

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

No. _____

JAMES BUTLER,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

- I. If the totality of the circumstances establish that a defendant is under police control and not free to leave until police questioning is finished, does the fact that the officer in control informs the defendant that he is not “under arrest” rule out any finding that the defendant was in custody at the time of the questioning?

**LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW
AND RULE 29.6 STATEMENT**

All parties appear in the caption of the case on the cover page. None of the parties included thereon have a corporate interest in the outcome of this case.

LIST OF ALL RELATED PROCEEDING PURSUANT TO RULE 14.1(b)(iii)

1. Sixth Circuit Court of Appeals; No. 19-3230; filed December 9, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James Butler, respectfully prays that a writ of certiorari issue to review the judgment below of the Federal Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Order of the Sixth Circuit Court of Appeals, No. 19-3230, filed December 9, 2019, appears at Appendix A-1 to the Petition.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1257 and 1651 as a judgment of the federal court of appeals was entered on December 9, 2019.

STATEMENT OF THE CASE

A grand jury for the Northern District of Ohio indicted the defendant-appellant James Butler for one count of Possessing a Firearm and/or Ammunition in or affecting commerce after the defendant had been convicted of a felony punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. §922(g)(1).

On October 15, 2018, the district court conducted a suppression hearing pursuant to a defense motion to suppress Butler's statements to law enforcement pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). The district court denied the motion based upon the testimony of law enforcement witnesses that Petitioner Butler was not in custody at the time he made the statements in response to questions posited to him by police officers.

Here, the officer in control of the Petitioner Butler called backup officers to ensure that he was unable to leave the area until he was questioned about a possible theft offense. Butler voluntarily surrendered without incident upon seeing numerous police cruisers appear in the area. The controlling officer then informed Butler that he was not under arrest, but that law enforcement merely wanted to question him about a different theft offense than the incident that formed the basis for the original stop.

According to the officer who apprehended Butler, to avoid Butler appearing to look like he was a snitch, the officer placed the defendant into the back of his locked cruiser. The officer made a call to the case officer of the second theft incident. Butler was not told he was free to leave. In fact, Butler could not leave the police vehicle without being let out by an officer. He was then questioned about the various accusations by the officers. Nevertheless, when Butler was not, in the opinion of the officers, to have been fully cooperative, he was placed under arrest

without ever leaving the back of the cruiser.

Because the officer told the defendant that he was not under arrest, no Miranda v. Arizona, 384 U.S. 436 (1966) protections were provided by either the officer who placed Butler into his zone car, or the officer who spoke to Butler on the telephone while Butler was in the back of his fellow officer's vehicle.

The evidence is uncontroverted that Butler was not free to leave the back of the police vehicle at any time between the time he was placed into it and when he was arrested. Nevertheless, the district court found there was no custody requiring the above protections be provided. This was based upon the mere fact that the questioning officer informed Butler that he was not under arrest when first apprehended. While the words of the officer made to a defendant while apprehending him for questioning is a relevant consideration when determining whether Miranda warnings are required, this should be a small consideration. But a self-serving statement to a defendant that he has not been placed in custody must not overcome the totality of the circumstances that establishes that the defendant was in a custodial environment at the time he was being questioned.

REASONS FOR GRANTING THE WRIT

- I. If the totality of the circumstances establish that a defendant is under police control and not free to leave until police questioning is finished, a statement by the presiding officer to the defendant that he is not “under arrest” does preclude a finding the defendant was in custody at the time of the questioning, and thus requires instruction pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).**

In this case, law enforcement officials questioned Butler about the underlying offense upon his apprehension without providing Miranda protections. The officers believed that the providing of the warnings was not necessary as they had not yet formally placed Butler under arrest. Before questioning Butler after placing him in the back of a police cruiser, the officer who placed Butler in his cruiser informed Butler at the time that he was not under arrest.

Nevertheless, the totality of the circumstances clearly establishes the contrary. Butler was in custody. He was not free to leave. He had been placed in the back of a police cruiser, in a “cage”, with the doors locked by a uniformed officer for the purposes of having him questioned about the underlying offense. When questioned, Butler denied that he stole the gun, but stated that he would look into it, or words to the effect, if given time.

Butler moved to suppress his statements regarding the theft of the gun. The trial court erred by finding Butler was not in custody at the time he was questioned by the police.

The government may not use statements, whether exculpatory or inculpatory, obtained from custodial interrogation unless they properly utilize procedural safeguards to guarantee the accused has been informed of and freely waived the Constitutional privileges of the Fifth Amendment. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966). The reason for excluding statements obtained in violation of Miranda is that custodial interrogation is inherently coercive.

Petitioner Butler was in custody when questioned by law enforcement on August 29, 2017. Arresting officers, circumvented Miranda requirements by merely informing Butler that he was not under arrest. The translation of “not under arrest” is that Butler was not in custody. The officers statement belies the actual totality of the circumstances, which established clearly that Butler was in custody, as at no time was he free to leave.

The confrontation between Butler and law enforcement began with the report to police of a possible theft in progress at a nearby Chugs gas station. Sgt. Kilgore of the Mansfield, Ohio Police Department, observed Butler walking eastbound away from a gas station. Kilgore thought Butler was attempting to avoid him by going into a nearby apartment. Therefore he called for backup cruisers. Upon their arrival, Butler saw that there was no escape and approached Kilgore’s cruiser.

Upon investigation of an alleged theft at the gas station/convenient store, Chugs, law enforcement determined that nothing could be proven to have been stolen. But the owner of that business did not want Butler on the premises.

Sgt. Kilgore had learned that earlier in the day there had been an unrelated theft of a gun from a firearms dealer. Therefore, even though Butler was not under arrest from the Chugs incident, Kilgore questioned him about the gun theft. He asked if Butler had stolen anything big lately. Butler hesitated and then denied it. Kilgore then stated, “come on, Jimmy. You don’t think that gun store was going to have cameras?” He replied, “I didn’t steal no gun.” At this time, Butler was leaning up against the cruiser.

Sgt. Kilgore then asked Butler if he wanted to talk to the case officer to “help you out with this . . .”. Butler said that he would but that “he would just need some time.” Kilgore,

however, decided to get the case officer on the phone immediately. Butler noted that he did not want to be seen talking to the police because he worried that in that area people might think that he was being a snitch. In response, Kilgore said that he “ will make it look like you are under arrest and sit in the truck and move to a different part of the park and get the case officer on the phone.” According to Kilgore, he told Butler that “you are not under arrest,” when Butler put his hands forward to be handcuffed.

The case officer for the gun theft was Joe Gladden. Kilgore was able to reach Gladden on the phone and handed his receiver to Butler. Kilgore could hear both sides of the conversation because the call was on a speaker phone. Gladden told Butler that he wanted to get the gun back as soon as possible, even that day. Kilgore did not believe that Butler was cooperating. Butler did not give straight forward answers and said that “he could get the gun back but just needed time.” It was at this point that he arrested him for the theft offense and placed him in handcuffs.

Sgt. Kilgore acknowledged that when he first encountered Butler, including when calling for back up, he was going to detain him. Therefore, for all intents and purposes, Butler was detained at that point. Whether he was handcuffed or not is not determinative. Despite what the officers said, Butler was not, and would not have been free to leave. His arrest upon not admitting the theft is clear evidence of this. At no time during this period did officers explain to Butler his rights under Miranda.

During the call to Gladden, Butler was in the back seat of the cruiser, in a “cage”. He could not get out of the doors because they locked automatically. The questioning was not about the theft for whas cleared, but only about the gun theft. It lasted about five minutes. Kilgore

acknowledged that the other officers were called to make sure that he did not try to avoid arrest. They left after he was seen to be in Kilgore's custody.

Consistently, Sgt. Kilgore also acknowledged that when he first confronted Butler, Butler was not free to leave, at least until he had been cleared on the Chugs incident. Thus, Butler was in custody, then for a brief moment he was not in custody (ironically when first placed in the back of the cruiser with no means of unlocking the door), then in custody again, within moments.

For what it is worth, Butler testified in his suppression motion. He acknowledged that he was told he was not under arrest, just before he was placed into the back of a cruiser. According to Butler, after he was in the cruiser, once he said that he would look into the theft, he was placed under arrest. Significantly, he testified that the officers never told him that he was free to go. He never believed that he could leave if he decided to do so.

The totality of the circumstances clearly establishes that Butler was in custody from the moment he was stopped by Sgt. Kilgore.

Formal Arrest Not Required to Invoke Miranda Protections

A formal arrest need not take place for Miranda to apply. In determining whether a person is in custody during an interrogation, the Supreme Court sets forth two essential questions: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112 (1995).

Here, without the "not-in-custody" statement, the facts would clearly have established custody interrogation requiring Miranda warnings to be provided to Petitioner Butler. The district court and the Sixth Circuit Court of Appeals erred in failing to suppress Butler's

statements made in the back of the locked police car in response to direct questioning by law enforcement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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