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distinguishes this case from *People v. Green*[16] and *People v Kerrigan*,[17] on which Sharp relies. It is closer to the language of search warrants which were held to authorize an off-premises search of named persons in *People v Carter*,[18] *People v. Velez*,[19] and *People v. Gonzalez*.[20] We conclude that the search warrant was personal to Sharp and authorized a search of his person on or off the premises identified in the warrant.

## CONCLUSION

For the reasons discussed, the district court did not err in denying Sharp's motion to suppress. The evidence which was the subject of that motion was properly received and established Sharp's guilt of the offense charged. We affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

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[16] *People v. Green*, 33 N.Y.2d 496, 310 N.E.2d 533, 354 N.Y.S.2d 933 (1974).

[17] *People v Kerrigan*, 49 A.D.2d 857, 374 N.Y.S.2d 22 (1975).

[18] *People v Carter*, 56 A.D.2d 948, 392 N.Y.S.2d 712 (1977).

[19] *People v. Velez*, 204 Ill. App. 3d 318, 562 N.E.2d 247, 149 Ill. Dec. 783 (1990).

[20] *People v. Gonzalez*, 316 Ill. App. 3d 354, 736 N.E.2d 157, 249 Ill. Dec. 315 (2000).

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STATE OF NEBRASKA, APPELLEE, V.
MILLARD W. LANDIS, APPELLANT.
794 N.W.2d 151

Filed February 18, 2011. No. S-09-1313.

1. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.

2. **Confessions.** It is a mixed question of law and fact whether a statement was voluntarily made and whether a custodial interrogation has occurred.
3. **Miranda Rights.** The safeguards provided by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
4. **Miranda Rights: Arrests: Words and Phrases.** A person is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest.
5. **Miranda Rights: Investigative Stops.** Persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
6. **Miranda Rights: Police Officers and Sheriffs: Investigative Stops.** When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver in custody and entitled to *Miranda* warnings.
7. **Miranda Rights: Arrests.** It is where a suspect is detained only to an extent analogous to an arrest that *Miranda* warnings are required.
8. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

John S. Berry, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, Nathan A. Liss, and James D. Smith for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

## NATURE OF CASE

Millard W. Landis, appellant, was convicted in the district court for Lancaster County of possession of a controlled substance (marijuana) with intent to deliver. He appealed to the Nebraska Court of Appeals. The Court of Appeals determined that Landis was in custody during questioning by state troopers and that because the troopers failed to give Landis *Miranda*

warnings, the evidence of the statement and physical evidence obtained as a result of such questioning should have been suppressed. The Court of Appeals reversed. We granted the State's petition for further review. We reverse the decision of the Court of Appeals and remand the cause with directions to affirm the conviction.

## STATEMENT OF FACTS

On the afternoon of November 18, 2008, a state trooper stopped Landis for speeding on Interstate 80. The trooper, Derek Kermoade, asked Landis to follow him to his cruiser where he would issue a warning. Landis followed Kermoade and sat in the front passenger seat. In response to questioning, Landis told Kermoade that he was traveling from New Mexico to Pittsburgh, Pennsylvania. Kermoade learned from a license plate check that the plates on Landis' car were issued for a different vehicle. Landis explained that he had recently traded cars and had been told by Pennsylvania motor vehicle officials that he could use the plates on the new car. Kermoade asked Landis whether he had ever been arrested, and Landis admitted he had been arrested for smoking marijuana in the 1970's.

Christopher Bigsby, another state trooper, had been monitoring traffic and conducting speed enforcement in a separate vehicle in the same area as Kermoade. Bigsby saw that Kermoade had stopped Landis, and Bigsby activated his scanner to listen in on the traffic stop. Bigsby learned that a criminal history check Kermoade had requested showed that Landis had a criminal history related to drugs. Bigsby made an additional inquiry and learned that Landis had been arrested for drug distribution in 2002. Knowing from listening in on the traffic stop that Landis was not being fully truthful about his criminal history, Bigsby approached Kermoade and told him that one of the tires on his cruiser was low on air as a ruse to get Kermoade out of the cruiser so that Bigsby could tell Kermoade about Landis' additional criminal history. After conveying the information to Kermoade outside Landis' hearing, Bigsby returned to his vehicle and continued to monitor the stop through his scanner.

Kermoade returned to his cruiser and asked Landis whether he had been arrested in 2002. Landis denied that he had been arrested in 2002. Kermoade gave Landis a warning for speeding and returned his registration and license to him approximately 20 minutes after the stop had been initiated. As Landis was starting to leave the cruiser, Kermoade asked whether he could ask a few more questions. Landis agreed to continue the conversation, sat back inside the cruiser, and shut the door. Kermoade asked Landis whether there was anything in his car that should not be there, such as large amounts of marijuana, methamphetamine, or heroin, or large amounts of cash or weapons. Landis denied that any of those things were in the car. Kermoade then asked whether he could search Landis' car. Landis said yes but immediately asked why Kermoade wanted to search the car. Kermoade said he had a feeling there was something in the car that should not be there.

Bigsby, who had been monitoring the conversation on his scanner, approached Kermoade's cruiser and stood outside the passenger door by Landis. Bigsby joined the conversation and told Landis that possession of "personal use" marijuana was just a citation and that after being cited, Landis could be on his way. Bigsby and Kermoade continued to ask Landis whether they could search his vehicle, and Bigsby repeated that possession of "personal use" marijuana would be only a citation. Shortly after Bigsby joined the conversation, Landis admitted to having marijuana on his person. Bigsby told Landis to take it out, and Landis took a cigarette holder containing five marijuana joints out of his pocket and handed it to Kermoade.

The troopers determined that Landis' statement that he possessed marijuana and his possession of the five marijuana joints, combined with other factors, gave them probable cause to search his vehicle. The troopers put Landis into the back seat of Kermoade's cruiser and went to search Landis' car. Upon opening the hatchback of the car, the troopers quickly found three bags containing bales of marijuana under the canvas cargo cover. The bags were later determined to contain approximately 125 pounds of marijuana. The troopers placed Landis under arrest for possession of marijuana with intent to

deliver. Landis was not given a *Miranda* warning at any time before the troopers searched his car.

Prior to trial, Landis moved to suppress evidence obtained as a result of the traffic stop, the troopers' questioning of Landis, and the search of his car. After a hearing that included testimony by Kermoade and Bigsby and the admission of video recordings of the stop from both troopers' cameras, the district court for Lancaster County denied the motion to suppress.

The court first concluded that Kermoade had probable cause to stop Landis for speeding. The court next considered whether Landis was illegally detained when Kermoade continued questioning him after giving him the warning for speeding. The court determined that Landis was not "in custody" during the questioning by Kermoade alone. The court noted that after Bigsby joined the questioning, "[t]here was a demonstrable difference in the tenor and intensity of the questioning" and "a palpable change in the circumstances." The court found, however, that the troopers "did not apply 'strong-arm' tactics" but that "deceptive stratagems were used during questioning." Although the court noted that such factors were "very persuasive that [Landis] was in custody," the court ultimately concluded that Landis "was not in custody at the time he produced the marijuana joints" and noted in particular "the brief time Bigsby was involved in the questioning." The court noted that Landis admitted to possessing marijuana "[w]ithin one and three-quarter minutes of Bigsby joining the questioning."

The court next considered whether the warrantless search of Landis' car was proper. The court concluded that the troopers had probable cause to search the car and cited factors including Landis' possession of five marijuana joints on his person and Landis' having lied about his criminal history, which included drug-related arrests.

The court also considered evidence from the suppression hearing for purposes of *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The court found that there was no "coercion or force of any nature used by the troopers during their contact during the stop" and concluded that Landis "freely, voluntarily, and knowingly made his statements" and that the statements should not be suppressed under *Denno*.

In a stipulated bench trial, the court received as evidence videos from Kermoade's and Bigsby's cruisers, Kermoade's written report, a forensic report on the testing of the marijuana found in Landis' car, and the transcript of the suppression hearing. Landis renewed, and the court overruled, his motion to suppress and objections made at the suppression hearing. The court found Landis guilty of possession of a controlled substance (marijuana) with intent to deliver. On December 17, 2009, the court overruled Landis' subsequent motion for new trial in which he asserted that the court erred when it overruled his motion to suppress and that there was not sufficient evidence to support the verdict. The court sentenced Landis to imprisonment for 2 to 4 years.

Landis appealed his conviction to the Court of Appeals and asserted, inter alia, that the district court erred when it overruled his motion to suppress. Landis did not complain of the initial stop or Kermoade's initial questioning. Instead, Landis asserted that an illegal stop and search began after Bigsby joined in the questioning and the troopers asked to search Landis' vehicle. Landis claimed that the district court erred when it found that *Miranda* warnings were not required based on its determination that he was not in custody.

In a memorandum opinion filed June 29, 2010, the Court of Appeals reviewed the circumstances of the questioning by the two troopers and concluded that Landis was in custody. The Court of Appeals stated that although Landis had been told that he was free to go, he was "'sandwiched'" between the two troopers and the only way he could have left was to ask Bigsby to step out of the way. The Court of Appeals further noted that although Landis voluntarily agreed to further questioning after Kermoade gave him the warning for speeding, the questioning in which both troopers participated was "assertive and police dominated, reaching such a level that a reasonable person would have felt pressured to admit guilt." Such questioning included assertions by both troopers that they believed Landis had something illegal in his car and repeated statements that if he admitted to possession of marijuana, he would just be given a citation and sent on his way. The Court of

Appeals characterized the questioning as "accusatory," though not threatening.

Considering these factors, the Court of Appeals concluded that "a reasonable person would not have felt free to terminate the interrogation and leave" and that therefore "Landis was 'in custody' during the questioning by Troopers Kermoade and Bigsby and *Miranda* warnings were required." Because *Miranda* warnings were not given, the Court of Appeals concluded that the district court should have granted Landis' motion to suppress his statement to the troopers that he had marijuana on his person. The Court of Appeals further concluded that without such statement, the troopers did not have probable cause to search Landis' vehicle, and that therefore the physical evidence obtained during and after the questioning, i.e., the five marijuana joints Landis took out of his pocket and the 125 pounds of marijuana found in the search of the car, should have been suppressed. The Court of Appeals therefore reversed Landis' conviction. After concluding that the evidence, including the erroneously admitted evidence, supported a guilty verdict, and relying on *Lockhart v. Nelson*, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), the Court of Appeals reversed, and remanded for a new trial.

The State filed a petition for further review, which we granted.

## ASSIGNMENTS OF ERROR

The State claims that the Court of Appeals erred when it (1) concluded that Landis was "in custody" during the questioning by the two troopers, (2) applied the exclusionary rule to suppress the physical evidence seized as a result of Landis' statements, and (3) reversed Landis' conviction. The State specifically asked this court to consider the application of *United States v. Patane*, 542 U.S. 630, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004) (generally holding that physical evidence need not necessarily be excluded following a *Miranda* violation), to this case in the event this court determined that Landis was in custody and his statements should be suppressed. Given our disposition of this case, we do not consider *Patane*.

## STANDARDS OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination. *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

[2] It is a mixed question of law and fact whether a statement was voluntarily made and whether a custodial interrogation has occurred. These questions involve the application of the facts surrounding the statement to the constitutional rubric mandated by the U.S. Supreme Court, and are reviewed under the two-point standard of review set forth above. See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

## ANALYSIS

### *The Court of Appeals Erred When It Determined That Landis Was in Custody When He Was Questioned by Two Troopers.*

The State claims that the Court of Appeals erred when it concluded that Landis was "in custody" during the questioning by the two troopers. We agree, and we therefore conclude that the Court of Appeals erred when it concluded that because *Miranda* warnings were not given, the district court should have granted Landis' motion to suppress his statement to the troopers that he had marijuana on his person, and further erred when it concluded that the physical evidence obtained during and after the questioning should have been suppressed.

In his motion to suppress, Landis asserted, inter alia, that he was illegally detained during the questioning by Kermoade and Bigsby. The district court acknowledged that there was a "demonstrable difference in the tenor and intensity of the questioning when Bigsby joined the discussion." However, the court also noted that Landis had earlier been told that he was free to terminate the interview and to leave. The court further found that the duration of the interrogation by both troopers

was "quite short" and that Landis admitted he possessed marijuana "[w]ithin one and three-quarter minutes of Bigsby joining the questioning."

The Court of Appeals disagreed with the district court's ruling and concluded that Landis was in custody during the questioning by both troopers. The Court of Appeals acknowledged that the time of questioning by both troopers was short, but determined that "the questioning was aggressive and dominated by the presence of two officers," one of whom stood outside the door by which Landis was sitting. The Court of Appeals found that a reasonable person would not have felt free to terminate the interrogation and leave, and concluded that Landis was in custody.

[3,4] The safeguards provided by *Miranda* come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010). *Miranda* warnings are required only when there has been such a restriction on one's freedom as to render one "in custody." *Id.* A person is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest. *Id.*

[5] With regard to the "in custody" determination, the State notes that the U.S. Supreme Court and this court have held that persons temporarily detained pursuant to an investigatory traffic stop are not "in custody" for purposes of *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). The State argues that such precedent is more applicable to the present case than *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009), upon which the Court of Appeals relied in its memorandum opinion. The State notes that *Rogers* involved a "classic police station interrogation" wherein the defendant experienced "2 hours of isolation in a police-dominated atmosphere, physically blocked from the exit, and subjected to aggressive accusatorial interrogation in which [the defendant] was confronted with substantial evidence to prove her guilty of a crime." 277 Neb. at 63, 760 N.W.2d at 57. The State argues that the circumstances of *Rogers* are significantly different

from the present case involving a vehicle stop in which Landis was subjected to a few minutes of questioning to which he voluntarily consented. Thus, the State suggests that the Court of Appeals' application of the *Rogers* analysis was misguided and that this case is controlled by the cases holding that a defendant is not "in custody" during an investigatory traffic stop. The State also takes issue with the Court of Appeals' characterization of the second trooper "blocking" Landis' exit when the trooper was standing at the door in order to participate in the questioning.

[6,7] As the State notes, we have held that an individual temporarily detained pursuant to an investigatory traffic stop is not in custody for purposes of *Miranda*. *State v. Casillas, supra*; *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000). Further, *Miranda* warnings are not required for general on-the-scene questioning as to facts surrounding a crime. *Dallman, supra*. When a person is detained pursuant to a traffic stop, there must be some further action or treatment by the police to render the driver in custody and entitled to *Miranda* warnings. *Id*. We stated in *Dallmann* that although courts have indicated that *Miranda* warnings may be required under some circumstances before a suspect is actually arrested, where police officers use no coercion or threat of force and any continued detention is at the consent of the suspect, *Miranda* warnings are not required. We concluded that it is where a suspect is detained only to an extent analogous to an arrest that *Miranda* warnings are required. *Id*.

In this respect, we have noted that neither a brief, voluntary pat-down search nor detaining an individual during the consensual search of his or her vehicle generally constitutes custody for purposes of *Miranda*. See *Dallmann, supra*. We have further held that temporarily detaining a driver to submit to routine field sobriety tests does not ordinarily rise to the level of custody so as to implicate *Miranda*. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

With these standards in mind, and given the district court's factual findings which are not clearly erroneous, we conclude that in the present case, Landis was not "in custody" when he was questioned by the troopers. Landis' interaction with

Kermoade could be characterized as being temporarily detained pursuant to an investigatory traffic stop. Before Landis could be considered to be in custody, some further action or treatment by the troopers that would raise Landis' detention to an extent analogous to an arrest was required.

We note two factors that distinguish the questioning in this case from a routine traffic stop—Landis was seated in the trooper's cruiser, and Landis was questioned by two troopers while he was physically located between the two. Landis' presence in the trooper's cruiser did not raise the interaction to the extent analogous to an arrest, because there is no indication that Kermoade used force or threats to get Landis to enter the cruiser or to remain there. After the initial purpose of the stop was completed, Landis voluntarily stayed in the cruiser for further questioning at Kermoade's request.

The presence of the second officer also did not raise the interaction to the level of an arrest. In concluding that the defendant in *Dallmann* was not in custody, we noted that although there were multiple police officers present, the officers used no threats of force or coercion to obtain the defendant's consent to a search, and that nothing in the record indicated that the defendant believed he was under arrest or that he was not free to leave. The presence of the second officer does not require the conclusion that Landis was under arrest or that he was not free to leave.

Landis voluntarily stayed with Kermoade for additional questioning. When Bigsby joined the conversation, the questioning became more assertive but did not rise to the level of threats of force or coercion. Although Landis was physically located between the two officers and it would have been difficult for him to leave without asking Bigsby to move, there is no indication that he attempted to leave or that the officers resisted any effort to leave. Furthermore, Landis was located between the two officers for less than 2 minutes when he made the statements he sought to suppress. Given the short duration of the questioning and other factors, we do not find this to be a situation where a reasonable person in Landis' circumstances would have concluded that he was not free to leave or was forced or threatened into confessing that he possessed marijuana.

We conclude the Court of Appeals erred when it concluded that Landis was "in custody" and that his statement that he possessed marijuana should have been suppressed due to a lack of *Miranda* warnings. The Court of Appeals further erred when it concluded that the physical evidence should have been suppressed because it was obtained as a result of such statement.

*The Court of Appeals Erred When It Reversed Landis' Conviction.*

The State also claims on further review that the Court of Appeals erred when it reversed Landis' conviction. Before concluding that the Court of Appeals erred when it reversed Landis' conviction, we consider Landis' other assignments of error which the Court of Appeals did not reach because it disposed of the appeal based on its determination that Landis was "in custody" and that therefore his statement and the evidence obtained as a result of his statement should have been suppressed.

In addition to the assignment of error upon which the Court of Appeals resolved the appeal, Landis asserted the district court erred when it determined that his statement was voluntary and that the troopers had probable cause to search Landis' vehicle. Landis also claimed that there was not sufficient evidence to support his conviction.

[8] The district court found that Landis' statement that he possessed marijuana was voluntary and need not be suppressed under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The court found that the record did not "reveal any coercion or force of any nature used by the troopers." We have noted that "'coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment.'" *State v. Bormann*, 279 Neb. 320, 332-33, 777 N.W.2d 829, 839 (2010) (quoting *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)). Based on factors similar to those in our analysis of whether Landis was "in custody," we conclude that the district court did not err when it concluded that Landis' statement that he possessed marijuana was voluntary.

Landis' assignments of error regarding probable cause to search his vehicle and sufficiency of the evidence both hinged on his being successful in his assertion that his statement that he possessed marijuana should be suppressed. Landis argued that without the statement, the troopers did not have probable cause to search his vehicle, and that without the evidence obtained from the search of his vehicle, there was not sufficient evidence to sustain his conviction. Because we have concluded that the statement need not be suppressed, it logically follows, and we further conclude, that the statement that he possessed marijuana and other factors combined to give the troopers probable cause to search Landis' vehicle and that the evidence obtained as a result of the troopers' questioning and the search of the vehicle was sufficient to support Landis' conviction.

Landis' additional assignments of error are without merit. We therefore conclude that the Court of Appeals erred when it reversed Landis' conviction.

## CONCLUSION

We conclude that Landis was not in custody during the questioning by the troopers and that therefore the Court of Appeals erred when it determined that Landis' statement during the questioning should have been suppressed for lack of *Miranda* warnings. We further conclude that Landis' other assignments of error were without merit and that the Court of Appeals erred when it reversed Landis' conviction. We reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to affirm Landis' conviction and sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.