STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1236

State of Minnesota,
Respondent,

vs.

Jeffrey Alan Rosebush,
Appellant.

Filed August 26, 2008
Affirmed in part and reversed in part
Klaphake, Judge

St. Louis County District Court
File No. 69VI-Cr-06-2436

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Karl G. Sundquist, Assistant County Attorney, St. Louis County Courthouse, 300-5th Avenue South, Virginia, MN 55792 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. F. Axelson, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Jeffrey Alan Rosebush challenges his convictions for fifth-degree controlled substance offense, Minn. Stat. § 152.025, subd. 2(1) (2006), driving after revocation, Minn. Stat. § 171.24, subd. 2 (2006), and driving without insurance, Minn. Stat. § 169.797, subd. 3 (2006). Appellant claims that: (1) he was in custody when a state trooper discovered drugs in his vehicle, and any statements he made after that time should have been suppressed because he was not given a *Miranda* warning until he was later formally placed under arrest; (2) because his custodial questioning was partially unrecorded in violation of *Scales*, evidence obtained as a result of police questioning should have been suppressed; and (3) the evidence is insufficient to prove the driving after revocation and driving without insurance offenses because the state offered no proof of these offenses other than his admissions.

We conclude that (1) appellant was not in custody when drugs were discovered in his vehicle and, therefore, evidence obtained during the inventory search was properly admitted; (2) the trooper's inadvertent failure to record a portion of appellant's interrogation was not a substantial *Scales* violation, so that evidence obtained during the interrogation was properly admitted; and (3) the state met its burden of proof on the driving after revocation offense with evidence of appellant's license revocation. We affirm as to those issues and as to issues raised in appellant's pro se brief, because they are without merit. But because the state offered only appellant's uncorroborated

admission as evidence of driving without insurance, we reverse his conviction for that charge for lack of sufficient evidence.

D E C I S I O N

On-the-scene Questioning

A law enforcement officer must give a defendant a *Miranda* warning to advise the defendant of his Fifth Amendment protection against self-incrimination before all custodial interrogations or "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 v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966) (footnote omitted); *State v. Heden*, 719 N.W.2d 689, 694-95 (Minn. 2006). The Supreme Court defines custody as "formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S. Ct. 1136, 1144 (1984) (quotation omitted); *see Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714 (1977) (noting that ultimate question is whether there is "formal arrest or restraint on freedom of movement" equivalent to formal arrest). "The test for determining whether a person is in custody is objective—whether the circumstances of the interrogation would make a reasonable person believe that he was under formal arrest or physical restraint akin to formal arrest." *In re Welfare of D.S.M.*, 710 N.W.2d 795, 797-98 (Minn. App. 2006).

"[W]hether a defendant was 'in custody' at the time of an interrogation is a mixed question of law and fact, requiring the appellate court to apply the controlling legal standard to historical facts as determined by the trial court." *State v. Wiernasz*, 584

N.W.2d 1, 3 (Minn. 1998). On review, this court examines the district court's findings of fact under the clearly erroneous standard of review but reviews de novo the district court's custody determination and the need for a *Miranda* warning. *Id.*

Appellant contends that he was placed in custody after Trooper David Johnston discovered drug paraphernalia in his vehicle. Appellant concedes that Johnston had the legal right to conduct an inventory search of the vehicle; the parties dispute whether appellant was in custody when Johnston, upon finding two spoons with residue and five syringes in the vehicle, asked appellant to identify the substances on the spoons and asked to see appellant's arms.

"On-the-scene" questioning, where the officers are simply trying to get a preliminary explanation of a confusing situation, does not require a *Miranda* warning. *State v. Walsh*, 495 N.W.2d 602, 604-05 (Minn. 1993) (allowing police arriving at murder scene to question defendant, who was handcuffed to a railing, to conduct a general preliminary investigation without giving the defendant a *Miranda* warning); *State v. Rosse*, 478 N.W.2d 482, 485 (Minn. 1991). "There are occasions where the officers need to ask questions to sort out the situation and determine who, if anyone, should be arrested." *Walsh*, 495 N.W.2d at 605.

Trooper Johnston's actions here were similar to the preliminary investigations that were found constitutionally sound in *Walsh* and *Rosse*, and we conclude that a reasonable person in appellant's position would not have believed that he was in custody when Johnston asked him about the spoons and syringes found in his vehicle. Appellant was not physically confined in any way—he was neither handcuffed nor placed in the squad

car. Trooper Johnston's behavior towards appellant was not otherwise coercive: he did not draw his weapon or physically intimidate appellant and, according to his testimony, he intended only to issue a citation to appellant for the non-drug offenses and was focused on inventorying the car while appellant stood nearby. We observe no error in the district court's determination that appellant was not in custody at that time.

Scales Violation

Appellant next contends that the failure of Trooper Johnston's on-person recording equipment to record a portion of his custodial questioning constitutes a substantial violation of *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994). *Scales* requires the recording of custodial interrogations, including any information given to defendants about their constitutional rights. *Id.* "Whether an officer's failure to record a custodial interrogation is a substantial violation of the *Scales* recording requirement is a legal question, subject to de novo review." *State v. Inman*, 692 N.W.2d 76, 79 (Minn. 2005).

At his omnibus hearing, appellant raised the issues of "whether the defendant was in custody for purposes of Miranda . . . [and] whether after he was Mirandized, whether there was a recording or whether there was a Scales violation[.]" A "substantial" violation of *Scales* occurs only "if the accused alleges, contrary to the prosecution's assertions, that no *Miranda* warning was given or that he did not waive his *Miranda* rights." *Id.* at 81. A defendant's failure to raise a factual dispute at the omnibus hearing about whether he received a *Miranda* warning constitutes a waiver of that issue. *Id.* ("We believe the relevant time to create a factual dispute is at the omnibus hearing where the *Scales* issue was raised and decided. [The defendant] waived his right to claim a

substantial violation of the *Scales* recording requirement by not creating a factual dispute at the omnibus hearing").

Here, appellant failed to contest at the omnibus hearing that he received a *Miranda* warning; to the contrary, Trooper Johnston testified that he gave appellant a *Miranda* warning. Because appellant failed to raise any *Miranda* issues at the omnibus hearing, we conclude that he waived the *Scales* issue. We also note that the record would not support finding a substantial violation of *Scales* because there is no evidence showing that Johnston's failure to record a portion of the interrogation was "willful," a requirement for demonstrating a substantial *Scales* violation. *Id.* at 80, n.3. Under these circumstances, the district court properly ruled that there was no *Scales* violation in this case.

Sufficiency of Evidence of Driving after Revocation

The offense of driving after revocation generally prohibits a person who knows or reasonably should know that his driver's license is revoked from operating a motor vehicle during the period of revocation. Minn. Stat. § 171.24, subd. 2 (2006). The state bears the burden of proving each element of a charged offense beyond a reasonable doubt. *State v. Robinson*, 604 N.W.2d 355, 362 (Minn. 2000).

Appellant contends that the state failed to meet its burden of proof because it failed to offer any evidence of this offense, except for appellant's admission of guilt. In general, "[a] confession of the defendant shall not be sufficient to warrant conviction without evidence that the offense charged has been committed." Minn. Stat. § 634.03

(2006). "A confession is any statement by a person in which he explicitly or implicitly admits his guilt of a crime." *State v. Vaughn*, 361 N.W.2d 54, 56 (Minn. 1985).

This court has held that evidence of a defendant's admission of driving after revocation, coupled with an arresting officer's independent verification that a defendant has operated a vehicle on a public highway during a period of license revocation, is sufficient to sustain a conviction for driving after revocation. *State v. Kerkhoff*, 377 N.W.2d 81, 82 (Minn. App. 1985). Such evidence exists in this case because Trooper Johnston observed appellant driving his vehicle on a highway, and, before stopping appellant's vehicle, he verified that appellant's driving privileges were revoked. Therefore, the evidence of appellant's admission and the corroborative evidence provided by Trooper Johnston are sufficient to support appellant's conviction for driving after revocation.

Sufficiency of Evidence for Driving without Insurance Offense

Appellant was convicted of failing to provide vehicle insurance, an offense which is defined as follows:

> Any person who operates a vehicle upon a public highway, street, or road in this state who knows or has reason to know that the owner does not have security complying with the terms of section 65B.48 in full force and effect is guilty of a crime[.]

Minn. Stat. § 169.797, subd. 3 (2006). Again, appellant contends that the state failed to meet its burden of proof because it offered no evidence except for appellant's admission of guilt to this offense.

Unlike the driving after revocation offense, the record includes no corroborative evidence to show that appellant was driving without vehicle insurance. While not every element of an offense must be corroborated, a confession must be supported by "independent evidence of trustworthiness." *In re Welfare of M.D.S.*, 345 N.W.2d 723, 735 (Minn. 1984); *see In re Welfare of C.M.A.*, 671 N.W.2d 597, 601 (Minn. App. 2003) ("the statute requires that the corroborating evidence show the harm or injury and that it was occasioned by criminal activity"). Here, the record shows only that appellant admitted that he did not have insurance and that he could not provide proof of insurance at the time his vehicle was stopped. Such evidence is insufficient to support a criminal conviction for driving without insurance. *State v. Fairchild*, 444 N.W.2d 572, 574-75 (Minn. App. 1989). Under a previous version of Minn. Stat. § 169.797, *Fairchild* ruled that a conviction for driving a motor vehicle without liability insurance required the state to establish that there was no insurance on the motor vehicle and that evidence of lack of proof of insurance was insufficient to establish beyond a reasonable doubt the lack of any insurance. 444 N.W.2d at 574-75. While *Fairchild* notes that "the construction of the criminal statute has made the state's burden of proof extremely difficult[,]" *id.* at 575, this court is constrained to follow *Fairchild* and must conclude that the district court erred in ruling that the state met its burden of proof on the charge of driving without insurance.

Appellant's Pro Se Arguments

Appellant's handwritten pro se brief alleges fact-based claims that do not find support in the record, and he includes no citations to legal authority in support of these

claims. Because appellant's claims are unsupported by law or the underlying record, they are without merit, and this court need not address them. *See State v. Krosch,* 642 N.W.2d 713, 719-20 (Minn. 2002) (deeming as waived allegations in appellant's pro se brief that are unsupported by cogent argument or citation to legal authority).

Affirmed in part and reversed in part.