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ATTORNEY FOR APPELLANT:

MICHAEL B. TROEMEL
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

TIVERIO SERRANO LUNA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0201-CR-33
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT II
The Honorable George Heid, Judge
Cause No. 79D02-0007-CF-71

September 17, 2002

MEMORANDUM DECISION - NOT FOR PUBLICATION

MATHIAS, Judge

Tiverio Serrano Luna ("Luna") appeals his jury conviction in Tippecanoe Superior Court II for one count of Child Molesting, as a Class A felony, and one count of Child Molesting, as a Class C felony.[1] Luna's one argument on appeal is whether the trial court abused its discretion when it denied his Motion to Suppress.

We reverse and remand for new trial.

Facts and Procedural History

The facts most favorable to the trial court's decision reveal that ten-year-old E.G. had stayed overnight at her friend's residence on July 24, 2000. The next day, July 25, E.G. accused Luna, her friend's father, of using his hands and mouth on her privates during the early morning hours that same day. E.G. reported the incident to her sister as soon as E.G. returned to her residence on July 25th. Her sister promptly called their mother, who was at work. E.G.'s mother took E.G. to Lafayette Home Hospital to be examined. Dr. Christian Strachan performed a pelvic examination on E.G. and noticed redness above the opening of her vagina. Appellant's App. p. 200. The incident was also promptly reported to the Lafayette Police Department and Child Protective Services that same day.

On the morning of the next day, July 26, 2000, E.G. was interviewed by Christine Kauffman ("Kauffman") of the Tippecanoe County Office of Family and Children at the Heartford House, a facility designed for conducting interviews with county children about abuse allegations. At the facility, one person interviews a child while a

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[1] Ind. Code § 35-42-4-3(a)(1) and (b) (1998).

representative from the prosecutor's office and police department watch the interview from an observation room in the basement of the house. The interview is videotaped, and the observers are able to call to the interviewer and submit questions that the interviewer might have overlooked. Appellant's App. p. 72. During this interview, E.G. reported that Luna removed her underwear and touched her "private" with his hands and mouth, the same facts she had reported to her sister, her mom, the hospital, Kauffman, and police officers the day before.

Later that same day, July 26, 2000, Detective Jay Rosen ("Detective Rosen"), who observed the interview at the Heartford House, and whose responsibilities with the Lafayette Police Department included investigating crimes involving juveniles, whether as perpetrators or victims, went to Luna's residence to ask Luna to go to the police station to tell his side of the story. Luna was not home, but Luna's wife told Detective Rosen that Luna was at work. Detective Rosen finally found Luna at his place of work in West Lafayette. Detective Rosen informed Luna that he was not under arrest and that he merely wanted to hear Luna's side of the story. Luna agreed to go to the police station right away. He drove separately from Detective Rosen.

Upon arrival at the station, but before the interview, Detective Rosen reiterated to Luna that he was not under arrest, that he could leave at any time, and that he did not have to answer any questions. Detective Rosen and Detective Tom Davidson ("Detective Davidson") interviewed Luna in their office. Detective Rosen testified that in order to get to the office, one has to enter a punch code to enter the area, but a punch code is not required the leave the area. Appellant's App. p. 35. Additionally, Detective Rosen

testified that the office door was closed, and that both he and Detective Davidson were sitting behind the desk and Luna was sitting on the opposite side of the desk closest to the office door. Appellant's App. p. 166.

The detectives first spoke with Luna without recording the conversation. It was during this first part of the conversation that Luna denied E.G.'s accusations. Detective Rosen told Luna that he wanted Luna to tell the truth, that he knew "a lot more happened than what he was telling [them,]" and he admitted that he implied to Luna that he thought Luna was lying. Appellant's App. p. 175. As the conversation continued, Luna admitted the allegations, and it was after this approximate half-hour dialogue that Luna's confession was recorded. Luna was never Mirandized, but was told that he could leave at any time and that he did not have to answer any questions. After approximately one hour, Luna was allowed to leave the police station.

The next day, July 27, 2000, Luna was arrested and charged with two counts of child molesting, one as a Class A felony, the other as a Class C felony. Before trial, Luna filed a motion to suppress his taped confession, which the trial court denied after a hearing. After a two-day jury trial in August 2001, Luna was found guilty of both counts. The trial court sentenced Luna to the Department of Correction for thirty years on the Class A felony, but declined to sentence him on the Class C felony. Luna was credited 419 days for pretrial confinement. Appellant's App. pp. 376-79. Luna now belatedly appeals the trial court's denial of his Motion to Suppress. Additional facts will be provided as necessary.

Standard of Review

Our standard of review for a denied motion to suppress is similar to our standard of review for claims of insufficient evidence to support a trial court determination. Crabtree v. State, 762 N.E.2d 241, 244 (Ind. Ct. App. 2002). We do not reweigh the evidence, but determine if there is substantial evidence of probative value to support the trial court's ruling. State v. Aynes, 715 N.E.2d 945, 949 (Ind. Ct. App. 1999) (citation omitted). We must look to the totality of the circumstances and consider all uncontroverted evidence together with conflicting evidence that supports the trial court's determination. Id. (citation omitted).

Discussion and Decision

Luna argues that the trial court abused its discretion when it denied his Motion to Suppress. Specifically, he argues that because he was in custody during his conversation with Detectives Rosen and Davidson but was not read his Miranda rights, the trial court should not have admitted his taped confession into evidence.

To be in custody for purposes of Miranda, a person does not need to be placed under formal arrest; a "custodial interrogation may occur without a formal arrest if a reasonable person in the accused's circumstances would believe he is not free to leave." Cliver v. State, 666 N.E.2d 59, 66 (Ind. 1996) (citing Stansbury v. California, 511 U.S. 318 (1994)). Simply being interviewed at a police station or because one is a suspect does not warrant giving Miranda warnings. Id. (citing Oregon v. Mathiason, 429 U.S. 492 (1977)). A police officer's opinion or suspicion of the person is a relevant consideration if the officer conveys his belief to the person being questioned and when

the conveyance of the belief would affect how a reasonable person in that position would understand his freedom to leave. Cliver, 666 N.E.2d at 66; Aynes, 715 N.E.2d at 949 (both cases citing Stansbury, 511 U.S. at 325).

The facts of this case support the conclusion that Miranda warnings were required, and are very similar to other Indiana cases that have addressed the issue of custodial interrogations. See Dickerson v. State, 257 Ind. 562, 276 N.E.2d 845 (1972); Aynes, 715 N.E.2d at 945; Johnson v. State, 484 N.E.2d 49 (Ind. Ct. App. 1985). Even though Luna, the only suspect in the case, drove to the police station himself, he did so at Detective Rosen's request, which was made at Luna's place of employment. Once at the station, Luna was led to an office located in a secure area not open to the public. The approximate one-hour interview was conducted by two detectives, behind closed doors, and was not recorded until after Luna first denied the accusations and then conceded approximately halfway through the interview. Lastly, before confessing, Detective Rosen conveyed to Luna that he believed Luna was guilty by insisting that Luna tell the truth after he denied the accusations, by telling Luna that he knew there was more to the story than Luna was admitting, and by implying that he believed Luna was lying. Under these facts and circumstances, we conclude that Luna was in custody and should have been advised of his Miranda rights. Therefore, the trial court abused its discretion when it denied Luna's Motion to Suppress. Luna's conviction is reversed and this case is remanded to the trial court for a new trial.

Reversed and remanded.

KIRSCH, J., concurs.

BARNES, J., dissents with opinion.

FILED
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CLERK OF THE INDIANA SUPREME COURT COURT OF APPEALS AND TAX COURT

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BARNES, Judge, dissenting

I respectfully dissent. As the majority opinion recognizes, the suspect here was clearly and distinctly told that he was not under arrest, that he was free to leave the police station at any time, and that he did not have to answer any questions. Luna, in fact, drove himself to the police station and after confessing to the crime was allowed to leave the station. Detective Rosen further asked Luna, "you don't feel at anytime like you've been here like against your will, do you," to which Luna responded "no." App. p. 140. Although I understand the majority's concern regarding certain aspects of "custody" surrounding the questioning of Luna, I believe that the proof is in the pudding here. He

was told he was not in custody and the police remained true to their word – they did allow Luna to leave even after he confessed to this crime.

Although Miranda is a basic tenet of police investigative protocol, it has always been required that a suspect be "in custody" before the warnings must be given to a suspect who will be subjected to police questioning. Luna was not "in custody." The majority asserts that the facts of this case "are very similar to other Indiana cases that have addressed the issue of custodial interrogations," citing Dickerson v. State, 257 Ind. 562, 276 N.E.2d 845 (1972), Aynes v. State, 715 N.E.2d 945 (Ind. Ct. App. 1999), and Johnson v. State, 484 N.E.2d 49, 51 (Ind. Ct. App. 1985). Majority slip op. p. 6. I would hold, however, that this is case more directly controlled by other precedent from this court, our supreme court, and the United States Supreme Court.

Specifically, I believe Oregon v. Mathiason, which post-dates (and seems to irreconcilably conflict with) Dickerson, is directly on point. 429 U.S. 492, 97 S.Ct. 711 (1977). There, the Supreme Court of Oregon held the defendant had been "in custody" for Miranda purposes where he was interviewed behind closed doors in a room at a police station, and police informed the defendant he was a suspect in a theft and even lied about finding the defendant's fingerprints at the crime scene. The United States Supreme Court disagreed, noting that the defendant had voluntarily come to the police station at the police's request, was immediately informed he was not under arrest, and in fact was allowed to leave, even after confessing, at the conclusion of a one-half-hour interview. Id. at 495, 97 S. Ct. at 714. The Supreme Court observed:

> Such a non-custodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

Id.

This reasoning is directly applicable here. I believe the majority is concluding that Luna's confession should be suppressed solely because he was questioned in a "coercive environment." Although police pressed Luna about his conduct, and told him they believed he, in fact, committed the crime, I find nothing untoward in that approach. The facts do not demonstrate that Luna was "in custody" and hence there was no requirement that the Miranda warnings be given before Luna was questioned and confessed. See also Joyner v. State, 736 N.E.2d 232, 241 (Ind. 2000) (holding defendant was not "in custody" where he drove himself to police station, officer testified at suppression hearing that defendant was free to come and go, and defendant was in fact allowed to leave at end of interview); Cliver v. State, 666 N.E.2d 59, 66 (Ind. 1996) (defendant was not "in custody" when he went to police station in response to police telephone request, was advised he was not under arrest and was free to leave, was interviewed by several officers in room with door left open, and he was allowed to leave at end of interview); Williams

v. State, 611 N.E.2d 649, 651-52 (Ind. Ct. App. 1993) (defendant was not "in custody" where he voluntarily accompanied two police officers to station, was interviewed in a private room, and was allowed to leave at completion of interview).[2] I would affirm the judgment of the trial court.

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[2] I have already indicated that I believe Dickerson is in direct conflict with Mathiason, and the United States Supreme Court has the last word on federal constitutional questions such as the requirement of Miranda warnings. Additionally, our supreme court in Cliver, while acknowledging the defendant's citation to Dickerson, made no further reference to it and instead relied on Mathiason and Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526 (1994), in holding the defendant was not in custody. This court in both Johnson and Aynes relied on Dickerson in concluding those defendants were in custody, and it may have been improper to do so after Mathiason. Those cases are both distinguishable from this case in any event. In Johnson, there is no reference to the defendant having been advised he was free to leave or free not to answer any questions, as was Luna. 484 N.E.2d at 51. The Aynes opinion expressly noted, unlike in Luna's case, that the defendant was never informed he was free to leave or that he did not have to answer questions. 715 N.E.2d at 950.