No. _____

In the

Supreme Court of the United States

SUZANNE ELIZABETH WEXLER

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

APPENDIX

Alexander Bunin
CHIEF PUBLIC DEFENDER
HARRIS COUNTY, TEXAS

Nicholas Mensch
Counsel of Record
ASSISTANT PUBLIC DEFENDER
HARRIS COUNTY, TEXAS
1201 Franklin St., 13th Floor
Houston, Texas 77002
(713) 274-6728
nicholas.mensch@pdo.hctx.net

Counsel for Petitioner

Appendix A

Majority and Dissenting Opinions of the Texas Court of Criminal Appeals

(June 30, 2021)

Wexler v. State, 625 S.W.3d 162 (Tex. Crim. App. 2021)

Wexler v. State

Court of Criminal Appeals of Texas

June 30, 2021, Delivered

NO. PD-0241-20

Reporter
625 S.W.3d 162 *; 2021 Tex. Crim. App. LEXIS 630 **; 2021 WL 2677427

SUZANNE ELIZABETH WEXLER, Appellant v. THE STATE OF TEXAS

Notice: PUBLISH

Prior History: **[**1]** ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY.

Wexler v. State, 593 S.W.3d 772, 2019 Tex. App. LEXIS 7751, 2019 WL 4022946 (Tex. App. Houston 14th Dist., Aug. 27, 2019)

Judges: KEEL, J., delivered the opinion of the Court in which KELLER, P.J., and HERVEY, RICHARDSON, YEARY, SLAUGHTER, and MCCLURE, JJ., Joined. WALKER, J., filed a dissenting opinion. NEWELL, J., dissented.

Opinion

[*165] Appellant challenges the admissibility of a statement she made to police during the execution of a search warrant, claiming that the statement was a product of custodial interrogation. The court of appeals determined that Appellant made the statement before she was in custody, and it was properly admitted by the trial court. *Wexler v. State, 593 S.W.3d 772, 775 (Tex. App.—Houston [14th Dist.] 2019)*. We granted Appellant's petition for discretionary review to decide whether the court of appeals erred in this determination. We conclude that Appellant failed to meet her burden of showing that she was in custody when she made the statement, and we affirm the judgment of the court of appeals.

I. Background

Police were told that the house at 318 Avenue A in South Houston was a site of drug dealing. During a week of surveillance, narcotics K-9 officers arrested four people leaving the house in possession of methamphetamine, and police got a warrant to search the house.

The **[**2]** search warrant was executed with the help of uniformed and plainclothes officers, narcotics K-9 units, and the Harris County Sheriff's Office High Risk Operations Unit (HROU), a SWAT-like team whose function was to secure the residence and detain any occupants. While uniformed officers in marked police cars blocked both ends of the street, 20 to 25 HROU officers surrounded the house, announced via loudspeaker from an armored vehicle that they had a search warrant, and directed occupants to exit the house. Appellant came out and was detained by HROU officers and put in the back of a patrol car.

While HROU did a protective sweep of the house, narcotics detective Jerome Hill questioned Appellant. Hill suspected that Appellant and someone named Jimmy were involved in distributing drugs, but Hill did not tell Appellant that she was a suspect, and he did not give her any warnings. The encounter was not recorded, but Hill testified that he said, "We have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what." Appellant told him that the drugs were "in her bedroom in a dresser drawer." Hill and other narcotics officers **[**3]** went into the house to conduct the search and found 25.077 grams of methamphetamine in the dresser drawer, marijuana packaged for individual sale, drug paraphernalia, scales, cash, and handgun magazines and ammunition. Hill arrested Appellant for possession with intent to distribute a controlled substance.

At trial Appellant objected to the admission of her statement that the drugs were in her bedroom in a dresser drawer. She claimed the statement was hearsay and that it should be excluded because Hill was trying to extract a confession and obtain evidence from her without giving her any warnings. The State responded that it was a statement by a party opponent or a statement against interest and that Appellant was detained but not in custody when she gave the statement. After voir dire examination of Hill and arguments of the parties outside the presence of the jury, the trial court overruled Appellant's objection and admitted her statement.

Appellant's friend testified in her defense. He said Appellant and her boyfriend, Jimmy, had broken up and that she **[*166]** had moved out of the house months before the search; she was in the house on the day of the search only to retrieve some of her belongings, **[**4]** and the drugs belonged to Jimmy. During deliberations, the jury asked for clarification of Detective Hill's testimony and sent out a note asking, "When Ms. Wexler was asked by Mr. Hill where the drugs would be found, was her response 'my bedroom' or 'the bedroom' or another variant?" The court read back to the jury Hill's testimony: "The defendant told me it would be in her bedroom in a dresser drawer." The jury found Appellant guilty, and the trial court sentenced her to 25 years in prison.

II. Court of Appeals

Appellant claimed on appeal that she was in custody when she was placed in the back of the patrol car and that she should have been given *Article 38.22* and *Miranda* warnings before Hill questioned her. *Miranda v. Arizona, 384*

U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); TEX. CODE CFJM. P. art. 38.22. She said her statement to Hill should have been excluded because she was not given the warnings. Wexler, 593 S.W.3d at 777. The court of appeals determined that the statement was properly admitted because Appellant was temporarily detained rather than under arrest when she made the statement. Id. at 780.

The fact that Appellant's freedom of movement was restricted when she was placed in the patrol car did not establish that she was under custodial arrest because a person under detention also may have her freedom of movement **[**5]** restricted but to a lesser degree. Id. at 779. There was no evidence that Appellant was aware of the presence of the armored vehicle or the number of officers on the scene, or that access to the street had been blocked. Id. at 780. Even if she were aware, this would show only one factor—the amount of force used—to determine custody. *Id.* (citing State v. Sheppard, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008)). There was no evidence that police used physical force on Appellant, handcuffed her, threatened her, displayed a firearm, or even spoke to her in a hostile tone. Wexler, 593 S.W.3d at 780.

There was evidence that an investigation was underway and that Appellant was detained during a protective sweep of the house, but the detention was brief, Appellant was questioned on scene, Hill was the only officer to question her, and he did not tell her that she was a under arrest or even a suspect. *Id.* (citing Herrera v. State, 241 S.W.3d 520, 525-26 (Tex. Crim. App. 2007) ("The subjective belief of law enforcement officials about whether a person is a suspect does not factor into our 'custody' determination unless an official's subjective belief was somehow conveyed to the person who was questioned.")). When Appellant was questioned, drugs had not yet been found, and Hill did not have probable cause to arrest her. Wexler, 593 S.W.3d at 780.

The court of appeals concluded that the record **[**6]** supported the trial court's implied finding that Appellant was temporarily detained and not arrested when Hill questioned her, so Hill was not required to warn her under *Miranda* or Article 38.22, and the trial court did not err in admitting her statement. Wexler, 593 S.W.3d at 780.

The dissenting opinion asserted that under the facts of the case, a reasonable person would have believed she was under restraint to the degree associated with an arrest. Id. at 783 (Hassan, J., dissenting) (quoting Dowthitt v. State, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)). "Appellant left the protections of a private home only after being instructed by an organized and well-equipped amassment of law enforcement **[*167]** personnel." Wexler, 593 S.W.3d at 784 (Hassan, J., dissenting). According to the dissent, these facts demonstrate that the police created a situation that would have led a reasonable person to believe her freedom had been significantly restricted, and Appellant was entitled to *Miranda* warnings. Id. at 785 (citing Dowthitt, 931 S.W.2d at 255).

III. Standard of Review

A trial court's ruling on a motion to suppress is reviewed for abuse of discretion and should be reversed only if it is outside the zone of reasonable disagreement. State v. Cortez, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018); State v. Story, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014). Custody is a mixed question of law and fact that does not turn on credibility and demeanor unless the witness testimony, if believed, **[**7]** would always decide the custody

question. *State v. Saenz, 411 S.W.3d 488, 494 (Tex. Crim. App. 2013)*. We apply a bifurcated standard of review, giving almost total deference to the trial court's factual assessment of the circumstances surrounding the questioning and reviewing *de novo* the ultimate legal determination of whether the person was in custody under those circumstances. *Id.*

When a trial court denies a motion to suppress and does not enter findings of fact, we view the evidence in the light most favorable to the ruling and assume the trial court made implicit findings of fact that support its ruling as long as those findings are supported by the record. *Herrera, 241 S.W.3d at 527*. The party that prevailed in the trial court is afforded the strongest legitimate view of the evidence, and all reasonable inferences that may be drawn from that evidence. *State v. Garcia-Cantu, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008)*.

IV. *Miranda* and *Article 38.22*

Miranda and *Article 38.22* deem statements produced by custodial interrogation to be inadmissible unless the accused is first warned that she has the right to remain silent, her statement may be used against her, and she has the right to hire a lawyer or have a lawyer appointed. *Miranda, 384 U.S. at 479*; *TEX. CODE CRIM. P. art. 38.22*. In addition, *Article 38.22* requires a warning that the accused has the right to terminate the interview at any time. *Herrera, 241 S.W.3d at 526*. The warnings **[**8]** are required only when there is custodial interrogation. *Id.*

A custody determination requires two inquiries: the circumstances surrounding the interrogation and whether a reasonable person in those circumstances would have felt that she was not free to leave. *Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)*. "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test" to determine whether there was restraint on freedom of movement of a degree associated with arrest. *Id.* The ultimate inquiry is whether, under the circumstances, a reasonable person would have believed that her freedom of movement was restricted to the degree associated with a formal arrest. *Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)*; *Dowthitt, 931 S.W.2d at 254*. The "reasonable person" standard presupposes an innocent person. *Dowthitt, 931 S.W.2d at 254* (citing *Florida v. Bostick, 501 U.S. 429, 438, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)*).

Dowthitt outlined four general situations that may constitute custody: (1) the suspect is physically deprived of her freedom of action in any significant way, (2) a law enforcement officer tells the suspect **[*168]** that she cannot leave, (3) law enforcement officers create a situation that would lead a reasonable person to believe her freedom of movement has been significantly restricted, or (4) there is probable cause to arrest, and law enforcement officers **[**9]** do not tell the suspect that she is free to leave. *931 S.W.2d at 255*.

For the first three situations, the restriction upon freedom of movement must amount to the degree associated with an arrest as opposed to an investigative detention. *Id.* For the fourth situation, the officer's knowledge of probable cause must be manifested to the suspect, and custody is established only if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe she is under restraint to a degree

associated with an arrest. *Id.*; *Stansbury, 511 U.S. at 325*. An officer's subjective intent to arrest the suspect is irrelevant unless that intent is communicated or otherwise manifested to the suspect. *Dowthitt, 931 S.W.2d at 254* (citing *Stansbury, 511 U.S. at 324-25* (police knowledge or beliefs bear on the custody issue only if they are conveyed to the suspect)).

To evaluate whether a reasonable person in the suspect's situation would have felt that there was a restraint on her freedom to a degree associated with arrest, the record must establish the circumstances manifested to and experienced by her. *State v. Ortiz, 382 S.W.3d 367 (Tex. Crim. App. 2012)* ("only the objective circumstances known to the detainee should be considered in deciding what a reasonable person in his position would believe."). *See also Thompson, 516 U.S. at 113* ("if **[**10]** encountered by a 'reasonable person,' would the identified circumstances add up to custody"); *Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)* ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.").

It is the defendant's initial burden to establish that her statement was the product of custodial interrogation. *Herrera, 241 S.W.3d at 526*; *Wilkerson v. State, 173 S.W.3d 521, 532 (Tex. Crim. App. 2005)*.

V. Analysis

Appellant had to do more than object to the admission of her statement; she had to show that it was a product of custodial interrogation. *Herrera, 241 S.W.3d at 526*. She failed to do so.

A. The Circumstances Surrounding the Interrogation

It is undisputed that HROU announced over a loudspeaker that the house was being searched and that any occupants must exit. Appellant exited and was seated in the back of a patrol car while HROU did a protective sweep of the house. Narcotics officers had not yet searched the house when Hill asked Appellant about the drugs in the house, and Hill arrested Appellant after the drugs were found. The record supports findings that the detention was brief, the investigation was efficient, Hill was the only officer to question Appellant, Appellant was not removed from the location of the search, and she was not told she could not leave. Viewing the evidence **[**11]** in the light most favorable to the trial court's ruling, Appellant failed to show that the objective circumstances of her detention would lead a reasonable person to believe that her freedom was restrained to a degree associated with an arrest.

Appellant argues that the record demonstrates that she would have been aware of the large contingent of officers on the scene, but she offered no evidence of her **[*169]** awareness of the police presence, and the trial court was not required to infer it. *See York v. State, 342 S.W.3d 528, 544 (Tex. Crim. App. 2011)* (with respect to suppression issues, the trial judge can draw rational inferences in favor of either party). Although Hill testified about the various law enforcement entities that helped execute the warrant, no one testified about whether Appellant would have been able to see them. For example, Hill testified that the HROU had an armored vehicle and over 20 officers who "surrounded" the house, but he did not testify where the vehicle was or where the officers were positioned. Hill

testified about the presence of narcotics officers on the scene, but he did not testify about their number or their location. Hill testified that patrol cars blocked the ends of the street, but he did not testify about **[**12]** their distance from the house or whether they were visible to Appellant at any point.

B. Would a reasonable person in those circumstances have felt that she was not free to leave?

Appellant says the court of appeals' majority failed to consider whether a reasonable person in her circumstances would have perceived that her physical freedom was restricted to the degree associated with a formal arrest. She argues that custody for *Miranda* purposes does not turn on the reasonableness of the police actions under the *Fourth Amendment* or merely a distinction between investigative detention and full arrest. She maintains that the court of appeals erred in focusing on the reasonableness of the actions of the police and relying on *Sheppard, 271 S.W.3d at 291*.

We agree with Appellant that the majority opinion did not clearly articulate the "ultimate inquiry" pertinent to the custody question for *Miranda* purposes—whether a reasonable person in the defendant's circumstances would have believed that her freedom of movement was restricted to the degree associated with a formal arrest. *Stansbury, 511 U.S. at 322*. And *Sheppard*, a *Fourth Amendment* case, did not deal with that "ultimate inquiry." *Sheppard, 271 S.W.3d at 283* (describing issue before the Court as "whether a person is 'arrested' for purposes of the *Fourth Amendment* **[**13]** if he is temporarily handcuffed and detained, but then released.") (footnote omitted).

But the majority below correctly recited the reasonable person standard and the need to examine "all the objective circumstances surrounding the questioning." *Wexler, 593 S.W.3d at 778*. It relied on cases addressing custody for *Miranda* purposes. *Id. at 778-79* (citing, e.g., *Herrera, 241 S.W.3d at 525*, and *Dowthitt, 931 S.W.2d at 255*). And it looked not only at the actions of the police, but also at whether Appellant was aware of those actions. *Wexler, 593 S.W.3d at 780*. Ultimately, its holding was in line with *Berkemer, 468 U.S. 420*.

In *Berkemer*, the Supreme Court considered whether a traffic stop rendered a person in custody for *Miranda* purposes. *468 U.S. at 435*. A traffic stop significantly curtails the freedom of the driver and passengers and is a seizure for *Fourth Amendment* purposes, but due to the nonthreatening, noncoercive aspect of the detention, a traffic stop usually does not constitute custody for *Miranda* purposes. *Berkemer, 468 U.S. at 436-40*. This is true even though a person temporarily detained pursuant to a traffic stop would not feel free to leave. *Id. at 436*. A motorist detained pursuant to a traffic stop is entitled to *Miranda* protections if he is subjected to treatment that renders him in custody for practical purposes; *Miranda* **[*170]** safeguards become applicable as soon as a suspect's freedom **[**14]** is curtailed to a degree associated with a formal arrest. *Berkemer, 468 U.S. at 440*. In concluding that the officer's treatment of Berkemer was not the functional equivalent of a formal arrest, the Court considered the short duration of the detention, its public setting, and the fact that Berkemer was not informed that the detention would not be temporary. *Id. at 441-42*.

Similarly, Appellant's detention was of short duration, it was in a public setting, and she was not told that her detention would not be temporary. There was no evidence that Appellant was aware of an overwhelming police

presence. Accordingly, the court of appeals correctly held that Appellant failed in her burden of proving that she experienced the functional equivalent of a formal arrest.

Appellant relies on *Ortiz*, but it is distinguishable. Ortiz was stopped for a traffic offense and interrogated by an officer named Johnson about drug possession. *Ortiz, 382 S.W.3d at 369-70*. By the time Ortiz made the incriminating statements that the bundle under his wife's skirt was cocaine, he and his wife were faced with at least two police cars and three officers, they had been handcuffed and frisked, the bundle had already been found, Ortiz knew it had been found, Ortiz knew that Johnson **[**15]** knew that Ortiz was on probation for cocaine possession, and Johnson's several questions and their timing conveyed his suspicion that Ortiz and his wife were acting in cahoots with respect to the drugs taped to her leg. *Ortiz, 382 S.W.3d at 370-71, 374 fn.32*. Given the objective circumstances, a reasonable person in Ortiz's position would have believed he was in custody when he made the incriminating statement. *Id. at 377*.

Appellant points to the number of officers she faced as compared with the number faced by Ortiz and argues that the show of force was overwhelming, but unlike the record in *Ortiz*, which included video of the traffic stop, *id. at 369*, the record here does not show what Appellant saw or knew about the show of force arrayed against her. Appellant also argues that Hill's question of her was like the questions posed to Ortiz because it suggested that Hill suspected her of drug possession. But whereas Hill posed a single question before any search took place, Johnson repeatedly asked Ortiz about drugs, and the questions yielded an incriminating response only after another officer told Johnson in Ortiz's presence that they had found "something" under Mrs. Ortiz's skirt. *Id.* at 375. That announcement was a relevant consideration **[**16]** only because Ortiz "apparently heard it[.]" *Id.*

Significantly, the *Ortiz* opinion's custody analysis scrupulously divorced the circumstances that were known to Ortiz from those that were not and considered only those known to him. *See, e.g., id. at 370 fn.8* (declining to consider the request for backup because "it is unclear whether the appellee could have overheard" it); *id. at 370 fn.11* (declining to consider that the bundle taped to Mrs. Ortiz's leg was known to be cocaine because "that information was not related to Johnson within the appellee's earshot"); *id. at 374 fn. 32* (noting that Ortiz knew that Johnson knew that Ortiz was on probation for a drug offense, making it a relevant consideration in the custody analysis). That scrupulousness underscores that the suspect's knowledge of the circumstances surrounding the interrogation is crucial to the custody analysis. But in this case, that crucial element is missing, and the trial court was not compelled to fill in the evidentiary gaps by inference.

[*171] VI. Conclusion

Appellant did not meet her burden to establish on the record facts showing that her statement to Hill was the product of custodial interrogation, and the trial court properly admitted the statement. The judgment of the **[**17]** court of appeals is affirmed.

Delivered: June 30, 2021

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Dissent by: WALKER

Dissent

WALKER, J., filed a dissenting opinion.

DISSENTING OPINION

The Court today concludes that Suzanne Elizabeth Wexler, Appellant, was not in custody and therefore her statements to police were not the product of a custodial interrogation. I cannot agree. Police commanded her to come out of the residence, placed her in the back of a police car, and told her they were going to find drugs and should just tell the police where the drugs were. Because her freedom of movement was significantly curtailed, and a reasonable person in Appellant's situation would not have felt free to leave, Appellant was in custody. The court of appeals got it wrong, and we should reverse. Because this Court does not, I respectfully dissent.

I — Physically Deprived of Freedom of Action

As the Court points out, in *Dowthitt* we outlined four general situations when a person is in custody:

> (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that **[**18]** his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.

Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996) (citing *Shiflet v. State, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985)*).

The Court determines that Appellant was not in custody because her detention was similar to a traffic stop, which usually does not constitute custody due to the nonthreatening and noncoercive aspect of the detention. *See Berkemer v. McCarty, 468 U.S. 420, 436-40, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)*. That is, even though Appellant was detained, her detention was short, in a public setting, and she was not told that the detention would not be temporary. *See id. at 441-42*.

Those factors may be true, but the analogy to a run-of-the-mill traffic stop is inapt. Appellant was not waiting safely in her own vehicle during a noncoercive and nonthreatening traffic stop. Police showed up to the residence, commanded her over loudspeaker to leave the safety of the residence, and placed her in the back of a police car. As we noted in *Shiflet*, the kind of custody that occurs when a suspect is physically deprived of his freedom of action in any significant way (the first kind of custody listed in *Dowthitt*) can occur when a person is placed in a

police vehicle and taken to the station house for questioning. **[**19]** *Shiflet, 732 S.W.2d at 629*. The same can be said for placing a person in a police vehicle and conducting the questioning right there, because there is "little difference in questioning in the police station and interrogation in a police vehicle." *See Ancira v. State, 516 S.W.2d 924, 926 (Tex. Crim. App. 1974)*.

Indeed, we have found custody even in traffic stops where the driver is placed in the back of the police car. *See Ragan v. **[*172]** State, 642 S.W.2d 489 (Tex. Crim. App. 1982)* (defendant stopped for traffic violations was in custody where officer, after observing several indications of intoxication, "asked" the defendant to have a seat in the police car, "assisted" him to the police car, and "helped" him sit in the back of the police car, after which the officer closed the door, sat in the driver's seat, and began asking questions); *Gonzales v. State, 581 S.W.2d 690, 691 (Tex. Crim. App. [Panel Op.] 1979)* (defendant, stopped for a traffic violation, was in custody where he was placed in the back of a police car and two officers were sitting in the car waiting for a radio report on the defendant's driver's license); *see also Higgins v. State, 924 S.W.2d 739 (Tex. App.—Texarkana 1996, pet. ref'd)* (defendant was in custody where he was placed in back of a police car; statement nevertheless admissible because it was spontaneously given and not the result of interrogation), *Port v. State, 798 S.W.2d 839 (Tex. App.—Austin 1990, pet. ref'd)* (defendant questioned while in back seat of police car was in custody; statement nevertheless **[**20]** admissible because *Miranda* rights were waived).

I agree with Justice Hassan's dissenting opinion below that placing a person in the back of a police car significantly impacts a person's freedom. *Wexler v. State, 593 S.W.3d 772, 784-85 (Tex. App.—Houston [14th Dist.] 2019)* (Hassan, J., dissenting) (citing *United States v. Blum, 614 F.2d 537, 540 (6th Cir. 1980)*). "While appellant was seated in the patrol car with the officer[] awaiting [the execution of the search warrant], it is inconceivable that [she] was free to leave if [she] had desired to do so." *Gonzales, 581 S.W.2d at 691*.

And she was not simply sitting in the car waiting for the search to conclude. The officer in the car with her told her that they had a warrant to search the residence and they were going to eventually find the drugs.[1] This shows that Appellant was not free to leave. I would conclude that Appellant was in custody when she was placed in the back of a police car and her freedom of movement was significantly impacted. *Shiflet, 732 S.W.2d at 629*.

II — Reasonable Person Would Not Feel Free to Leave

Additionally, the Court concludes that, because Appellant was not aware of the overwhelming police presence at the scene, she would not have believed that she was not free to leave. According to the Court, "the record does not show what Appellant saw or knew about the show of force arrayed against her." **[**21]** But the record does show.

Appellant was aware that police were, over a loudspeaker, commanding her to leave the residence.[2] When she did so, she was aware that multiple officers were present, because more than one officer detained her, and, as she was

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[1] Rep. R. vol. 3, 58.

[2] Rep. R. vol. 3, 46.

exiting the house, other officers were entering the house or had already entered it.[3] Furthermore, these officers were SWAT-like.[4] She was immediately detained and placed in the back of a police car,[5] and obviously she must have been aware that she was detained and placed in the back of a police car. Even if Appellant was not aware that one of the vehicles present was an armored one and she was not aware of exactly how many officers there were, the reasonable person would appreciate that a significant police force was there. This **[*173]** show of force, that Appellant was aware of, weighs in favor of finding that a reasonable person would not have felt free to leave.

Finally, while Appellant was in the back of the police car, she was being questioned by a police officer, who told her either that:

> Hey, we have a search warrant. We're going to find the drugs. Just tell me where they are.[6]

or

> Hey, we have a search warrant. We're going to find the **[**22]** drugs in the house and any contraband. Just tell me where it is.[7]

or

> We have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what.[8]

The majority downplays this as the "[posing] of a single question before any search took place," but even as a single question, the officer's statement clearly conveyed to Appellant that police were looking for drugs and that they believed she knew where the drugs were located. A reasonable person, after being placed in a police car, being told by a police officer that they have a warrant and are searching the residence for drugs, being told that they will find the drugs, and then being asked one question by that officer—"Where are the drugs?"—would feel like a suspect. While being a focus of the investigation is not itself determinative of being in custody, it is a relevant factor to a custody determination. *Meek v. State, 790 S.W.2d 618, 621 (Tex. Crim. App. 1990)*; *Dowthitt, 931 S.W.2d at 254*. This factor, along with the other circumstances surrounding Appellant's questioning, weigh in favor of a conclusion that she would not feel free to leave.

III — Conclusion

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[3] *Id.* at 46-51.

[4] *Id.* at 43.

[5] *Id.* at 47, 48-49.

[6] *Id.* at 52.

[7] *Id.*

[8] *Id.* at 58.

In short, the police made a show of force and commanded Appellant to leave the residence. Once **[**23]** she did so, the police placed her in a police vehicle, told her they were searching the residence for drugs, and wanted her to tell them where the drugs were. Any reasonable person in Appellant's position would not feel free to leave. This constitutes custody. I disagree with the Court's conclusion that it was not, and I respectfully dissent to the Court's decision to affirm the judgment of the court of appeals.

Filed: June 30, 2021

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Appendix B

Order of the Texas Court of Criminal Appeals granting discretionary review

(June 17, 2020)

In re Wexler, No. PD-0241-20, 2020 Tex. App. LEXIS 442 (Tex. Crim. App. June 17, 2020) (order) (not designated for publication)

In re Wexler

Court of Criminal Appeals of Texas

June 17, 2020, Decided

PD-0241-20

Reporter
2020 Tex. Crim. App. LEXIS 422 *

SUZANNE ELIZABETH WEXLER

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] FROM HARRIS COUNTY - 14-17-00606-CR.

Wexler v. State, 593 S.W.3d 772, 2019 Tex. App. LEXIS 7751, 2019 WL 4022946 (Tex. App. Houston 14th Dist., Aug. 27, 2019)

Opinion

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW GRANTED. ORAL ARGUMENT WILL NOT BE PERMITTED.

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Appendix C

Order of the Texas Fourteenth District Court of Appeals denying rehearing *en banc*

(February 27, 2020)

FILE COPY

Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

Thursday, February 27, 2020

Eric Kugler
Assistant District Attorney
1201 Franklin
Suite 600
Houston, TX 77002-1923
* DELIVERED VIA E-MAIL *

John Crump
Harris County DA's Office
1201 Franklin St Ste 600
Houston, TX 77002-1930
* DELIVERED VIA E-MAIL *

Nicholas Mensch
Assistant Public Defender
1201 Franklin, 13th Floor
Houston, TX 77002
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 14-17-00606-CR
Trial Court Case Number: 1513928

Style: Suzanne Elizabeth Wexler
v.
The State of Texas

Please be advised that on this date the court **DENIED APPELLANT'S** motion for rehearing en banc in the above cause. (Justices Hassan and Poissant would grant en banc reconsideration)

Panel Consists Of Chief Justice Frost and Justices Christopher, Wise, Jewell,, Spain, Hassan and Poissant (Justices Zimmerer and Bourliot not participating)

Sincerely,

/s/ Christopher A. Prine, Clerk

Appendix D

Order of the Texas Fourteenth District Court of Appeals denying rehearing

(November 19, 2019)

FILE COPY

Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, November 19, 2019

Eric Kugler
Assistant District Attorney
1201 Franklin
Suite 600
Houston, TX 77002-1923
* DELIVERED VIA E-MAIL *

John Crump
Harris County DA's Office
1201 Franklin St Ste 600
Houston, TX 77002-1930
* DELIVERED VIA E-MAIL *

Nicholas Mensch
Assistant Public Defender
1201 Franklin, 13th Floor
Houston, TX 77002
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 14-17-00606-CR
Trial Court Case Number: 1513928

Style: Suzanne Elizabeth Wexler
v.
The State of Texas

Please be advised that on this date the Court **DENIED APPELLANT'S** motion for rehearing in the above cause. Justice Hassan would grant

Panel Consists of Wise, Zimmerer, Hassan

Sincerely,

/s/ Christopher A. Prine, Clerk

Appendix E

Majority and Dissenting Opinions of the Texas Fourteenth District Court of Appeals

(August 27, 2019)

Wexler v. State, 593 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2019)

Wexler v. State

Court of Appeals of Texas, Fourteenth District, Houston

August 27, 2019, Dissenting Opinions Filed

NO. 14-17-00606-CR

Reporter
593 S.W.3d 772 *; 2019 Tex. App. LEXIS 7751 **; 2019 WL 4022946

SUZANNE ELIZABETH WEXLER, Appellant v. THE STATE OF TEXAS, Appellee

Notice: PUBLISH — *TEX. R. APP. P. 47.2(b)*.

Subsequent History: Petition for discretionary review granted by *In re Wexler, 2020 Tex. Crim. App. LEXIS 422 (Tex. Crim. App., June 17, 2020)*

Affirmed by *Wexler v. State, 2021 Tex. Crim. App. LEXIS 630, 2021 WL 2679981 (Tex. Crim. App., June 30, 2021)*

Prior History: **[**1]** On Appeal from the 177th District Court, Harris County, Texas. Trial Court Cause No. 1513928.

State v. Wexler, 2017 Tex. Dist. LEXIS 25274 (Tex. Dist. Ct., June 27, 2017)

Counsel: For Appellant: Nicholas Mensch, Houston, TX.

For State: John Crump, Houston, TX.

Judges: Panel consists of Justices Wise, Zimmerer, and Hassan (Hassan, J., dissenting).

Opinion by: Jerry Zimmerer

Opinion

[*775] MAJORITY OPINION

Appellant Suzanne Elizabeth Wexler was convicted of possession of methamphetamine with intent to distribute. *See* *Tex. Health & Safety Code §§ 481.102*, *481.112(d)*. The trial court sentenced appellant to serve 25 years in

prison. Appellant appeals her conviction in two issues. Appellant asserts in her first issue that the trial court erred when it overruled her objection to the admission of a statement she made at the scene of her arrest and before she was given *Miranda* warnings. *See* Miranda v, Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We overrule this issue because appellant's statement was made before she was in custody. Appellant argues in her second issue that she received ineffective assistance of counsel because her trial counsel failed to request a trial continuance due to a missing defense witness. We overrule this issue because appellant has not demonstrated that she was prejudiced by her trial counsel's allegedly deficient handling of her case. We therefore affirm the trial court's judgment.

BACKGROUND

Jerome Hill is a narcotics detective with the South Houston Police Department. **[**2]** Hill was assigned to the Harris County Sheriff's Department Narcotics Task Force doing undercover narcotics work. Hill received information from the Humble Police Department that crystal methamphetamine had been sold from a residence located at 318 Avenue A in South Houston. Based on that information, Hill set up surveillance of the residence by a South **[*776]** Houston narcotics K-9 unit. The K-9 unit was instructed to monitor traffic in and out of the 318 Avenue A residence. The K-9 unit eventually made three traffic stops of vehicles leaving the 318 Avenue A address where methamphetamine was discovered.[1]

As a result of the three traffic stops, Hill believed that the 318 Avenue A residence was being used to distribute drugs. According to Hill, appellant lived at the 318 Avenue A house and she was a suspect in the investigation, in fact, she was one of two targets of the investigation.[2] Hill obtained a search warrant for the 318 Avenue A house. The plan for searching the house called for uniformed police to initially block access to Avenue A. The Harris County Sheriff's Office High Risk Operations Unit ("HROU") would then surround the house, serve the warrant, and conduct a protective sweep of **[**3]** the house. Only when the protective sweep was completed, and any people in the house had been removed, would the narcotics officers enter the house to conduct the search for narcotics.

On June 16, 2016, the HROU, narcotics officers, and other uniformed police units arrived on the scene. The uniformed police units blocked off both ends of the street to prevent any traffic on the street while the warrant was being executed. The HROU surrounded the house and announced their intention to search the home based on a search warrant over a loud speaker.[3] The HROU directed anyone in the house to exit. Appellant came out of the house where she was detained by the HROU and placed in the back seat of a patrol car.[4] According to Hill, once

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[1] The traffic stops occurred on June 5, June 9, and June 12. The largest amount of methamphetamine discovered was 73 grams found during the June 5 traffic stop.

[2] Hill identified a second target of his investigation as "Jimmy." Hill testified that he "guess[ed] that it was [Jimmy's] house." According to Hill, Jimmy was not present at the house during the search.

[3] According to Hill, the loud speaker was on an armored vehicle that the HROU uses to serve warrants.

appellant was placed in the patrol car, she was detained as part of the investigation and she was not free to leave. The HROU then began its protective sweep of the house to ensure there were no threats present.

While the HROU was performing its protective sweep of the house, Hill stated the following to appellant: "Hey, we have a search warrant. We're going to find the drugs. Just tell me where they are." Appellant responded that the narcotics were "in her bedroom **[**4]** in a dresser drawer." At the time that Hill spoke with appellant, the actual search of the house by narcotics officers had not started, and no illegal drugs had been found. While it is undisputed that appellant was placed in the backseat of a patrol car for officer safety and so that police could conduct the search of the house, there is no evidence she was handcuffed or otherwise restrained by officers. In addition, there is no evidence that officers pointed firearms at appellant or threatened her. There was also no evidence that Hill was hostile in tone when he addressed appellant. While Hill considered appellant a suspect at the time of the search, he did not tell appellant that she was a suspect.

Once HROU had completed the protective sweep of the house, the narcotics officers entered to conduct the search. The house had two bedrooms and a small addition had been added to the back. Inside **[*777]** appellant's bedroom, officers found female clothing, drug paraphernalia, several cell phones, scales, and marijuana individually bagged for sale. Additionally, the narcotics officers found 25.077 grams of methamphetamine in appellant's dresser drawer. Along with the methamphetamine, the police **[**5]** found "a bunch of plastic baggies and some currency." Police also found handgun ammunition and magazines. According to Hill, the items that the narcotics officers found inside the house were consistent with the sale of narcotics. Once the search of the house had been completed, Hill placed appellant under arrest.

During trial appellant objected to the admission of her statement made in response to Hill's question. In appellant's view, Hill's question was a custodial interrogation and she should have received the warnings required by *Miranda* and *article 38.22 of the Code of Criminal Procedure* before being questioned. Because she was not given those warnings, appellant argued that her statement should be excluded. After allowing appellant's trial counsel to conduct a voir dire examination of Hill outside the presence of the jury, the trial court overruled appellant's objection and admitted appellant's statement.

During her case, appellant called a single witness to testify, Jimmy Sherlock. Sherlock testified that he had been friends with appellant for about twenty years. According to Sherlock, appellant had moved out of the Avenue A house in April and was living with him. Sherlock explained that appellant had broken up with her boyfriend, **[**6]** Jimmy McCullough, and had decided to move out of his house. Sherlock testified McCullough was a drug dealer and that he believed the drugs found in the house were his. Sherlock further testified that he went with appellant to the Avenue A house on June 16, 2016 to pick up the last of her possessions. When they arrived at the Avenue A house, Sherlock dropped appellant off and he left. During cross-examination, Sherlock revealed that he had been previously convicted of burglary and robbery. Sherlock also admitted that appellant was a close friend.

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[4] A second occupant of the house, John Forster, was found in the small addition at the back of the house with a small amount of black tar heroin. Forster was placed in the back of a second patrol car. Forster was eventually arrested and convicted.

The jury found appellant guilty and she was sentenced to serve 25 years in prison. Appellant moved for a new trial claiming that her trial counsel was ineffective for, among other things, failing to request a continuance in order to compel John Forster to appear to testify. The trial court held a hearing on appellant's motion. During the motion for new trial hearing, appellant did not call Forster, or produce any evidence related to Forster's availability to testify during appellant's trial, or his prospective testimony. Appellant instead relied on Forster's affidavit that had been previously secured by appellant's trial counsel. The trial court **[**7]** denied appellant's motion. This appeal followed.

ANALYSIS

I. The trial court did not commit reversible error when it overruled appellant's objection and admitted appellant's statement into evidence.

Appellant argues in her first issue that the trial court committed reversible error when it overruled her objection to the admission of her statement made at the scene. In appellant's view, she was in custody when she was placed in the backseat of a patrol car, she should have received the warnings required by *Miranda* and *article 38.22 of the Code of Criminal Procedure* before Hill questioned her, and because she did not, the trial court should have sustained her objection and excluded the statement.

Appellant did not file a pre-trial motion to suppress her statement. She instead objected to its admissibility during trial. **[*778]** After appellant objected, the trial court allowed appellant's trial counsel to question Hill outside the presence of the jury. The trial court then heard argument from appellant's counsel as well as the State before overruling appellant's objection. Because a motion to suppress is simply a specialized objection to the admissibility of evidence, we shall apply the same standard of review to the trial court's custody determination **[**8]** as if appellant had moved to suppress her statement. *See Kuether v. State, 523 S.W.3d 798, 807, n.10 (Tex. App.—Houston [14th Dist.] 2017, pet. ref d)*.

In reviewing a trial court's ruling on a motion to suppress, an appellate court applies an abuse-of-discretion standard and will overturn the trial court's ruling only if it is outside the zone of reasonable disagreement. *Martinez v. State, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011)*. We view the evidence in the light most favorable to the trial court's ruling. *Wiede v. State, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007)*. At a suppression hearing, the trial judge is the sole trier of fact and assesses the witnesses' credibility and decides the weight to give that testimony. *Id. at 24-25*. If a trial court has not made a finding on a relevant fact, we imply the finding that supports the trial court's ruling, so long as it finds some support in the record. *State v. Kelly, 204 S.W.3d 808, 818-19 (Tex. Crim. App. 2006)*. We will sustain the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *State v. Dixon, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)*.

In *Miranda*, the Supreme Court of the United States held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *384 U.S. at 444*. Texas codified

these safeguards in **[**9]** article 38.22 of the Texas Code of Criminal Procedure. Section 3(a) of article 38.22 provides that no oral statement of an accused "made as a result of custodial interrogation" shall be admissible against him in a criminal proceeding unless an electronic recording of the statement is made, the accused is given all specified warnings, including the *Miranda* warnings, and he knowingly, intelligently, and voluntarily waives the rights set out in the warnings. Tex. Code Crim. Proc. art. 38.22 § 3(a).

Miranda warnings and article 38.22 requirements are mandatory only when there is a custodial interrogation. Herrera v. State, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). The meaning of "custody" is the same for purposes of both *Miranda* and article 38.22. *Id.* The State has no burden to show compliance with *Miranda* unless and until the record as a whole "clearly establishes" that the defendant's statement was the product of a custodial interrogation. *Id.* When considering whether a person is in custody for *Miranda* purposes, we apply a reasonable person standard. Our custody inquiry includes an examination of all the objective circumstances surrounding the questioning. Herrera, 241 S.W.3d at 525. The subjective belief of law enforcement officers about whether a person is a suspect does not factor into the custody determination unless that officer's subjective belief has been conveyed to the person being questioned. Id. at 525-26.

There are **[**10]** four general situations which may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a **[*779]** situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that she is free to leave. Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). Both state and federal courts recognize three categories of interaction between police and citizens: encounters, investigative detentions, and arrests. Ortiz v. State, 421 S.W.3d 887, 890 (Tex. App.—Houston [14th Dist.] 2014, pet. ref d). Both detention and arrest involve a restraint on one's freedom; the difference is in the degree. *Id.* An arrest places a greater restraint on an individual's freedom of movement than does an investigative detention. *Id.* Persons temporarily detained for purposes of investigation are not in custody for *Miranda* purposes, and thus the right to *Miranda* warnings is not triggered during an investigative detention. Hauer v. State, 466 S.W.3d 886, 893 (Tex. App.—Houston [14th Dist.] 2015, no pet.). There is no bright line rule dividing investigative detentions and custodial arrests. State v. Sheppard, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). When called upon to **[**11]** make that determination, courts examine several factors including "the amount of force displayed, the duration of a detention, the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and any other relevant factors." *Id.*

Appellant argues that she was in custody when Hill asked her where in the house the drugs were located. In making this argument, appellant emphasizes the level of force present at the scene of the search. Specifically, appellant

points out (1) the large number of officers on the scene,[5] (2) the presence of an HROU armored vehicle, (3) the police had blocked the street prior to the search, and (4) had potentially surrounded the house. Appellant also relies on the fact that the police placed her in the backseat of a patrol car as well as Hill's trial testimony that she was not free to leave. Appellant also points out that she "was not told that she was not under arrest." Finally, appellant asserts that Hill "expressed to the **[**12]** appellant his suspicion that the appellant possessed drugs through his only question to the appellant."

We disagree appellant has established that she was in custody when Hill asked her about the location of the drugs. We turn first to Hill's testimony that appellant was not free to leave once she was placed in the patrol car. The fact that appellant's freedom of movement was restricted does not establish that she was under custodial arrest because a person temporarily detained for purposes of investigation also has her freedom of movement restricted. *See* *Ortiz, 421 S.W.3d at 890* ("Both detention and arrest involve a restraint on one's freedom of movement; the difference is the degree."). "If the degree of incapacitation appears more than necessary to simply safeguard the officers and assure the suspect's presence during a period of investigation, this suggests the detention is an arrest." *Id. at 891* (internal quotation marks omitted). While there **[*780]** were numerous police officers on the scene, there is no evidence appellant was aware of that number. There is also no evidence appellant was aware that the police had blocked access to the street, or that there was an armored vehicle on the scene. Even if she was, this evidence **[**13]** goes to only one of the factors listed in *Sheppard*, the amount of force used.

There is no evidence in the record that the police used physical force to remove appellant from the house, handcuffed her at any time, threatened her, displayed a firearm, or even spoke to her in a hostile tone. *See* *Ortiz, 421 S.W.3d at 891* ("The defendant bears the initial burden of demonstrating that a statement was the product of custodial interrogation, and the State has no burden to show compliance with *Miranda* until the defendant meets the initial burden."). There is however, evidence in the record that an investigation was under way when appellant was detained. *See* *Mount v. State, 217 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2007, no pet.)* ("Whether a person is under arrest or subject to a temporary investigative detention is a matter of degree and depends upon the length of the detention, the amount of force employed, and whether the officer actually conducts an investigation."). Further, there was evidence that appellant was detained so the HROU could perform a protective sweep of the house. *See* *Sheppard, 271 S.W.3d at 290* (concluding officer's handcuffing of defendant was temporary detention, not an arrest, because it was done, in part, to enable officer to make protective sweep of scene). There was also evidence that appellant's **[**14]** detention was relatively brief and that the police did not remove appellant from the scene prior to Hill's question. *See* *id. at 291*. Hill was the only officer to talk with appellant and he did not inform her that she was under arrest or even a suspect. *See* *Herrera, 241 S.W.3d at 525-26* ("The subjective belief of law enforcement officials about whether a person is a suspect does not factor into our 'custody' determination unless an official's subjective belief was somehow conveyed to the person who was questioned."). Finally, it was undisputed

[5] There is no evidence in the record establishing the exact number of police on the scene. Hill did testify that there were between 20 and 25 HROU officers on the scene. Hill offered no testimony on the number of narcotics officers or uniformed patrol officers on the scene.

that illegal drugs had not been found in the house at the time Hill asked appellant where the drugs were located and thus Hill did not have probable cause to arrest appellant at that moment. *See* Hernandez v. State, 107 S.W.3d 41, 47 (Tex. App.—San Antonio 2003, pet. ref d) ("An officer who lacks probable cause but whose observations lead to a reasonable suspicion that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion."). We conclude that the record supports the trial court's implied conclusion that appellant was temporarily detained, not under arrest, when Hill asked her where the drugs were **[**15]** located. As a result, Hill was not obligated to provide appellant the warnings required by *Miranda* and article 38.22 of the Code of Criminal Procedure. Therefore, the trial court did not err when it overruled appellant's objection and admitted her statement into evidence. We overrule appellant's first issue.

II. Appellant did not establish that she received ineffective assistance of counsel.

Appellant asserts in her second issue that her trial counsel was ineffective because he did not ask for a continuance to compel Forster to appear to testify during her trial.

A. Standard of review and applicable law

An accused is entitled to reasonably effective assistance of counsel. **[*781]** King v. State, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983); Bradley v. State, 359 S.W.3d 912, 916 (Tex. App.—Houston [14th Dist.] 2012, pet. ref d). However, reasonably effective assistance of counsel does not mean error-free representation. Ex parte Felton, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991). Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination. Wert v. State, 383 S.W.3d 747, 753 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Therefore, when evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of the case without the benefit of hindsight. **[**16]** Lopez v. State, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011); Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

To establish ineffective assistance of counsel, a defendant must prove that (1) trial counsel's representation fell below the standard of prevailing professional norms, and (2) there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* Hernandez v. State, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (applying *Strickland* standard to claims of ineffective assistance under the Texas Constitution). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the claim of ineffective assistance. Strickland, 466 U.S. at 697. If a criminal defendant can prove trial counsel's performance was deficient, he still must prove he was prejudiced by his trial counsel's actions. Thompson, 9 S.W.3d at 812. This requires the defendant to demonstrate a reasonable probability that the result of the proceeding would have been different if trial counsel had acted professionally. *Id.* A reasonable probability is a probability sufficient to undermine confidence in

the outcome. *Mallett v. State, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001)*. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Cox v. State, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012)*.

When, as here, an appellant raises an ineffective-assistance claim in a motion **[**17]** for new trial, we analyze the issue on appeal as a challenge to the trial court's denial of the motion for new trial. *See Charles v. State, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004)* (holding appropriate standard of review for claim of ineffective assistance of counsel brought forth in motion for new trial is abuse of discretion); *Robinson v. State, 514 S.W.3d 816, 823 (Tex. App.—Houston [1st Dist.] 2017, pet. ref d)*. In those circumstances, we review the trial court's application of the *Strickland* test through an abuse-of-discretion standard. *Charles, 146 S.W.3d at 208*. Generally, applying this standard means that we must decide whether the trial court's ruling was arbitrary or unreasonable. *See Webb v. State, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007)*. As a reviewing court, we must afford "almost total deference" to a trial court's determination of historical facts and its application of the law to fact questions the resolution of which turns on an evaluation of credibility and demeanor. *See Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)*. In the absence of express findings, we presume that the trial court made all findings, express and implied, in favor of the prevailing party. *Okonkwo v. State, 398 S.W.3d 689, 694 (Tex. **[*782]** Crim. App. 2013)*. We therefore view the evidence in the light most favorable to the trial court's ruling, and we will uphold that ruling if it was within the zone of reasonable disagreement. *See Webb, 232 S.W.3d at 112*.

B. Appellant has not shown that she was prejudiced by her trial counsel's decision to [18] not ask for a continuance**.

Appellant asserts in her second issue that her trial counsel's performance was deficient because he failed to ask for a continuance of the trial in order to compel Forster to appear and testify on her behalf. Appellant goes on to argue that she was prejudiced by this deficient performance because Forster's testimony would have been beneficial to her defense. According to appellant, if her trial counsel had sought a continuance, Forster, who was found in the house during the search with black tar heroin, would have "been able to testify consistently with some of the items that Mr. Sherlock testified to, such as the appellant moving out of the residence in early April [and that appellant] was only present at the residence during the raid to retrieve a few of her remaining items from the residence." Appellant also asserts that Forster would have been able to testify that the methamphetamine found in the bedroom "dresser was not the appellant's, but Jimmy's." Appellant concludes by arguing that Forster's testimony was "necessary and crucial to the defense" because "it would have helped to corroborate the testimony of Mr. Sherlock, whose credibility was damaged **[**19]** by the State due to his prior conviction and would have provided testimony from someone who was actually present during the raid of the residence."

Appellant has not demonstrated that she was prejudiced by her trial counsel's failure to request a continuance because, by her own admission, Forster's proposed testimony was cumulative of Sherlock's testimony. *See Ex parte Flores, 387 S.W.3d 626, 638 n.53 (Tex. Crim. App. 2012)* ("Applicant cannot show prejudice for failure to call a witness whose testimony would be cumulative of an expert who did testify."); *Crawford v. State, 355 S.W.3d 193,*

199 (Tex. App.—Houston [1st Dist.] 2011, pet. ref d) (trial counsel was not ineffective for failing to call a passenger who was in defendant's car because defendant did not identify any fact to which witness would testify that trial court had not already heard from another witness); *Tutt v. State, 940 S.W.2d 114, 121 (Tex. App.—Tyler 1996, pet. ref d)* (defendant's trial counsel was not ineffective for failing to call certain witnesses when proposed witnesses' testimony would have been cumulative of other testimony). Because appellant has not established the second *Strickland* prong, we conclude that the trial court did not abuse its discretion when it denied appellant's motion for new trial. We overrule appellant's second issue.

CONCLUSION

Having overruled appellant's issues on appeal, we **[**20]** affirm the trial court's judgment.

/s/ Jerry Zimmerer

Justice

Panel consists of Justices Wise, Zimmerer, and Hassan (Hassan, J., dissenting).

Publish — TEX. R. APP. P. 47.2(b).

Dissent by: Meagan Hassan

Dissent

DISSENTING OPINION

The majority erroneously concludes Appellant was not in custody at the time of her inculpatory and custodial interrogation. Appellant complied with police instructions (conveyed via loudspeaker from an armored police vehicle by High Risk Operations Unit personnel), exited the residence in which she was previously located as an armed SWAT team prepared to enter and conduct a safety sweep, was placed in a police car, was informed a search of **[*783]** the home from which she just exited would be performed, was informed the drugs secreted therein would be found, was asked where said drugs would be found (an inherently inculpatory question under the circumstances), and was never informed she was free to leave. Under these facts, "a reasonable person [would] believe that [s]he is under restraint to the degree associated with an arrest." *Dowthitt v. State, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996)*. Because Appellant's statement to the officer during this questioning was the only evidence that directly linked her to the drugs for which she was prosecuted, I **[**21]** dissent.

GOVERNING LAW

"'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." *Cannon v. State, 691 S.W.2d 664, 671 (Tex. Crim. App. 1985)* (citing *Orozco v. Tex., 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969)*; *Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381, 1968-2 C.B. 903 (1968)*; and *Miranda v. Ariz., 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966))*. *See also Miranda, 384 U.S. at 444* ("By custodial interrogation, [the United States Supreme Court] mean[s] 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* is a promise from the judiciary to the People; the majority breaks this promise by unreasonably concluding the instant facts do not constitute "custody" as a matter of newly-created Texas law without citation to any precedent which requires said conclusion.

"A person is in 'custody' only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." *Dowthitt, 931 S.W.2d at 254*; *see also Gardner v. State, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009)*. Texas law is clear that:

> [A]t least four general situations . . . may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, **[**22]** (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.

Dowthitt, 931 S.W.2d at 255 (citing *Shiflet v. State, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985)*; *see also id.* ("[C]ustody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest.").

ANALYSIS

The instant facts facially trigger at least the first and third variants in *Dowthitt*, the legal precedents sustaining same are readily ascertainable, and there is no compelling reason to ignore any (much less all) of them; as a result, I reject the majority's conclusion that Appellant was not in custody at the time of her inculpatory statements.

Once a focused[1] suspect is placed in a police vehicle under analogous circumstances, commonsense dictates that the **[*784]** suspect's "freedom of action" has been significantly impacted. *See Miranda, 384 U.S. at 444*. Most

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[1] *See Miranda, 384 U.S. at 444 & n.4*. *See also Shiflet, 732 S.W.2d at 624* (citing *Escobedo v. Ill., 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964))* and *Ancira v. State, 516 S.W.2d 924, 927 (Tex. Crim. App. 1974)* ("The obvious purpose of the agents interrogating him was to elicit an incriminating statement for 'the investigation was no longer a general inquiry into an unsolved crime' but had begun 'to focus on a particular suspect'[.]"); *accord State v. Preston, 411 A.2d 402, 405 (Me. 1980)* ("The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda* . . . .") (citing *U.S. v. Hall, 421 F.2d 540, 545 (2d Cir. 1969)* and

directly, such persons (as opposed to those who voluntarily enter such vehicles) are no longer free to be in the physical place where **[**23]** they were located before being placed in a police vehicle by a police officer;[2] while certain interactions in more public spaces would foreseeably yield less significant deprivations, Appellant left the protections of a private home only after being instructed by an organized and well-equipped amassment of law enforcement personnel. Appellant's placement in a police vehicle significantly impacted her "freedom of action" and constituted custody. *See* U.S. v. Blum, 614 F.2d 537, 540 (6th Cir. 1980) (defendant's placement in a police vehicle with a uniformed officer constituted a restriction on his freedom sufficient to constitute custody).

Comparable physical deprivations of *drivers*' freedoms have historically constituted custody in Texas even when there was no warrant. *See* Ragan v. State, 642 S.W.2d 489 (Tex. Crim. App. 1982) (citing Gonzales v. State, 581 S.W.2d 690 (Tex. Crim. App. 1979) (vehicle was weaving; driver was stopped for possible DWI and asked to sit in patrol car while his license was checked; he was not free to go; he was asked if he had been in trouble before); Scott v. State, 564 S.W.2d 759 (Tex. Crim. App. 1978) (driver stopped for routine license check, arrested for outstanding traffic warrant, and placed in patrol car; when pistol was found in his car, driver was asked to whom it belonged); **[**24]** Newberry v. State, 552 S.W.2d 457 (Tex. Crim. App. 1977) (driver was stopped for several traffic violations, and had difficulty getting out of his car and finding his license; he was asked if he had been drinking, what he had been drinking, how much he had been drinking, and what he had been doing; he was then "placed under arrest," although he had not been free to go since he was **[*785]** stopped); and Harper v. State, 533 S.W.2d 776 (Tex. Crim. App. 1976) (driver stopped for making a sudden turn while approaching a license check point; registration records did not match the make of car being driven; driver was asked to whom the car belonged)). Here, Appellant had just exited a private home after being instructed to do so from an armored police vehicle, there was a presumably valid search warrant for said home, she was placed in a police car, and *then* she was informed police would find the secreted drugs about which a police officer was asking while she was in the back seat of a police car in the midst of an organized police operation. I simply cannot agree with the majority's implicit finding that

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Yale Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda*, in Criminal Law and the Constitution, 335-85, Ann Arbor, Mich.: Institute of Continuing Legal Education, 1968).

[2] These facts are readily distinguished from non-custodial cases where people who have reason to believe officers suspect they committed a crime voluntarily accompany police officers investigating criminal activity to a certain location. *See* Shiflet, 732 S.W.2d at 630 (citing Ruth v. State, 645 S.W.2d 432 (Tex. Crim. App. 1979); McCrory v. State, 643 S.W.2d 725 (Tex. Crim. App. 1982); Ragan v. State, 642 S.W.2d 489 (Tex. Crim. App. 1982); **Stewart v. State, 587 S.W.2d 148 (Tex. Crim. App. 1979)**; Stone v. State, 583 S.W.2d 410 (Tex. Crim. App. 1979); Gonzales v. State, 581 S.W.2d 690 (Tex. Crim. App. 1979); Brooks v. State, 580 S.W.2d 825 (Tex. Crim. App. 1979); Scott v. State, 571 S.W.2d 893 (Tex. Crim. App. 1978); Newberry v. State, 552 S.W.2d 457 (Tex. Crim. App. 1977); Lovel v. State, 538 S.W.2d 630 (Tex. Crim. App. 1976); Allen v. State, 536 S.W.2d 364 (Tex. Crim. App. 1976); Bailey v. State, 532 S.W.2d 316 (Tex. Crim. App. 1975); Adami v. State, 524 S.W.2d 693 (Tex. Crim. App. 1975); Ancira, 516 S.W.2d at 924; Graham v. State, 486 S.W.2d 92 (Tex. Crim. App. 1972); Evans v. State, 480 S.W.2d 387 (Tex. Crim. App. 1972); Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971); Higgins v. State, 473 S.W.2d 493 (Tex. Crim. App. 1971); Calhoun v. State, 466 S.W.2d 304 (Tex. Crim. App. 1971); Tilley v. State, 462 S.W.2d 594 (Tex. Crim. App. 1971); Hoover v. State, 449 S.W.2d 60 (Tex. Crim. App. 1969); and Bell v. State, 442 S.W.2d 716 (Tex. Crim. App. 1969)).

Appellant's freedom of action was not significantly impacted or that she (and all similarly situated persons) are not entitled to constitutional protections under comparable facts.

Additionally, these facts **[**25]** demonstrate law enforcement "create[d] a situation that would lead a reasonable person to believe that his [or her] freedom of movement ha[d] been significantly restricted[.]" *Dowthitt, 931 S.W.2d at 255*. "It is inconceivable that a person in such a situation could have reasonably concluded that he or she was free just to walk away." *State v. Pies, 140 Ohio App. 3d 535, 748 N.E.2d 146, 151 (Ohio Ct. App. 2000)*; *see also State v. Snell, 2007- NMCA 113, 142 N.M. 452, 166 P.3d 1106, 1110 (N.M. Ct. App. 2007)* (questioning after placement in back of police car with doors locked constituted custodial interrogation), *cert. denied*, *555 U.S. 1045, 129 S. Ct. 626, 172 L. Ed. 2d 608 (2008)*; *State v. Malik, 552 N.W.2d 730, 731 (Minn. 1996)* (questioning after placement in a police car was custodial where (1) police had knowledge of inculpatory acts, (2) police were going to conduct a search, and (3) no one informed defendant he was free to leave); *State v. Wash., 102 N.C. App. 535, 402 S.E.2d 851, 853 (N.C. Ct. App. 1991)*, *rev'd*, *330 N.C. 188, 410 S.E.2d 55, 56 (N.C. 1991) (per curiam) (Greene, J. dissenting)* (defendant was in custody when he was placed in the back of a police car with handles that did not work and his movement was restricted); *State v. Preston, 411 A.2d 402, 405 (Me. 1980)* (questioning defendant alone in a police car "increased the coercive nature of the interrogation"); *Commonwealth v. Palm, 315 Pa. Super. 377, 462 A.2d 243, 246 (Pa. 1983)* (interrogation in front seat of Game Protector's vehicle was a custodial investigation); and *People v. Sanchez, 280 A.D.2d 891, 721 N.Y.S.2d 435 (N.Y. App. Div. 2001)* (reasonable people placed in a police car "would have believed that he [or she] was in custody") (citing *People v. Yukl, 25 N.Y.2d 585, 256 N.E.2d 172, 307 N.Y.S.2d 857 (N.Y. 1969)*, *cert. denied*, *400 U.S. 851, 91 S. Ct. 78, 27 L. Ed. 2d 89 (1970)*). While there is no inherent wrongdoing associated **[**26]** with police creating a situation where reasonable people believe they are incapable of leaving, the majority ignores the impropriety of making inculpatory interrogatories after creating such a scenario without first providing the People with *Miranda* warnings.

In an era where the ubiquity of recording devices makes the People increasingly aware that some alleged suspects are (*inter alia*) beaten, choked, and executed for markedly less, the majority's conclusion that Appellant was free to simply walk away defies reason. Indeed, many people who have such unfortunate interactions with law enforcement do not have the forewarning typically associated with (1) first being placed in a police vehicle, (2) a judicially-approved warrant, (3) an armored police vehicle, (4) a well-armed SWAT team preparing to conduct a protective sweep of the house from which they just exited under police instruction, (5) traffic being re-routed away the block, *and then* (before, during, or after accusatory questioning based on an officer's personal and **[*786]** well-informed suspicions of guilt) (6) unilaterally departing from police vehicles without express permission to do so. *Cf. Dewey v. State, 629 S.W.2d 885, 886 (Tex. App.—Ft. Worth 1982, pet. ref'd)* (appellant was not in custody where he **[**27]** exited the police car during a conversation with officers, walked to his car, retrieved a beer, and returned to the officers' car).

The officers here were not conducting a general investigation; instead, they specifically targeted a specific house, acquired a warrant therefor, and then focused on (then detained) Appellant when she compliantly egressed therefrom. *See Ancira, 516 S.W.2d at 926* ("The questioning of appellant by the officer in the police vehicle cannot be characterized as a general investigation into an unsolved crime, nor was the questioning made under

circumstances to bring it within the ambit of general on-the-scene investigatory process."). Additionally, the presence of multiple police cars adds (at least marginally) to the question whether Appellant was in custody for *Miranda* purposes. *See* State v. Ortiz, 382 S.W.3d 367 (Tex. Crim. App. 2012). Finally, the implicit threat that Appellant would (at least) be forcibly seized if she did not voluntarily leave the house (then submit to a detained interrogation) expressly contravenes the majority's conclusion that she was not in custody. Martinez v. State, 337 S.W.3d 446, 455 (Tex. App.—Eastland 2011, pet. ref'd) ("When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be **[**28]** forcibly taken, then that person is not in custody at the time.") (citing Dancy v. State, 728 S.W.2d 772, 778-79 (Tex. Crim. App. 1987)); *see also* Miller v. State, 196 S.W.3d 256, 264 (Tex. App.—Ft. Worth 2006, pet. ref'd) (citing Anderson v. State, 932 S.W.2d 502, 505 (Tex. Crim. App. 1996), *cert. denied*, *521 U.S. 1122, 117 S. Ct. 2517, 138 L. Ed. 2d 1019 (1997)* and Sander v. Tex., 52 S.W.3d 909, 915 (Tex. App.—Beaumont 2001, pet. ref'd) (citing *Anderson* and *Dowhitt*)).

As a result, Appellant was in custody within the meaning of the United States Constitution and she was entitled to *Miranda* warnings as a matter of clearly established and heretofore unbroken law. The trial court erred in admitting her statement.

Finally, the inclusion of Appellant's statement at trial was the *only* evidence the State presented to connect her to the drugs and the State relied heavily on Appellant's statement in its closing argument. Even the State's witness who was responsible for collecting and logging the evidence at the scene testified he did not know of anything connecting that evidence to Appellant. Jimmy Sherlock testified on Appellant's behalf that Appellant had been living with him for months prior to the search at issue. Other than her statement to the officer while in custody on the scene, there was no evidence in the record connecting Appellant to the drugs found at the home. Therefore, the admission of the statement was harmful to Appellant.

For the foregoing reasons, I would reverse and remand to the trial court **[**29]** for a new trial without the statement obtained while Appellant was in custody, and therefore I dissent.

/s/ Meagan Hassan

Justice

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