Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-080

OCTOBER TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Misty Peck	}	DOCKET NO. 3320-8-06 CnCr
		Trial Judge: Christina Reiss

In the above-entitled cause, the Clerk will enter:

Defendant appeals the district court's order denying her motion to suppress. On appeal, defendant argues that her statements must be suppressed because she was in custody when police interrogated her without advising her of her Miranda rights. We affirm.

Following a motion-to-suppress hearing, the court found the following facts. In July 2006, a Williston police officer observed a pickup truck driving in the WalMart parking lot. The officer considered the truck's speed too fast for the conditions and pulled in behind the truck when it stopped in a parking space. The officer asked the operator for his driver's license and learned that it was under suspension. The officer then arrested the operator and called for backup. Two additional officers arrived on the scene. The officers gained consent from the operator to search the truck and found WalMart shopping bags without receipts. Police also found marijuana in the glove box of the truck. At the time, defendant was shopping inside WalMart, and police paged her. Police asked if she had the receipts for the merchandise in the truck, and defendant showed them a receipt. Defendant returned to the truck and found the operator under arrest. Police did not arrest her, nor did they tell her that she could not leave. Police asked if she had any contraband, and defendant replied that she had some marijuana in her purse. When she could not locate it, police showed her the marijuana from the glove box and defendant told police that it was hers. Defendant was arrested and charged with unlawful possession of marijuana.

Defendant filed a motion to suppress, claiming that her incriminatory statements should be suppressed because they were made as a result of a custodial interrogation that took place without a Miranda warning. Following a hearing, the trial court denied the motion. The court found that police questioned defendant in a public place, did not place defendant under arrest and did not restrain her movement. Thus, the court concluded that defendant was not in custody and no Miranda warning was required. Defendant entered a conditional plea and appealed the court's denial of her motion to suppress.

We review a motion to suppress using a mixed standard of review. We will affirm the court's factual findings unless clearly erroneous, and review conclusions of law de novo. State v. Pontbriand, 2005 VT 20, ¶12, 178 Vt. 120. Defendant has the burden of proving that she was in police custody when she made the incriminating statements. Id. ¶ 10. Whether a suspect is in custody requires "an objective inquiry into the totality of the circumstances to determine if a reasonable person would believe he or she were free to leave or to refuse to answer police questioning." State v. Willis, 145 Vt. 459, 475 (1985). Defendant contends that under the circumstances—police had already arrested her friend when she arrived at the truck, police confronted her with illegal contraband they found in the truck, and police did not tell her that she was free to leave—a reasonable person would not feel free to leave.

Looking at the totality of the circumstances, we conclude that defendant was not in police custody when she made the incriminating statements. Defendant contends that she was in custody because police had already arrested her friend and had found contraband in the truck. The action of confronting a suspect with incriminating evidence is not enough to demonstrate that the suspect was in custody. See Pontbriand, 2005 VT 20, ¶ 18 (explaining that even though officers confronted suspect with incriminating email it was not enough for a person in the suspect's position to believe he was no longer free to leave). In addition, we are not persuaded by defendant's claim that she was in custody because police did not explain that she was free to go, and police would have stopped her if she attempted to leave. "The subjective beliefs of the police and the suspect are irrelevant" to the inquiry of whether a reasonable person would believe she is free to leave or to refuse to answer police questioning. State v. Garbutt, 173 Vt. 277, 282 (2001). Moreover, a person may be detained by police but not be in custody for Miranda purposes. Accordingly, although police may have detained defendant if she had attempted to leave, whether she was in custody depended on "the coercive nature of the physical setting of police questioning." Willis, 145 Vt. at 473.

There was no evidence of such coercion or that defendant was being questioned in a "police-dominated atmosphere." Miranda v. Arizona, 384 U.S. 436, 445 (1966). A "police-dominated atmosphere" is created when "objective evidence show[s] that the police questioned the suspect in an enclosed space and isolated the suspect from others for an extended time." Pontbriand, 2005 VT 20, ¶¶ 15, 16. Here, police questioned defendant in a public place during a time when the public was present and did not arrest her or attempt to restrict her movement. We

therefore conclude that defendant has not met her burden of proving that she was in police custody.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice