**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A14-0715**

State of Minnesota,
Appellant,

vs.

Abdullahi Ali Farah,
Respondent.

**Filed November 24, 2014**
**Affirmed**
**Hooten, Judge**

Hennepin County District Court
File No. 27-VB-13-11357

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan L. Segal, Minneapolis City Attorney, Paula J. Kruchowski, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

Drake D. Metzger, Metzger Law Firm, LLC, St. Louis Park, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

**HOOTEN**, Judge

On appeal from the district court's order suppressing statements made by respondent Abdullahi Ali Farah, appellant State of Minnesota argues that the district court's order had a critical impact on the prosecution warranting pretrial appeal, and that

the district court erred in finding that Farah was unconstitutionally subjected to custodial interrogation without the required *Miranda* warning. Because the district court did not err in suppressing Farah's statements, we affirm.

## FACTS

The relevant facts are largely undisputed by the parties. At 7:00 p.m. on July 16, 2013, Minneapolis Park Officer Adam Swierczek went to Riverside Park in Minneapolis in response to a call from dispatch alerting him to an assault in the park. By the time he arrived, the incident was over and paramedics were already at the scene with the two victims, one of whom was bleeding. One of the victims, A.K., told Swierczek that he had been punched in the face, could identify the suspect, and knew where the suspect lived. Swierczek drove in his car with A.K. and obtained an exact address for the suspect, who lived a block from the park. Swierczek then returned to the park with the victims, at which point the victims noticed Farah walking down the street about half a block away. According to Swierczek's testimony, one of the victims pointed at Farah and stated, "That's him right there. He's the one who did it." The victims wanted to talk with Farah, but Swierczek prevented them from doing so in order to avoid another confrontation.

Swierczek, who was in full uniform and carrying his gun, a baton and handcuffs, immediately approached Farah and asked him something like, "What's going on here today?" or "Come here, I have a question." Swierczek then performed "some sort of frisk" or pat search on Farah. Swierczek testified that "[Farah] would have been detained at that point" after the search, and was not free to leave. Swierczek began questioning Farah and asked for "his version of the story," and Farah responded that he was fasting

for Ramadan and was upset that the victims were at the park with his sister. While the record is unclear as to what questions Swierczek asked, Farah admitted going to the park with another person and hitting one of the victims. Swierczek then handcuffed Farah, put him in back of his marked squad car, and drove to Farah's residence. Swierczek continued to ask Farah questions about his identity and the identity of the other suspect, as Farah had no proof of identification with him. At no point did Swierczek read Farah his *Miranda* rights.

After arriving at Farah's residence, Swierczek spoke to Farah's sister about the incident. Farah's sister told Swierczek that she went to the park with the two victims, and that Farah and another man had shown up and gotten into an altercation with the victims. Swierczek returned to the squad car where Farah was being held, placed Farah under arrest, issued him a municipal citation for prohibited conduct in the park, and released him.

At arraignment, the state tab charged Farah with two additional counts of fifth-degree assault. A formal complaint was filed on March 31, 2014, charging Farah with two counts of disorderly conduct and one count of fifth-degree assault. A *Rasmussen* hearing was held on April 15, 2014, on Farah's motion to suppress his statements. Swierczek testified and the parties presented oral argument. Farah did not testify. The district court orally granted the motion to suppress Farah's statements, and issued a written order reaching the same conclusion on April 21, 2014. The district court held that the circumstances of the pat-search and subsequent questioning created a "coercive and threatening environment," and that a reasonable person in that situation would have

believed he or she was in custody functionally equivalent to a formal arrest. The state appeals from that order.

**D E C I S I O N**

In order to prevail on appeal from a pretrial order, the state must "clearly and unequivocally" show: (1) the district court's order "will have a critical impact on the state's ability to successfully prosecute[;]" and (2) the district court's order was made in error. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted). Critical impact is a threshold requirement that must be met before considering whether the pretrial order was issued in error. *Id.* (citing *State v. Zanter*, 535 N.W.2d 624, 631 (Minn. 1995)).

**I.**

When appealing a pretrial suppression order, the state must clearly and unequivocally show that excluding the evidence has a "critical impact" on the prosecution by "significantly reduc[ing] the likelihood of a successful prosecution." *State v. Joon Kyu Kim*, 398 N.W.2d 544, 551 (Minn. 1987). Critical impact is a "demanding standard." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quoting *Zanter*, 535 N.W.2d at 630). The state argues that the suppressed statements have a critical impact on its likelihood of a successful prosecution, and Farah concedes that the exclusion of his statements will critically impact the state's case. Based on the unique facts of this case and the high level of proof required, *State v. McLeod*, 705 N.W.2d at 784, we conclude that the state has not shown a critical impact on its prosecution given the availability of eyewitness testimony that duplicates Farah's confession. But because

the parties stipulated to critical impact and only contest whether the district court erred in suppressing Farah's statements, we are compelled to consider the district court's order on the merits.

**II.**

In reviewing a district court's pretrial order to suppress evidence, "we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted). We independently review the district court's legal determination regarding custody, while granting "considerable, but not unlimited, deference to a trial court's fact-specific resolution of such an issue when the proper legal standard is applied." *State v. Sterling*, 834 N.W.2d 162, 168 (Minn. 2013) (quotation omitted). Determining whether a defendant was subject to custodial interrogation requires consideration first of the circumstances surrounding custody, and then an examination of the interrogation itself. *In re Welfare of G.S.P.*, 610 N.W.2d 651, 657 (Minn. App. 2000).

**A.**

The state's main contention is that the district court erred in concluding that Farah was in custody while being questioned by Officer Swierczek. Under the Fifth Amendment's protection against self-incrimination, a *Miranda* warning must precede statements made during custodial interrogation for those statements to be used by the prosecution. *Miranda v. Arizona*, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 1612 (1966). In determining whether a suspect was in custody, "[t]he test is not whether a reasonable

person would believe he or she was free to leave." *State v. Champion*, 533 N.W.2d 40, 43 (Minn. 1995). Instead, the test is whether, "based on all the surrounding circumstances, a reasonable person under the circumstances would believe that he or she was in police custody of the degree associated with formal arrest." *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010) (quoting *Champion*, 533 N.W.2d at 43).

The supreme court has set forth a number of factors that courts are to consider in determining whether a suspect is in custody. Factors indicative of custody include:

> (1) the police interviewing the suspect at the police station; (2) the suspect being told he or she is a prime suspect in a crime; (3) the police restraining the suspect's freedom of movement; (4) the suspect making a significantly incriminating statement; (5) the presence of multiple officers; and (6) a gun pointing at the suspect.

*State v. Vue*, 797 N.W.2d 5, 11 (Minn. 2011). The following factors indicate that a suspect is not in custody:

> (1) questioning the suspect in his or her home; (2) law enforcement expressly informing the suspect that he or she is not under arrest; (3) the suspect's leaving the police station without hindrance; (4) the brevity of questioning; (5) the suspect's ability to leave at any time; (6) the existence of a nonthreatening environment; and (7) the suspect's ability to make phone calls.

*Id.* "While no factor alone is determinative," several factors in combination may indicate that a suspect is in custody. *Thompson*, 788 N.W.2d at 491.

In holding that Farah was subject to custodial interrogation by Swierczek, the district court cited a number of facts that supported its finding of custody: (1) Farah was never told he not under arrest; (2) Farah was the only suspect for the assault; (3)

Swierczek took physical control of Farah via the pat search; (4) Swierczek "created a coercive and threatening environment;" (5) Farah made incriminating statements; (6) Farah was not able or free to leave; and (7) Swierczek testified that Farah was detained and not free to leave. Based on these facts, the district court concluded that Farah was subjected to the "functional equivalent of a formal arrest" and therefore was in custody for purposes of *Miranda*.

The state contends that the court's conclusion is unsupported by record, because other custody factors weigh against a finding of custody or do not apply in this case. The length of questioning by Swierczek and Farah's potential ability to have made a phone call were not established at the *Rasmussen* hearing. The questioning took place on a public street, which is neither the police interrogation room nor the private residence envisioned as the two ends of the custody-location spectrum. *See Vue*, 797 N.W.2d at 11. Furthermore, several of the factors weigh against the district court's custody finding. Farah was not physically restrained for much of the questioning: Swierczek was alone and did not draw his gun at any point, the two spoke in a public place, and the officer did not handcuff Farah until he took him home in his squad car. Farah was never told that he was a prime suspect for the assault or formally placed under arrest prior to questioning.

The state argues that these circumstances show that Swierczek conducted a threshold investigative inquiry, not a custodial interrogation. When officers are asking questions at the scene and "simply trying to get a preliminary explanation of a confusing situation," a *Miranda* warning is not required. *State v. Walsh*, 495 N.W.2d 602, 604–05 (Minn. 1993); *see also State v. Kinn*, 288 Minn. 31, 34–35, 178 N.W.2d 888, 891 (Minn.

1970);[1] *accord Miranda*, 384 U.S. at 477–78, 86 S. Ct. at 1629–30 (finding that "[g]eneral on-the-scene questioning as to facts surrounding a crime" may lack the "compelling atmosphere" of custodial interrogation). In *Walsh* and *Kinn*, officers sought information from individuals they found upon arrival at the scene of the crime or accident, and such preliminary questioning was held to not constitute custodial interrogation. *Walsh*, 495 N.W.2d at 603, 605; *Kinn*, 268 Minn. at 33, 178 N.W.2d at 889.

However, the situation in the instant case more closely resembles the "compelling atmosphere" that troubled the *Miranda* Court, where defendants were taken into custody in a police station and interrogated without counsel present, 384 U.S. at 445, than the "general on-the-scene questioning" found in *Walsh* or *Kinn*. Swierczek did not seem to be seeking a "preliminary explanation of a confusing situation" in talking to Farah, but instead sought to gather facts from Farah to prove his guilt. *Walsh*, 495 N.W.2d at 604–05. Unlike the *Kinn* and *Walsh* defendants, Farah was not found at the scene when Swierczek arrived. Swierczek instead approached Farah after the officer had already spoken with the victims and gone by Farah's house, and one of the victims had identified Farah by sight and named him as the perpetrator. Farah's situation here is similar to the later questioning of the defendant in *Walsh*, where the preliminary questioning situation

[1] Both parties present arguments relying on language in *Kinn* providing that the officer's focus on the defendant as a suspect controls whether a *Miranda* warning is required. This dictum was expressly overruled by the supreme court in *State v. Herem*, 384 N.W.2d 880, 884 (Minn. 1986).

"changed" into custodial interrogation when the victim's body was discovered and the police frisked and handcuffed the defendant. *Walsh*, 495 N.W.2d at 605.

The more apposite line of cases here are those which consider when a police officer's temporary detention of an individual, otherwise known as a *Terry* stop, becomes a custodial interrogation. *Cf. State v. Rosse*, 478 N.W.2d 482, 486 (Minn. 1991) ("The label[] of . . . 'threshold investigative questioning' seem[s] only to blur this issue."). "*Miranda* generally does not apply to temporary investigative detentions." *State v. Perkins*, 353 N.W.2d 557, 560 (Minn. 1984). But the stop and any questioning "must be reasonably related in scope to the justification for their initiation," otherwise "questioning may ripen into custodial interrogation where a *Miranda* warning is needed." *Rosse*, 478 N.W.2d at 485–86. When Swierczek approached Farah, he frisked him for weapons before asking questions.[2] Swierczek then "detained" Farah while questioning him, and testified that he would not have let Farah leave. The detention is further supported by the fact that Farah was never told during questioning that he could leave or that he was not under arrest. In the Fourth Amendment context, while a person "being detained temporarily is not free to leave during the period of detention . . . that does not convert the detention into an arrest." *State v. Moffatt*, 450 N.W.2d 116, 120 (Minn. 1990). On its own, Swierczek's "detention" of Farah does not convert the encounter into a de facto arrest. It is, however, an indication that Farah's freedom of movement was restrained,

[2] Swierczek testified that it was his procedure to conduct a frisk search before talking with a suspect. Whether Swierczek had a reasonable, articulable suspicion of criminal activity and a belief that Farah was armed and dangerous to support this *Terry*-type frisk search and detention is not an issue raised by the parties. *Cf. State v. Flowers*, 734 N.W.2d 239, 250–51 (Minn. 2007) (discussing the *Terry* search exception rule).

and detention in combination with other indicators of custody can create a custodial environment. *See Rosse*, 478 N.W.2d at 486 (finding defendant to be in custody when she was detained at the site of a drug bust, pat searched, questioned, and told she would be free to leave only after "everything had been sorted out"); *Perkins*, 353 N.W.2d at 560 ("[O]nce he was frisked and the gun seized, defendant might reasonably have believed that he was going to be arrested and that he was not merely being temporarily detained.").

Other circumstances show that this encounter, if it ever was an investigatory stop, quickly ripened into a custodial interrogation. Further evidence of custody is found in the result of the encounter between Farah and Officer Swierczek: a statement by Farah admitting that he punched one of the victims, significantly incriminating Farah for the alleged assault. While not dispositive, a significantly incriminating statement that is the result of police questioning indicates that a suspect was in custody from that point forward. *State v. Heden*, 719 N.W.2d 689, 695 (Minn. 2006). Even if the interrogation was noncustodial at the outset, the ultimate question is whether a reasonable person would feel he or she was in custody equivalent to formal arrest *after* making an incriminating statement. *Champion*, 533 N.W.2d at 43. In *Champion*, the defendant voluntarily came to the police station and was found to be in custody only after he significantly incriminated himself. *Id.* at 42–43. The circumstances here were more custodial from the start: Farah was sought out, frisked, and "detained" by Swierczek, and the officer immediately began asking him questions. The reasonable person who was treated like Farah, and then proceeded to incriminate him or herself, would likely believe they were under custody analogous to arrest even if formal arrest had not yet occurred.

The circumstances after the encounter further show that the interrogation was custodial. Farah was not allowed to leave unhindered after being questioned. Swierczek testified that Farah was placed in a squad car in handcuffs, arrested, and given a citation before being released.

"[N]o factor alone is determinative" of custody, *Thompson*, 788 N.W.2d at 491, and we "must examine all the surrounding circumstances" in deciding this issue. *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998). While lacking some of the outward indicia of restraint—handcuffs during the interview, a pointed gun, or a police interrogation room, this police encounter was initiated by a victim's direct identification of the defendant, included a frisk for weapons and detention of the defendant, led to the admission of incriminating statements, and ended in handcuffing, arrest and citation. Such an encounter likely created a coercive and threatening environment during the interrogation. Consideration of the overall circumstances shows that a reasonable person in Farah's position would have believed they were in custody equivalent to a formal arrest. Because the district court applied the correct legal standard, we are directed to give considerable deference to its fact-specific resolution of this issue. *Sterling*, 834 N.W.2d at 168. Therefore, the district court did not err in concluding that Farah was in custody while being questioned by Officer Swierczek.

**B.**

The second prong of *Miranda* directs us to focus on whether the questioning conducted by the police constitutes "interrogation." *In re Welfare of G.S.P.*, 610 N.W.2d at 657. In a footnote of its brief, the state argues that the questioning here was not

interrogation, citing *State v. Tibiatowski*, 590 N.W.2d 305 (Minn. 1999). The district court found that there was no dispute at the *Rasmussen* hearing regarding whether the questioning by Officer Swierczek was an interrogation. A review of the record of the *Rasmussen* hearing shows that the state only made oral arguments regarding custody, and did not address whether Swierczek's questioning was a *Miranda* interrogation. Issues not raised before the district court are generally not considered on appeal by this court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

But even if the issue is considered, the record indicates that Swierczek interrogated Farah. "Interrogation" under *Miranda* is "express questioning" or "any words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689–90 (1980); *accord Tibiatowski*, 590 N.W.2d at 309. Officer Swierczek testified that his first statement upon approaching Farah was, "What's going on here today?" or "Come here, I have a question." After the pat search, the two had a conversation in which the officer asked Farah for "his version of the story," which included specific questions about whether Farah had hit one of the victims. While the record is unclear on the exact course of the conversation between the two, this is undoubtedly the type of express questioning that is "reasonably likely to elicit an incriminating response" from Farah, and in fact did just that. *Tibiatowski*, 590 N.W.2d at 309 (quoting *Innis*, 446 U.S. at 301, 100 S. Ct. at 1689–90).

**Affirmed.**