STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0266

State of Minnesota,
Respondent,

vs.

Dale Sexton Hedlund,
Appellant.

Filed May 19, 2009
Affirmed
Peterson, Judge

Meeker County District Court
File No. 47-CR-07-228

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

Stephanie L. Beckman, Meeker County Attorney, 325 North Sibley Avenue, Litchfield, MN 55355 (for respondent)

John D. Ellenbecker, 803 West St. Germain Street, P.O. Box 1127, St. Cloud, MN 56301 (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

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

PETERSON, Judge

In this appeal from a conviction of first-degree controlled-substance crime, appellant argues that the district court erred in concluding that because an unannounced, in-home interview by appellant's probation officer was not a custodial interview, the probation officer was not required to give a *Miranda* warning before eliciting incriminating statements about a new offense. We affirm.

FACTS

Appellant Dale Sexton Hedlund had been on supervised release for a previous controlled-substance offense since December 2003. Supervised-release conditions included submitting to drug testing and unannounced visits by his probation officer. While appellant was on supervised release, his probation officer, Cindy Kragenbring, made three to five random visits per year to his residence, each time accompanied by law-enforcement officers.

Shortly after 6:00 p.m. on February 18, 2007, Kragenbring, accompanied by two plainclothes sheriff's deputies, made an unannounced visit to appellant's residence. Appellant answered the door and allowed Kragenbring and the officers to enter. Kragenbring explained that they were there to conduct a urinalysis test. Appellant indicated that he had been using methamphetamine frequently and would test positive. Appellant submitted to a urinalysis test, which came back positive, and appellant was arrested.

During a search incident to arrest, plastic bags containing 16.9 grams of methamphetamine were found on appellant's person. Items associated with the sale of methamphetamine were found during a later search of appellant's residence. Appellant was charged with first- and second-degree controlled-substance crime in violation of Minn. Stat. § 152.021, subd. 1(1), 2(1) (2006) (possession of ten grams or more methamphetamine with intent to sell and possession of six grams of a mixture containing methamphetamine). Appellant moved to suppress his statement to the officers on the ground that he was in custody when he made the statement, and, therefore, a *Miranda* warning was required. The district court denied the motion.

The parties submitted the case to the district court for decision on stipulated facts. The district court found appellant guilty of first-degree controlled-substance crime and sentenced him to an executed term of 122 months in prison. This appeal followed.

D E C I S I O N

"[W]hether a defendant was 'in custody' at the time of 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 and reviews de novo the district court's custody determination and the need for a *Miranda* warning. *Id.*

A law-enforcement officer must give a defendant a *Miranda* warning to advise the defendant of his Fifth Amendment protection against self-incrimination before "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). "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).

In *Murphy*, the Supreme Court held that a probationer who made an incriminating statement during a meeting with his probation officer was not in custody for *Miranda* purposes and that the probation officer's failure to inform the probationer of the right against self-incrimination did not bar the use of the statement at trial. 465 U.S. at 430-34, 104 S. Ct. at 1144-45. The Court explained:

> Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess. . . . [C]ustodial arrest thrusts an individual into an unfamiliar atmosphere or an interrogation environment created for no purpose other than to subjugate the individual to the will of his examiner. Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from the psychological intimidation that might overbear his desire to claim the privilege. Finally, the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained.

Id. at 433, 104 S. Ct. at 1145; *see also State v. Tibiatowski*, 590 N.W.2d 305, 308-10 (Minn. 1999) (analyzing *Murphy* in context of deciding whether suspect who was in custody on unrelated offense was in custody for all *Miranda* purposes).

Murphy is factually distinguishable from this case in that the interview in *Murphy* was a scheduled interview that took place in the probation officer's office. 465 U.S. at 424, 104 S. Ct. at 1140. Here, Kragenbring made an unannounced visit to appellant's home, but we conclude that this distinction is not legally significant. We agree with the district court's reasoning:

> Provided [appellant] fulfilled his obligations as set forth in his conditions of release, he would have been free to leave (i.e., stay at his home) at the end of the meeting. . . .
>
> . . . [Appellant's] interview took place in the confines of his own, familiar, home. Also, while unannounced, [appellant] was aware that such interviews were a necessary part of his conditions of release. [Appellant] was familiar with his probation agent, Ms. Kragenbring, as well as [the sheriff's deputies]. . . . Ms. Kragenbring simply asked [appellant] several straight forward questions and [appellant] answered them in the affirmative.

To support his argument that he was in custody, appellant relies on the following language in *Murphy*:

> A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. *There is thus a substantial basis in our cases for concluding that*[1] if the state, either expressly or by

[1] Appellant omitted the italicized language from the *Murphy* quotation in his brief.

> implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.

Id. at 435, 104 S. Ct. at 1146.

But the *Murphy* opinion discusses three different exceptions from the general rule that a witness who does not want to incriminate himself must assert his Fifth Amendment privilege, rather than answering questions, and the language that appellant quotes does not appear in the portion of the opinion that discusses the exception for a person in police custody. The quoted language appears in the portion of the opinion that discusses the exception that applies when the assertion of the Fifth Amendment privilege is penalized in such a way that the penalty forecloses a free choice to remain silent and compels incriminating testimony. *Id.* at 434, 104 S. Ct. at 1146. Appellant's argument ignores the analysis in this portion of the opinion. The Supreme Court concluded that because Murphy's probation conditions proscribed only false statements and contained no suggestion that his probation could be revoked if he asserted his Fifth Amendment privilege, there was no attempt by the state to attach an impermissible penalty to the exercise of the privilege against self-incrimination. Murphy could not have harbored a reasonable belief that his probation might be revoked for exercising his Fifth Amendment privilege, and, therefore, the exception did not apply. *Id.* at 436-39, 104 S. Ct. at 1147-48; *see* Minn. Stat. § 609.14 (2008) (probation-revocation statute); *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980) (setting forth findings required before probation can be

revoked). This analysis has no bearing on the question of whether appellant was in custody.[2]

Appellant also argues that Kragenbring being accompanied by plainclothes deputies assigned to a drug task force was coercive because the deputies intended to question appellant about his being tipped off in advance regarding the timing of Kragenbring's random visits. But Kragenbring testified:

> I had been attempting to make a home visit with [appellant] for some period of time in the past. He has a very long driveway. It's very easy to see a squad car coming up, and generally I would get there and he wouldn't be home, although his shoes may be in view. He could either go to the apartment downstairs, which I cannot access, or go out the back door.

The district court found, "Kragenbring used non-uniformed officers and an unmarked vehicle on this occasion because Kragenbring believed that [appellant] was able to remove himself from his residence on prior occasions by spotting the marked patrol car coming down his driveway." This finding is supported by Kragenbring's testimony and is not clearly erroneous.

Appellant argues that at a minimum, the district court should have suppressed any statement made after his arrest. Appellant did not raise this issue before the district court. Generally, this court will not consider matters that were not argued before or considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Moreover,

[2] We also note that, as in *Murphy*, nothing in the record suggests that appellant could have harbored a reasonable belief that his probation might be revoked for exercising his Fifth Amendment privilege.

appellant makes only a general assertion that questioning continued following his arrest. He does not identify any questions that were asked, and the record does not indicate that appellant made any incriminating admission following his arrest.

Under *Murphy*, the district court properly determined that appellant was not in custody for *Miranda* purposes when he made his statement to the officers and that appellant's statement would be admissible at trial.

Affirmed.