in the BOL and his direction of travel.

¶12. Rutland City Police Department had learned of Jessica Anctil's prior felony convictions for assaults on a family member and on a law enforcement officer, and this information was transmitted to area police officers. Detective LaChance was aware of this information.

¶13. Detective LaChance stopped the defendant's vehicle as it was making a right hand turn onto West Street at the corner of Rt. 7 next to a Mobil gas station. The vehicle was stopped and the operator was later identified as Jessica Anctil and the passenger as Kenneth Barber. Detective LaChance approached the passenger side of the vehicle with his weapon drawn but held by his side. The passenger window was up and the door was locked. Detective LaChance knocked on the window to get Kenneth Barber's attention and said "police - open the door." When Kenneth Barber opened the door, Detective LaChance took him by the arm, removed him from the vehicle, and handcuffed him on the ground. He was patted down for weapons and none were found. Kenneth Barber gave his name when asked. He made no other statements and Detective LaChance asked him no questions. He told Mr. Barber that he was being detained for the Vermont State Police. He was placed in a Rutland City Police Department cruiser.

¶14. Following similar procedure, another police officer had Jessica Anctil exit the vehicle and she was handcuffed.

¶15. Within 30 seconds of Detective LaChance putting Kenneth Barber on the ground, two one-man Rutland City Police Department cruisers arrived at the scene and parked approximately 40 feet away from and in front of Jessica Anctil's vehicle. Two more officers arrived in an unmarked vehicle. The cruisers had their blue lights flashing. Detective LaChance then left the scene. Cones were put around the defendant's vehicle.

¶16. Jessica Anctil and Kenneth Barber were put in separate Rutland City Police Department cruisers. Rutland City Police Department contacted the Vermont State Police.

¶17. Corporal Larson of the Rutland City Police Department arrived at the scene within seconds of the stop. He had his blue lights on. He arrived at the scene of the stop when they were both on the ground. Jessica Anctil was handcuffed. When Corporal Larson arrived, there were approximately five or six marked cruisers and two or three unmarked vehicles. The cruisers had their blue lights on. At least 8-10 police officers were there. The Anctil vehicle was completely surrounded and blocked in by the cruisers. Jessica Anctil and Kenneth Barber were within six feet of each other and were placed in separate cruisers. A number of police officers were around both of them.

¶18. While Corporal Larson was at the scene of the stop, Jessica Anctil and Kenneth Barber were permitted to leave their respective cruisers to have a cigarette and stretch.

¶19. Both Jessica Anctil and Kenneth Barber were told that the Vermont State Police wanted to speak with them and that they were being held until the Vermont State Police arrived.

¶20. At the time of the BOLs, which were issued between 5:27 a.m. and 6:09 a.m. on

June 11, 2003, the Vermont State Police considered Jessica Anctil and Kenneth Barber potential suspects.

¶21. Covell did not want Jessica Anctil and Kenneth Barber in handcuffs because he wanted them interviewed when they were not in custody. He did not want them in custody because he did not want to read them their Miranda warnings.

¶22. Covell advised the Rutland City Police Department that Jessica Anctil's vehicle could be moved from the road and into the Mobil station parking lot.

¶23. Davidson arrived at the scene of the stop approximately 25 minutes after the stop. He was in an unmarked police vehicle. When he arrived, Jessica Anctil and Kenneth Barber were in separate Rutland City Police Department cruisers. They were both handcuffed. Subsequently, Detectives Crossman and Cappogrossi arrived in separate unmarked police vehicles. Lastly, Covell arrived in a separate unmarked police vehicle. The Rutland City Police Department left the scene.

¶24. Davidson asked the Rutland City Police Department officers to uncuff both Jessica Anctil and Kenneth Barber. He told Jessica Anctil that she was not under arrest and that she was free to go, but that he needed to interview her. Jessica Anctil replied that she knew the Vermont State Police wanted to interview her and that she was on her way to speak with them when she was pulled over.

¶25. Prior to being stopped by Detective LaChance, Jessica Anctil turned left on to West Street from Rt. 7. This direction of her travel would have taken her away from the Vermont State Police barracks in Rutland. Davidson did not believe that she was on her way to speak with them when she was pulled over.

¶26. Jessica Anctil told Davidson that she was upset with the actions of the Rutland City Police Department, which had patted her down and handcuffed her. Davidson replied that it was not the intent of the Vermont State Police for her to be stopped in that matter, but that it was important for the Vermont State Police to speak with her about what she saw, heard, and observed at the Shlosser residence. He reminded the defendant that she was not in custody and free to leave. He asked her if she would speak to him in his vehicle; she agreed and walked to his car with him.

¶27. Davidson told Jessica Anctil that some items appeared to be missing from Mr. Shlosser's resident. She advised that she had some things in her car that "gramps" had given her the week prior to his death, including a deck of cards with Vermont scenery on them and some silver spoons. Upon Davidson's request, Jessica Anctil permitted him to look at these items, but she did not permit him to take them. Davidson advised that he needed her consent to search before he could even look at these items.

¶28. At 11:05, or approximately 20 minutes after arriving at the scene, Davidson asked Jessica Anctil if she would sign a Consent to Search form for the items in her car and for her motel room #55 at the Travel Inn. She did so and followed Davidson to her car.

¶29. Davidson asked if there were any dangerous items in the car; Jessica Anctil replied that there were needles that she and Kenneth Barber had used to shoot up oxycodone, but that there were no drugs in the car.

¶30. While searching the car, Davidson found the cards. Jessica Anctil advised that "gramps" - meaning Mr. Shlosser - had given them to her and she gave Davidson permission to take them.

¶31. In the glove box, Davidson found seven silver collectible spoons and one gold-colored spoon. Jessica Anctil advised that "gramps" had also given these to her. Davidson also found a backpack in the car which Jessica Anctil advised belonged to Kenneth Barber. Davidson asked Crossman to inquire if Kenneth Barber would consent to a search of the backpack. Crossman obtained a signed consent to search the backpack from Kenneth Barber. Drug paraphernalia and items consistent with drug preparation were found in the backpack.

¶32. A newspaper reporter and photographer arrived at the scene. The photographer began taking pictures of Jessica Anctil and Kenneth Barber. Jessica Anctil reacted strongly to their presence by speaking loudly to the photographer, making obscene gestures, and yelling to Kenneth Barber regarding her opinion of the photographer.

¶33. Covell suggested moving the interview to the Vermont State Police barracks in Rutland. Davidson asked Jessica Anctil if she would be willing to go to the barracks instead of being in a public place observed by the newspaper reporter and photographer. She indicated she was willing to do so. Davidson then asked Jessica Anctil if she was willing to drive herself and Kenneth Barber to the barracks where it would be more private and so that she would have her car available to leave when the interview was completed. Jessica Anctil spoke privately with Kenneth Barber and he agreed to drive with her to the barracks.

¶34. Jessica Anctil drove out of the Mobil station to Rt. 7 north in the direction of the Vermont State Police barracks. Davidson followed in his unmarked vehicle. He was several car lengths behind her. Crossman and Covell followed in their unmarked vehicles. Covell lost sight of Jessica Anctil's vehicle at times. None of the unmarked police vehicles were using blue lights or sirens.

¶35. During the drive, Jessica Anctil appeared ready to make a wrong turn one block before the Vermont State Police barracks. Davidson pulled around the Anctil vehicle and passed her to show her the correct turn to the barracks.

¶36. Jessica Anctil and Kenneth Barber entered the Vermont State Police barracks through a back door accompanied by all the detectives. Jessica Anctil and Davidson went down a hall to the Commander's office where she sat in a chair. The commander's office was approximately twelve feet square in size, with a window, door, desk and chairs.

¶37. Crossman went to another room to interview Kenneth Barber. Kenneth Barber was given the Miranda warnings immediately, but Crossman also told him he was not under arrest.

¶38. Davidson asked Ms. Anctil if she wanted anything to drink, and she requested coffee and water. He prepared her coffee and brought it to her. He told her that she was not under arrest and that she was free to go if she wanted. She said she understood and "just wanted to get it over with." Davidson then asked if she would mind if he taped the interview. She said she did not want it taped.

¶39. Jessica Anctil then asked to use the bathroom. The bathroom was in the public area of the barracks, and Davidson escorted her there and alerted the administrative person in that area that she would need to be readmitted back to the secure area of the barracks. When Jessica Anctil finished using the bathroom, she alerted the administrative person; that person contacted Davidson who went to meet Jessica Anctil. When he did so, Jessica Anctil commented that she thought "he'd forgotten about her."

¶40. While Jessica Anctil was in the bathroom, Davidson spoke with Covell about wanting to tape record any statement that she gave. He taped a tape recorder under the desk and

thought he had turned it on. He ultimately discovered that he had not.

¶41. When Ms. Anctil came back into the office, Davidson again told her she was not under arrest and that she was free to go. She asked no questions of Davidson.

¶42. Davidson asked Ms. Anctil to describe her activities leading up to the discovery of Mr. Shlosser's body. As she did he wrote out her statement. When she was finished speaking, Davidson asked her to read it over, she said she had been reading it as he was writing and she knew that it was accurate. (See State's 5 in Evidence.)

¶43. Before Ms. Anctil signed the statement, Crossman came into the room and asked her if he could ask some questions. Crossman did not know if Ms. Anctil had been read her Miranda rights. Ms. Anctil agreed to speak with Crossman and he brought up the issue of the timing and content of her telephone call to her work. Specifically, he noted that the 911 call was made at 8:00 p.m. while her call to work was made between noon and 2:00 p.m., thus preceding the 911 call, and that she had said her grandfather had been murdered. Ms. Anctil had a blank expression when confronted with the time frames of her telephone calls. She could not remember if she used the word "murdered" or "killed" when she called work. She could not explain the time gap of several hours.

¶44. Ms. Anctil then asked Davidson whether she should talk to "someone" about this. Both Davidson and Crossman responded that she was already talking to "someone" because she was talking to them about it. Ms. Anctil responded that maybe she should talk to a lawyer or something like that. Davidson replied it was up to her but the detectives wished to speak with her now. Davidson again told Ms. Anctil that she was not in custody and that she was free to leave at any time. Crossman does not remember hearing Davidson tell Jessica Anctil that she was free to

leave.

¶45. Ms. Anctil responded that she just wanted to get it over with and would keep talking to the police. She then mentioned that she needed to go to work shortly. Davidson told her she could leave for work and they would talk to her later. Ms. Anctil then stated that she wanted to get the interview over with, and that she was not going to work anyway. Ms. Anctil then signed her three page statement.

¶46. After she signed her statement, Crossman confronted her with information he had received from Kenneth Barber blaming her for Mr. Shlosser's murder and he played this portion an audio tape of his interview with Kenneth Barber. Ms. Anctil responded that she, Kenneth Barber, and Denise Bates had wanted to rob someone for money for drugs and that she had suggested they rob Mr. Shlosser because he lived alone, he always had cash available, and he would let them into the house.

¶47. Ms. Anctil told investigators that the three of them then went to Mr. Shlosser's house, that he let her in, that she went to the bathroom, that while she was in the bathroom she heard a thump, and that when she returned she saw "gramps" face down on the floor. She gave multiple versions of Mr. Shlosser's body position and the locations of Kenneth Barber and Denise Bates.

¶48. Ms. Anctil then said that when she came out of the bathroom, Kenneth Barber was on top of Mr. Shlosser "finishing him off."

¶49. Later, Ms. Anctil said that when she came out of the bathroom, Kenneth Barber was not "finishing him off," rather, she stated that Mr. Barber was in the kitchen and that she had not seen anything.

¶50. Ms. Anctil then noticed the tape recorder taped to the bottom of the desk and she lunged for it, but Davidson got it first. He showed her that the tape recorder was not recording, and she suggested that this was because it had run out of tape. She then told Davidson that she did not want to talk to him anymore, but she continued to speak with Crossman. Subsequently, she also spoke with Davidson again.

¶51. There was nothing recorded on the tape.

¶52. Ms. Anctil then asked to call her parents. Davidson dialed the phone and gave it to her. Davidson stayed in the room while she called. She spoke to a person whom she addressed as "father." Davidson could hear her side of the conversation. She told this person she was on the way to see the Vermont State Police when she was stopped and she complained about her treatment by the Rutland City Police Department. She also said that "Denise" had suggested robbing Mr. Shlosser, that it was "Kenny" who "did it," that although she was present, she had not known that they were going to kill Mr. Shlosser, and that "these bastards" had hidden a tape recorder in the interview room. She ended the conversation by saying "they're going to arrest me for murder, dad."

¶53. Davidson put a new audio tape into the tape recorder and then read the Miranda warnings to Jessica Anctil. This was successfully recorded. No written Miranda warnings or waiver were obtained. Davidson read the Miranda warnings to the defendant twice. Davidson prefaced the Miranda warnings by saying "Because you know obviously at this point we can't just let people walk out. Okay?" After he completed the first reading Davidson asked "Do you understand each of the rights I explained to you?" Ms. Anctil replied, "I wasn't listening." Davidson then said "What? Did you understand what I read to you." Ms. Anctil replied, "I didn't

even hear you but sure.” Davidson then said “Well I’ve got, you know I’ve got to make sure you understand. Can I read them over to you again?” to which Ms. Anctil replied “Sure.” Davidson then suggested that Ms. Anctil move to a different seat and she replied “I don’t want to, I’m really upset.” Thereafter Ms. Anctil questioned Davidson and Crossman about what Kenneth Barber had told them, when he had told them these things, and when the police obtained their information about the miniature trains which were located in Springfield.

¶54. Crossman directed Davidson to finish reading the Miranda warnings, which he did. Davidson began by saying “This form because obviously nobody is free to go right now we’ve got to go through this okay.” In response to the last Miranda question, “Do you understand each of these rights I explained to you,” Anctil replied “Yep.” She then asked if she could have a Public Defender if she wanted one and Davidson replied, “Yep.” Davidson then asked her “And you said you want to talk to us now?” She replied, “sure.” Davidson then read the Miranda waiver, concluding by saying “We haven’t threatened or promised anything to you have we?” Anctil stated, “I guess not.” Davidson replied, “Okay so you agree with that? Agree with what I just read?” Anctil stated, “Well I mean you promised me that you would call the dam [sic] judge when this is done.”

¶55. Davidson then asked Anctil what had happened and the interview recommenced.

Opinion

Ms. Anctil moves to suppress all of her statements made during the stop and at the police barracks, arguing that the statements were obtained through custodial interrogation in violation of her rights under Miranda v. Arizona, 384 U.S. 436 (1966).*

It is a familiar rule that a suspect is entitled to be advised of her Miranda rights prior to custodial interrogation. State v. Beer, 2004 VT 99, ¶25, 177 Vt. 245. “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.” Miranda, 384 U.S. at 444. When assessing if there was “interrogation”, the Court has little difficulty determining that all of Ms. Anctil’s statements were made in response to questioning initiated by law enforcement. Detective Davidson initiated the interview at the scene of the stop by asking about items missing from Mr. Shlosser’s residence, and he initiated the interview at the Vermont State Police barracks by questioning her about her activities prior to discovering the body.

The more problematic question is whether Ms. Anctil was “in custody” when she made her various statements. “In evaluating whether a suspect is in custody for purposes of Miranda, the trial court must objectively examine the totality of the circumstances to determine if a reasonable person would believe he or she were free to leave or to refuse to answer police questioning.” Beer, 2004 VT 99 at ¶ 25 (internal quotations omitted). A suspect is considered to be in custody if those circumstances rise to the functional equivalent of formal arrest. State v.

* Ms. Anctil also argues that her statements should be suppressed under Vermont’s Public Defender Statute, 13 V.S.A. § 5234, which requires that a suspect be advised of her right to an attorney prior to custodial interrogation. Because suppression under each of these rubrics depends on a finding that the defendant was subject to custodial interrogation, that inquiry is determinative of both arguments in this case. See State v. Picknell, 142 Vt. 215, 224 (1982) (noting that the Public Defender Statute “recognizes Miranda’s concern for bad faith interrogation of individuals accused of a crime without the presence of counsel.”).

Willis, 145 Vt. 459, 473 (1985). Several categories of relevant circumstances have emerged as useful in making this determination, among them the time and place of the questioning, the method used by the police to summon the individual, the length and form of the questioning, the number of officers present, the conduct of the police, the degree of pressure applied to detain the individual, the extent to which the individual is confronted with evidence of guilt, and whether objective indicia of arrest are present. See, e.g., United States v. Nishnianidze, 342 F.3d 6, 13 (1st Cir. 2003); United States v. Booth, 669 F.2d 1231, 1235 (9th Cir. 1981); State v. Cruz-Matta, 674 P.2d 1368, 1371 (Ariz. 1983); State v. Melemai, 643 P.2d 541, 544 (Haw. 1982); State v. Bleyl, 435 A.2d 1349, 1358 (Me. 1981); Whitfield v. U.S., 441 A.2d 415, 425 (Md. 1980).

The totality of the circumstances surrounding the initial stop of Ms. Anctil's car leads the court to conclude that she was in custody at that time. While recognizing that neither the use of handcuffs nor questioning in a police cruiser automatically turns a detention into a custodial interrogation, see, e.g., United States v. Cota, 953 F.2d 753, 758-59 (2d Cir. 1992); United States v. Touzel, 409 F.Supp.2d 511, 522 (D.Vt. 2006); State v. Lancto, 155 Vt. 169, 171 (1999), it would stretch reason beyond the breaking point to conclude that a reasonable person in the defendant's position would believe she was "at liberty to leave or to decline to answer the officer's questions." Lancto, 155 Vt. at 168. Ms. Anctil was initially approached by an officer with his gun drawn, removed from her vehicle, handcuffed on the ground, patted down, and placed in the back seat of a cruiser. She was isolated from Mr. Barber. Her vehicle was surrounded by seven to nine police vehicles, several with blue lights flashing, and at least eight to ten officers were on the scene. Her vehicle was blocked in by police cruisers. It was patently

obvious that this was not a routine traffic stop. Cf. State v. Boardman, 148 Vt. 229, 231 (1987) (holding that a defendant was not in custody when stopped by a single officer and questioned about alcohol consumption because “the atmosphere was substantially less ‘police dominated’ than the types of interrogation addressed in Miranda and subsequent cases where Miranda has been applied.”).

Applying the factors listed above, the questioning took place in the morning at a busy intersection, was of relatively short duration, and the officer did not actively confront the defendant with evidence of guilt. However, the stop of the vehicle, in response to the Vermont State Police BOL’s, the manner in which the officer ordered the defendant out of the motor vehicle, the number of officers and cruisers present with blue lights flashing satisfies this court that the situation amounted to the functional equivalent of formal arrest. Willis, 145 Vt. at 473. Accord New York v. Quarles, 467 U.S. 649, 655 (1984) (holding that defendant was in custody because he was surrounded by at least four police officers and handcuffed). This result did not change when the Vermont State Police arrived, although the handcuffs were removed, and the defendant was permitted to leave the cruiser and informed that she was not under arrest.

Notwithstanding the desire of the detectives for a noncustodial stop, and their protestations that she was not under arrest, the overwhelming police presence would still have led a reasonable person to believe that she was not in fact free to leave or to refuse to answer their questions.

Indeed, viewing the circumstances as a whole, it is fair to say that “no amount of verbal explanation could turn what occurred [at the stop] into a voluntary, noncustodial encounter.”

Beer, 2004 VT 99 at ¶ 27 (rejecting the State’s argument that a suspect was not in custody because she was informed that she was considered merely a witness and that she was not in

custody). Because Ms. Anctil was thus subject to custodial interrogation without the benefit of warnings satisfying Miranda's requirements, her statements made at the scene of the stop, and any evidence obtained, must be suppressed.

After the initial interview in the police cruiser, Detective Davidson asked Ms. Anctil if she would be willing to drive to the State Police barracks, and allowed her to have a private conversation with Kenneth Barber before doing so. She agreed to go to the Vermont State Police barracks and drove her own car to the barracks. At the barracks, Davidson again reiterated that she was not under arrest, made her a coffee, and allowed her to use the bathroom in the public area of the barracks. Ms. Anctil indicated that she understood that she was free to leave, but that she "just wanted to get it over with." Davidson then asked her general questions about her activities, and wrote out her statement. At this juncture, the factors tending to show that Ms. Anctil was under the functional equivalent of arrest had dissipated. She was voluntarily present at the barracks, she indicated that she understood that the interview was voluntary, there was only one officer present, and she was not confronted with evidence of guilt. A person may be interviewed in a police station without being in custody for Miranda purposes, see State v. Gulley, 155 Vt. 65 (1990). This court is satisfied that a reasonable person in defendant's position would not have believed that she was in custody at that time.

After Detective Davidson's interview, Detective Crossman entered the room and, perhaps believing that the defendant had already been advised of her Miranda rights, pointed out that she had informed someone at her workplace that her grandfather had been killed several hours prior to making the 911 call. Ms. Anctil had little to say in response, but asked whether she should speak to an attorney. When the officers avoided answering that question, she mentioned that she

needed to go to work shortly. Davidson told her she could leave for work and they would talk to her later. She reiterated that she wanted to complete the interview, and she then signed the statement that she had given to Detective Davidson earlier.

Immediately after Ms. Anctil signed her statement, the tone of the interview changed dramatically. Crossman told her that Mr. Barber had blamed her for the murder, and he played an audio tape of Barber's statement to that effect. At this point it became clear that the detectives considered Ms. Anctil a suspect in the murder. It is inappropriate to consider the subjective views of either the defendant or the detectives to determine whether defendant was in custody. Willis, 145 Vt. at 473 ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.") (quoting Berkemer v. McCarty, 468 U.S. 420, 421-22 (1984)). However, once articulated, the fact that the police suspect that a person is guilty of murder would surely cause most reasonable persons to doubt that they were free to walk away from an interrogation. Confrontation with evidence of guilt is therefore an important element within the totality of the circumstances inquiry. See Stansbury v. California, 511 U.S. 318, 320 (1994) (per curiam) ("An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned."); Beer, 2004 VT 99 at ¶ 27 (citing Stansbury with approval); United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982) (affirming suppression of a statement where police officers interrupted an exculpatory story by confronting the defendant with evidence of guilt, and noting that in such circumstances a reasonable person could conclude he was not free to leave).

The holding in State v. Pontbriand, 2005 VT 20, ¶18, 178 Vt. 120, does not detract from this analysis. In Pontbriand, the Vermont Supreme Court reversed the trial court's suppression of statements made by the defendant while confined by illness to a hospital room. The trial court had determined that the defendant was in custody because he could not leave the room, although the police had made no efforts to confine him or isolate him from health care workers and had emphasized that he was not required to answer their questions. The Supreme Court, after determining that the totality of the circumstances did not indicate that the defendant was subject to a "police-dominated atmosphere," went on to note that the fact that the police showed the defendant an incriminating email he had written did not turn the interview into a custodial interrogation. Id. at ¶¶ 17-18. The Court reasoned that knowledge of this email, along with the officer's statements that they knew what had happened and that they could not promise that he would not be arrested, did not "constitute evidence so overwhelming that a reasonable person in Pontbriand's position would believe that he or she was no longer free to end the conversation." Id.

By contrast, the confrontation in Ms. Anctil's case invoked elements of interrogation more likely to overwhelm a reasonable person's sense that she was not free to leave or to refuse to answer questions. That confrontation made it apparent that the detectives had separated her from Mr. Barber in order to gain an advantage in the interrogation. They had allowed her to tell an exculpatory story before confronting her with evidence they had obtained from another suspect still held in isolation down the hall. Under these circumstances, the obvious implication was that Ms. Anctil had no choice but to answer the questions or live with whatever answers Mr. Barber might give. The situation was thus more like State v. Badger, 141 Vt. 430, 439-40 (1982), in

which the suspect was offered the choice of answering questions or submitting to a lie-detector test, than Pontbriand, in which the suspect was informed from the outset that the police had already obtained incriminating evidence. Compare Badger, 141 Vt. at 436 with Pontbriand, 2005 VT 20 at ¶ 3. This confrontation threw the other circumstances of the interview into a markedly different light, and the totality of these circumstances indicates that Ms. Anctil was in custody after the confrontation.

Once confronted with evidence of guilt, and after Det. Davidson carefully avoided informing her of her right to an attorney, Ms. Anctil related a version of her story which was far more incriminating than that contained in her signed statement. She then made further incriminating statements on the telephone, within hearing of the officers, indicating to someone, apparently her father, that she expected to be arrested for murder. As Ms. Anctil was in custody at the time, and had not been informed of her Miranda rights, these statements cannot be used against her.

When Ms. Anctil's telephone conversation ended, Davidson confirmed what was already evident by telling her that she was "obviously" no longer free to leave. He then read her the Miranda warnings. She indicated that she did not hear what he had read. After two more readings, Ms. Anctil finally indicated that she understood and asked whether she could have a public defender. Davidson replied that she could, but redirected her to the interview, during which she essentially reviewed the incriminating statement she had just given.

Regardless of whether Ms. Anctil actually waived her rights under Miranda and under the Public Defender Act, the audiotaped interview must be suppressed as the product of the preceding illegal interrogation. The Vermont Supreme Court has made clear that a subsequent confession

must be suppressed if it is infected by the taint of an initial illegality and intervening events have not broken the causal chain to dissipate the effect of that illegality. Badger, 141 Vt. at 439-40. See also Missouri v. Seibert, 542 U.S. 600, 617 (2004) (upholding suppression of statement made after the suspect received Miranda warnings but which followed immediately on unwarned interrogation).

In Badger, the Vermont Supreme Court affirmed the trial court's decision to suppress where an initial statement, the illegality of which was not in question, was followed one day later by an interview to resolve gaps and inconsistencies in the illegally obtained statement. The Court rejected the State's argument that the intervening issuance of Miranda warnings purged the illegality of the original interview. Id. at 440. In this case, the detective elicited a highly incriminating statement from the defendant during an illegal custodial interrogation, warned her of her rights under Miranda, and then within minutes essentially asked that she repeat her previous statement on tape. Apparently, the only time that passed between the interrogations was that necessary to warn the defendant of her Miranda rights and turn on the tape recorder. Therefore, as in Badger "the close relationship in time and circumstances between the two confessions minimized the salutary effects of the Miranda warnings." Id. at 441. Under these circumstances, this court must conclude that "the involuntariness of the initial confession fatally tainted the second confession." Id. at 40.

In sum, because she was in custody and not informed of her rights under Miranda, all of Ms. Anctil's statements at the scene of the stop must be suppressed as well as any physical evidence which was obtained. Because the indicia of arrest had dissipated, her statements at the State Police barracks prior to being confronted with Mr. Barber's accusation will not be

suppressed, including her statement identified as State's #5 in Evidence. Any statements made thereafter, including her audiotaped interview, are suppressed.

Order

For the reasons discussed above, Jessica Anctil's motion to suppress is **GRANTED** as to her statements and any evidence obtained from the time her vehicle was stopped until she arrived at the State Police barracks; her motion is **DENIED** as to statements made from that point until Detective Crossman confronted her with Mr. Barber's accusation; and her motion is **GRANTED** as to any statement made thereafter.

Dated at Chelsea, Vermont, the 2nd day of October, 2006.


HON. M. PATRICIA ZIMMERMAN
Presiding Judge

Filed

OCT - 4 2006

Rutland District Court