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SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Certiorari to the Colorado Court of Appeals Case No. 08CA974	
ANDREW MUMFORD Petitioner v. THE PEOPLE OF THE STATE OF COLORADO Respondent	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender RYANN S. HARDMAN, #37922 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 10SC295

OPENING BRIEF

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☒ It contains 4,021 words.

☒ It does not exceed 30 pages.

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☒ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.___), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

Signature of attorney or party

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INTRODUCTION

Petitioner, Andrew Mumford, was the defendant in the trial court and will be referred to by name. Respondent, the State of Colorado, will be referred to as the prosecution or the State. The record on appeal consists of one CD. Citations reference the file name and PDF page number. The transcript dated March 19, 2007, actually occurred on March 19, 2008.

ISSUE ANNOUNCED BY THE COURT

Whether the court of appeals erred in determining that the defendant was not in custody for purposes of *Miranda.*

STATEMENT OF THE CASE

The prosecution charged Mr. Mumford with possession of one gram or less of a schedule II controlled substance.[1] (file p9-10) The date of the alleged offense was June 20, 2007. (file p9-10) A jury trial was held March 18-19, 2008. (3/18/08; 3/19/08) The jury returned a verdict finding Mr. Mumford guilty as charged. (sealed p32) Immediately following trial, the court sentenced Mr. Mumford to two years of supervised probation. (3/19/08, p171-72; file p43-44) The Court of Appeals affirmed the judgment on March 18, 2010. This Court granted Mr. Mumford's Petition for Writ of Certiorari in part on November 30, 2010.

[1] §18-18-405(1), (2.3)(a)(I), C.R.S. 2007 (a class six felony).

STATEMENT OF THE FACTS

A. The Hearing on the Motion to Suppress

Defense counsel filed a motion to suppress Mr. Mumford's statements made to Detective Sarkisian. (file p19-20) The motion alleged that Mr. Mumford's unwarned statements were the product of custodial interrogation and, thus, should be suppressed. (*Id.*)

At the hearing on the motion, Detective Sarkisian testified that three uniformed patrol officers and six members of the El Paso County Sheriff's Metro Vice Narcotics Unit arrived at Mr. Mumford's home to carry out a search warrant for Mr. Mumford's home and an arrest warrant for Christopher Timmerman, who had allegedly sold drugs from the home. (3/18/08, p7) Detective Sarkisian was assisting with the execution of the warrants. (*Id.* p9) He watched the patrol officers approach Mr. Mumford's residence while he waited in an undercover vehicle. (*Id.* p10) The patrol officers had their guns drawn as they approached the front door. (*Id.* p21)

The patrol officers removed Mr. Mumford, Timmerman, Denise Hartman, and Huery[2] from the home. (*Id.* p11) Police arrested Timmerman. (*Id.*) Timmerman told police that he had marijuana in his pocket and a quarter pound of marijuana in the house. (*Id.* p13) Hartman told police that she had needles and methamphetamine in

[2] Mr. Huery's first name does not appear in the record.

her purse. (*Id.*) Police recovered those items. (*Id.*) Officers had also observed Huery inside the home with marijuana in his hands. (*Id.* p13, 39) Police patted down Mr. Mumford and took his identification. (*Id.* p41-42) Officers testified that Timmerman, Hartman, and Huery were handcuffed but that Mr. Mumford was not. (*Id.* p24, 34, 38-39) However, Detective Sarkisian testified that it is standard practice to handcuff people removed from a home during a search. (*Id.* p22)

Mr. Mumford was not free to leave. (*Id.* p26, 40) Police directed Mr. Mumford and his friends to sit on the curb in front of the house. (*Id.* p27, 39) While police searched the home, Detective Sarkisian guarded Mr. Mumford and the others at the curb because they were going to be charged. (*Id.* p11-12, 26, 40)

Detective Sarkisian questioned Mr. Mumford while Mr. Mumford was sitting on the curb. (*Id.* p15) The detective wore street clothes, a black vest that said "sheriff," and a concealed gun. (*Id.* p14-15) He stated that he did not threaten or tell Mr. Mumford that he had to speak with him. (*Id.* p17) He also claimed that his tone was conversational, and he did not take out his gun. (*Id.*) Detective Sarkisian asked Mr. Mumford if he lived in the house and "if he had anything in the room or in the house that [he] need[ed] to know about because [the police] were there with a search warrant for drugs." (*Id.* p15, 31) Mr. Mumford said that he lived there and that "he had a small amount of personal-use cocaine in his nightstand drawer." (*Id.* p15-16)

Detective Sarkisian did not advise Mr. Mumford of his *Miranda* rights at that time. (*Id.* p32)

The detective entered the house and found a small amount of cocaine in the table. (*Id.*) Police handcuffed Mr. Mumford and put him in a patrol vehicle. (*Id.* p17-18) The substance tested positive for cocaine weighing 0.1 gram. (3/19/08, p134-35)

Mr. Mumford testified that he was outside on his porch when an officer approached and asked to speak with Timmerman. (*Id.* p51) Mr. Mumford brought Timmerman outside and started to return inside when the officer pulled his gun on him and asked another officer to detain him. (*Id.* p51-52, 60) The officer handcuffed Mr. Mumford, took him to sit on the curb, and took his identification. (*Id.* p52)

Detective Sarkisian told Mr. Mumford, "if you cooperate, you're not going to get in trouble. Tell us what you have; nothing bad is going to happen to you." (*Id.* p55) When Mr. Mumford spoke with Detective Sarkisian, he was still handcuffed. (*Id.* p54) Detective Sarkisian was frustrated, aggressive, and overpowering. (*Id.* p68) He spoke to the detective because he felt he had to do so. (*Id.* p55) Police did not advise him of his *Miranda* rights until he was taken to the police station. (*Id.*) He then refused to make any further statement. (*Id.* p56)

B. The Trial Court's Ruling

The trial court found that Mr. Mumford was subject to interrogation and that he was not advised of his *Miranda* rights. (*Id.* p92, 95) Thus, the pivotal issue was whether Mr. Mumford was in custody when he made the statements to police. (*Id.*)

The court found that the police did not have any information regarding Mr. Mumford but were at his home to arrest Timmerman and to search the home. (*Id.* p93) Two uniformed officers went to the front door, and they had "a weapon drawn at the outset of the encounter," "for a relatively brief time." (*Id.* p93, 99)

During the search and interrogation, Mr. Mumford was not free to leave. (*Id.* p93) Police told Mr. Mumford that he was not free to go and to sit at the curb, although he was not handcuffed. (*Id.* p94, 99) Police took his identification. (*Id.* p94) There were two people with him at the curb, and at least one officer was nearby. (*Id.* p95) Contrary to two police officers' testimonies, the court found that Mr. Mumford was not being guarded by police. (*Id.* p101) He was not physically restrained. (*Id.* p101) Detective Sarkisian's tone was conversational and his questions were "relatively innocuous." (*Id.* p100) However, he reassured Mr. Mumford "that if he cooperated things would go well for him." (*Id.* p96) The court noted, "This is, in fact, what persuaded the defendant to speak at the time . . . ." (*Id.* p100)

Based on these facts, the court concluded that Mr. Mumford was not in custody when he made the statements to Detective Sarkisian and that a *Miranda* advisement was not required. (*Id.* p101) Thus, the court denied Mr. Mumford's motion to suppress statements. (*Id.*)

The prosecution introduced Mr. Mumford's statements at trial. (3/19/08, p30-31) And the prosecutor emphasized the statements in her opening statement and closing argument. (*Id.* p21,153-57)

C. The Court of Appeals' Ruling

The majority opinion concluded that Mr. Mumford was not in custody during Detective Sarkisian's questioning. *The People of the State of Colorado v. Andrew Wayne Mumford*, 2010WL961644, *2-4 (Colo. App. No. 08CA0974, Mar. 18, 2010). The majority differentiates Fourth Amendment seizures from Fifth Amendment custody. *Id.* at *2. However, it ultimately observed "that the mere fact of temporary detention is legally insufficient by itself to create custody 'is not to say ... that Miranda rights can never be implicated during a valid investigatory stop.'" *Id.* (quoting *People v. Breidenbach*, 875 P.2d 879, 886 (Colo. 1994)). Thus, the issue of custody turns on the "totality of the circumstances." *Id.*

The dissenting opinion concluded that Mr. Mumford was in custody. *Id.* at *6-8 (Webb, J., dissenting). The dissent noted that the following circumstances indicated that Mr. Mumford was in custody:

> The following factors, here either found by the trial court or established by testimony of police officers at the suppression hearing, have been recognized by our supreme court as leading a reasonable person to consider himself in custody. When defendant encountered police officers at the door to his home:
>
> • At least one of the officers had his weapon drawn
>
> • After the officers entered, they handcuffed two other people in the home
>
> • Defendant was patted down
>
> • An officer told defendant he was not free to leave
>
> • Another officer then directed him to a curb in front of the home
>
> • One or two officers were nearby the curb
>
> • At least six officers were at the scene
>
> • An officer took defendant's identification and did not return it
>
> • Before questioning defendant, the detective told him that "if he cooperated things would go well for him."

Id. at *7 (internal citations omitted).

The dissent further explained, "'the defendant did hear some form of assurance' from the detective, which was 'what persuaded the defendant to speak at the time.'" *Id.* at *7. "[U]nless the police 'had grounds to arrest,' the detective lacked any legitimate basis for offering defendant 'some form of reassurance ... consistent with what the defendant testified,' i.e., 'if he cooperated things would go well for him.' Thus, from this statement a reasonable person would infer that he was in custody." *Id.* at *8.

SUMMARY OF THE ARGUMENT

The trial court erroneously admitted statements of Mr. Mumford that were obtained by law enforcement and were the result of custodial interrogation without the benefit of *Miranda* warnings, in violation of his state and federal constitutional right against self-incrimination. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18; *Miranda v. Arizona*, 384 U.S. 436 (1976). The erroneous admission of the statements was not harmless beyond a reasonable doubt and requires reversal of Mr. Mumford's conviction. *See Chapman v. California*, 386 U.S. 18 (1967).

ARGUMENT

Mr. Mumford Was Deprived of His Freedom to the Degree Associated with Formal Arrest When He Was Removed at Gunpoint from His Home, Told He Was Not Free to Leave, and Told that "If He Cooperated Things Would Go Well for Him," Among Other Circumstances.

A. Standard of Review

This issue is preserved. After a hearing, the trial court denied Mr. Mumford's motion to suppress statements that he made to police. (3/18/08, p101)

Whether an individual is in custody for *Miranda* purposes is a question of law that this Court reviews de novo. *Effland v. People*, 240 P.3d 868, 873-74 (Colo. 2010). Fifth Amendment violations are subject to constitutional harmless error review. *People v. Trujillo*, 49 P.3d 316, 326 (Colo. 2002); *see Chapman v. California*, 386 U.S. 18, 23-24 (1967). Reversal is required unless this Court is confident that the error was harmless beyond a reasonable doubt. *Trujillo*, 49 P.3d at 326; *see Chapman*, 386 U.S. at 23-24.

B. Argument

The United States and Colorado Constitutions guarantee every criminal suspect a right against self-incrimination. U.S. Const. amends. V, XIV; Colo. Const. art. II, §18; *People v. Matheny*, 46 P.3d 453, 462 (Colo. 2002). To protect that right, "*Miranda* prohibits the prosecution from introducing in its case-in-chief any statement, whether inculpatory or exculpatory, procured by custodial interrogation, unless the police

precede their interrogation with certain warnings." *Matheny*, 46 P.3d at 462; *see Miranda v. Arizona*, 384 U.S. 436 (1976).

Police may temporarily detain a person during the execution of a search warrant for his residence. *Michigan v. Summers*, 452 U.S. 692, 704-05 (1981). However, such detentions may become custodial for purposes of *Miranda*. *See People v. Breidenbach*, 875 P.2d 879, 886 (Colo. 1994) ("This is not to say . . . that *Miranda* rights can never be implicated during a valid investigatory stop. Rather, a court must examine the facts and circumstances surrounding the encounter in order to determine whether *Miranda* applies."). This Court applies a totality of circumstances test in such situations to determine whether the person is in custody. *See id.*; *see also People v. Holt*, 233 P.3d 1194, 1197-99 (Colo. 2010) (applying totality of circumstances test); *People v. Moore*, 900 P.2d 66, 71-73 (Colo. 1995) (same).

A suspect is in custody when "under the totality of circumstances, a reasonable person in the defendant's position would consider himself to be deprived of his freedom of action to the degree associated with a formal arrest." *Matheny*, 46 P.3d at 468. The court should consider the following factors:

> (1) the time, place, and purpose of the encounter; (2) the persons present during the interrogation; (3) the words spoken by the officer to the defendant; (4) the officer's tone of voice and general demeanor; (5) the length and mood of the interrogation; (6) whether any limitation of movement or other form of restraint was placed on the

> defendant during the interrogation; (7) the officer's response to any questions asked by the defendant; (8) whether directions were given to the defendant during the interrogation; and (9) the defendant's verbal or nonverbal response to such directions.

Id. at 465-66. However, the list of factors is not exhaustive, and no single factor is determinative. *Id.* at 466.

Moreover, the court may consider whether the police told the defendant he was free to leave. *People v. Cowart*, 2010WL5093882, *3 (Colo. No. 10SA214, Dec. 13, 2010); *Holt*, 233 P.3d at 1198. And the court may consider whether police used deceptive ploys or strong-arm tactics during the interrogation. *U.S. v. Griffin*, 922 F.2d 1343, 1351 (8th Cir. 1990) (such tactics are more generally associated with formal arrest than with an informal encounter with police).

In *People v. Moore*, police were executing a search warrant in connection with an investigation of drug dealing at Moore's home. 900 P.2d at 68, 72. There were six armed police officers inside. *Id.* at 72-73. The officers were not in uniform, but they wore jackets that said "police." *Id.* at 72. When Moore entered his home, three officers drew their guns and pointed them at him. *Id.* Police told him he was not under arrest and that he was free to leave. *Id.* Police told him to sit on a recliner if he was going to stay. *Id.* He was not handcuffed, but an officer stood five feet away from him. *Id.* An officer asked Moore what he would find in Moore's wallet, and

Moore said "three eight balls." *Id.* Based on these facts, this Court determined that Moore was in custody and affirmed the trial court's order suppressing Moore's statements. *Id.*

Similarly, in *People v. Holt*, this Court determined that Holt was in custody after six to nine armed officers arrived at his residence to carry out a search warrant. 233 P.3d at 1195, 1197. They handcuffed Holt and "stood near him as security." *Id.* at 1195-96, 1197. The officers then removed the handcuffs, took him from his home, and questioned him while he sat on the floor of a police van with his legs hanging outside the door. *Id.* at 1196. The officers told Holt that he was not under arrest, but they did not tell him that he was free to leave. *Id.* at 1196, 1198. Holt knew the officers were conducting a search warrant and were likely to discover incriminating evidence that would lead to his arrest. *Id.* at 1198. *See also People v. Polander*, 41 P.3d 698, 701, 705 (Colo. 2001) (finding custody where, during an investigatory stop, Polander was patted down and instructed to sit on curb, but was not handcuffed, while police searched vehicle; it was apparent that police had grounds to arrest the occupants of the vehicle and Polander "had every reason to believe she would not be briefly detained and then released"); *People in Int. of D.F.L.*, 931 P.2d 448, (Colo. 1997) (no dispute regarding custody where juvenile was handcuffed in living room and "not free to leave" during execution of search warrant).

Here, Mr. Mumford was present while nine armed officers were searching his home. (3/18/08, p9, 93-94) When the first officer encountered Mr. Mumford, he pointed his gun at him. (*Id.* p99) Police confirmed that the occupants of the house possessed drugs. (*Id.* p13, 39) They handcuffed the three other people who were with Mr. Mumford. (*Id.* p24, 34, 38-39) Police patted Mr. Mumford down, took his identification, and told him to sit on the curb while they conducted the search. (*Id.* p41, 94) Officers told Mr. Mumford that he was not free to leave. (*Id.* p34, 40, 47) Detective Sarkisian and other officers stood near Mr. Mumford at the curb while the police searched his home. (*Id.* p15, 26, 40) Officer Huston testified that Mr. Mumford was "under guard" because the occupants of the home were going to be charged. (*Id.* p40)[3]

Detective Sarkisian told Mr. Mumford, "[I]f you cooperate, you're not going to get in trouble. Tell us what you have; nothing bad is going to happen to you." (*Id.* p55) As noted by the dissent in the Court of Appeals' decision, "unless the police 'had grounds to arrest,' the detective lacked any legitimate basis for offering defendant 'some form of reassurance ... consistent with what the defendant testified,' i.e., 'if he cooperated things would go well for him.' Thus, from this statement a reasonable

[3] The trial court's finding that "there doesn't appear to be close guard" is clearly erroneous. (See 3/18/08, p15, 26, 40, 101)

person would infer that he was in custody." *Mumford*, 2010WL961644 at *8 (Webb, J., dissenting) (citing *People v. Sandoval*, 218 P.3d 307, 309-10 (Colo. 2009) (reasonable person "would feel restrained to a degree associated with formal arrest" because while questioning the defendant at a hospital, police told him that if he did not come voluntarily to the police station, he would be brought there involuntarily); *United States v. Czichray*, 378 F.3d 822, 833 (8th Cir. 2004) (Arnold, J., dissenting) (insinuation that agents would investigate suspect's elderly father if he did not cooperate supported inference that he was in custody, under the "whether agents used strong-arm tactics or deceptive stratagems" factor of *U.S. v. Griffin*, 922 F.2d at 1349); *State v. Coen*, 125 P.3d 761, 767 (Or. Ct. App. 2005) ("[A]t the point where the trooper told defendant he would be arrested if he did not cooperate without the benefit of a lawyer's advice-the nature of the questioning created an environment in which a reasonable person would have felt compelled to answer the trooper's questions.")).

Even if Mr. Mumford was not handcuffed, the defendants in *Moore* and *Polander* were similarly not handcuffed. And, in *Holt*, police removed Holt's handcuffs before questioning him. As in *Moore* and *Polander*, police limited Mr. Mumford's movements by instructing him to remain in a certain location and by guarding him at the curb. And, unlike *Moore*, police specifically told Mr. Mumford that he was not free to leave.

(*Id.* p15, 26, 40, 94) *See Moore*, 900 P.2d at 72 (police told Moore that he was free to leave); *see also Holt*, 233 P.3d at 1198 ("no officer told Holt that he was free to leave").

Moreover, as in *Holt*, Mr. Mumford knew the officers were executing a search warrant for his home and that they were likely to discover incriminating evidence that would lead to his arrest. *See Holt*, 233 P.3d at 1198. And, similar to *Polander*, police arrested Mr. Mumford's friends and found drugs belonging to them. *See Polander*, 41 P.3d at 701. Officer Huston testified that police were detaining all of the occupants because "[w]e knew there was marijuana in there." (3/18/08, p47)

The Court of Appeals' reliance on *Maryland v. Shatzer*, 559 U.S. ----, 130 S.Ct. 1213 (2010) and *Michigan v. Summers*, 452 U.S. 692 (1981) is misplaced. As applicable to this case, *Shatzer* merely reaffirms the general rule that a totality of circumstances test controls the custody determination. *Shatzer*, 130 S.Ct. at 1224. And *Summers* does not involve *Miranda* or the custody determination at all. *See U.S. v. Kim*, 292 F.3d 969, 976 (9th Cir. 2002) (a *Miranda*/custody case distinguishing *Summers* because "whether an individual detained during the execution of a search warrant has been unreasonably seized for Fourth Amendment purposes and whether that individual is 'in custody' for *Miranda* purposes are two different issues").

Summers holds that police may temporarily detain a person during the execution of a search warrant. *Summers*, 452 U.S. at 704-05 (officers asked Summers to re-enter

his residence and remain inside while they searched). Indeed, the court stated, "the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." *Id.* at 701-02. The quote relied on by the Court of Appeals is taken out of context. The United States Supreme Court stated, "[i]n sharp contrast to the custodial interrogation in *Dunaway* [*v. New York*, 442 U.S. 200 (1979) (which occurred at a police station)], the detention of *this respondent* was 'substantially less intrusive' than an arrest." *Id.* at 702 (emphasis added). This quote again merely indicates that a totality of circumstances test would apply in a custody determination. *Summers* does not stand for the proposition, as the Court of Appeals suggests, that detaining a home occupant during execution of search warrant necessarily falls short of custody. In the present case, the police did exploit the detention in order to gain more information, resulting in the custodial interrogation of Mr. Mumford.

The Court of Appeals also relied on cases that are distinguishable from the present case. In *United States v. Bennett*, 329 F.3d 769, 774 (10th Cir. 2003), the officers used handcuffs and guns because they believed it was necessary for their safety. Bennett was known to carry a gun, and he disobeyed police orders when the arrived at his home. *Id.* Accordingly, the court determined that "[the] use of firearms and

handcuffs did not transform Mr. Bennett's detention into an arrest." *Id.* However, Mr. Mumford was not known to be dangerous, and he complied with police orders to produce Timmerman. (3/18/08, p93, 98)

Moreover, the Court of Appeals relied on *United States v. Davis*, 530 F.3d 1069 (9th Cir. 2008). In its custody analysis, the court in *Davis* exclusively focused on the type of questions asked of Davis.[4] It did not assess the totality of circumstances. Indeed, *Davis* involved a "casual" and "low key" encounter between police and Davis. It did not involve circumstances similar to those at issue here, where Mr. Mumford was removed from his home at gunpoint, directed to remain on the curb, guarded by police, and persuaded to incriminate himself by a promise that "if he cooperated things would go well for him."

The totality of the circumstances in this case supports a conclusion that a reasonable person in Mr. Mumford's position would consider himself to be deprived of his freedom of action to the degree associated with a formal arrest. Accordingly, the trial court misapplied the applicable facts to the controlling legal standard and erred by concluding that Mr. Mumford was not in custody when he made the

[4] The court in *Davis* focused on the type of questions asked of Davis, relying on *U.S. v. Kim*, 292 F.3d at 976. However, the court in *Kim* correctly reviewed the totality of circumstances and, indeed, differentiated types of questioning only in distinguishing *Michigan v. Summers*. *Kim*, 292 F.3d at 976.

unwarned statements to police and by failing to determine that the statements were obtained in violation of *Miranda*. *See Polander*, 41 P.3d at 701; *Moore*, 900 P.2d at 73.

CONCLUSION

Because Mr. Mumford's statements were obtained in violation of *Miranda* and his state and federal constitutional rights, and because their admission cannot be deemed harmless beyond a reasonable doubt, this Court should reverse Mr. Mumford's conviction and remand the case for a new trial with instructions that the prosecution be barred from using the challenged statements in its case in chief.

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CERTIFICATE OF SERVICE

I certify that, on February 1, 2011, a copy of this Opening Brief was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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