Affirmed and Opinion filed April 6, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00694-CR

ASHLEY TODD HARLAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 5
Harris County, Texas
Trial Court Cause No. 97-34439

O P I N I O N

Appellant, Ashley Todd Harland, was convicted by the jury of driving while intoxicated and sentenced to punishment at 180 days in the Harris County jail, probated for one year. He raises one point of error on appeal, complaining that the trial court erred in overruling his motion to suppress his custodial statements made without benefit of *Miranda* warnings. We affirm.

Viewed in the light most favorable to the trial court's overruling of the motion to suppress, the record reflects that on August 16, 1997, appellant was stopped by Houston police officer Eric Crawford for running a stop sign and making a turn without signaling.

When Officer Crawford approached appellant, he noticed a strong odor of alcohol. When he asked appellant if he had been drinking, appellant replied "A whole bunch" and admitted that he was drunk. The officer asked appellant to get out of his car for field sobriety tests, at which point appellant stated "Listen, I know I'm drunk. I'm headed to La Strada. If you'll just follow me to La Strada, I can get a ride home." Officer Crawford declined. Appellant subsequently failed all three field sobriety tests, and was arrested for suspicion of driving while intoxicated.

In his sole point of error, appellant alleges the trial court erred in admitting into evidence these extrajudicial statements made by appellant, as he had been in custody at the time of the statements and no *Miranda* warnings had been given to him beforehand. Appellant's position turns on whether he was in custody at the time the statements were made.

As a general rule, appellate courts should afford almost total deference to a trial court's determination of the historical facts that the record supports, particularly when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We afford the same amount of deference to trial court's rulings on "application of law to facts questions," which are also known as "mixed questions of law and fact," if resolution of those ultimate questions turns on an evaluation of credibility and demeanor. We may, however, review on a *de novo* basis mixed questions of law and fact not falling within this category. *Id*. Absent a showing of an abuse of discretion, this Court will not disturb the trial court's ruling. *See Hutto v. State*, 977 S.W.2d 855, 857 (Tex. App. – Houston [14th Dist.] 1998, no pet.).

In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate question remains simply whether there was a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520 (1983) (per curiam). The United States Supreme Court has made it clear that the initial

determination of custody depends on the objective circumstances of the interrogation, not on the subjective views held by either side to the interrogation. *Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 1529 (1994) (per curiam). Under *Stansbury*, *Miranda* warnings are not required until the officer has objectively created a custodial environment and has communicated to the accused his intention to effectuate custody to the accused himself. Under facts substantially similar to those here involved, the Supreme Court in *Stansbury* held that the motorist was not in custody for purposes of *Miranda*, as the officer had not communicated anything to the motorist that created a custodial environment.

This identical situation, and the questions asked of appellant by the officer, were held as not creating a custodial situation in *Abernathy v. State*, 963 S.W.2d 822 (Tex. App. – San Antonio 1998, pet. ref'd). In *Abernathy*, the officer stopped the defendant for speeding, and smelled an odor of alcohol when the defendant opened his window. The officer requested the defendant to get out of his car, and asked whether he had had anything to drink. The defendant answered in the affirmative. The defendant failed field sobriety tests and was placed under arrest. In affirming the DWI conviction, the appellate court upheld denial of the motion to suppress and admission of defendant's statements, stating there had been no custodial interrogation under the guidelines set out in *Stansbury* and *Beheler*.

While appellant does not cite *Stansbury*, *Beheler* or *Abernathy* in his brief, and consequently does not give us the benefit of any argument as to why these controlling cases should not apply, he does argue that by not agreeing to follow appellant to the restaurant, Officer Crawford objectively manifested a custodial environment. We disagree. The officer's refusal to follow appellant in his vehicle would not lead a reasonable person in appellant's position to believe he was not free to leave. *See Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151 (1984). The communications complained of by appellant did not proceed beyond the investigatory stage, and there was no custodial interrogation requiring *Miranda* warnings to be given. Appellant's point of error is overruled.

The judgment below is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed April 6, 2000.

Panel consists of Justices Sears, Draughn and Hutson-Dunn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Joe L. Draughn and D. Camille Hutson-Dunn sitting by assignment.