

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF TROY,
Plaintiff-Appellee,

UNPUBLISHED
September 27, 2012

v

JOHN VINCENT HAGGARTY,
Defendant-Appellant.

No. 305646
Oakland Circuit Court
LC No. 2011-009386-AR

Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order denying his application for leave to appeal the district court's denial of his motion to dismiss a charge of operating while intoxicated, § 5.15(1) of Chapter 106 of the Troy City Code, and refusal to suppress statements he made on the basis he was not given warnings required by *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We affirm.

I. MOTION TO DISMISS

First, defendant contends that he was not operating a motor vehicle when the police found him because his vehicle was in a position of safety.¹ We conclude that although defendant was not operating a motor vehicle at the time the police found him, there was sufficient circumstantial evidence for the arresting officer to have reasonable cause to believe that defendant had operated a motor vehicle while intoxicated before the police arrived.

We review questions of statutory interpretation de novo. *City of Plymouth v Longeway*, 296 Mich App 1, 5; ___ NW2d ___ (2012). We review the trial court's ruling on a motion to dismiss for an abuse of discretion. *People v Stephen*, 262 Mich App 213, 218; 685 NW2d 309 (2004). The trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

¹ In his motion to dismiss, defendant argued that the officer lacked reasonable cause to believe a misdemeanor had been committed and that defendant committed it.

Defendant was charged with operating while intoxicated under § 5.15(1) of Chapter 106 of the Troy City Code. The citation also lists MCL 257.625(1), which is substantially similar. Accordingly, we rely on cases interpreting MCL 257.625(1) to determine whether the police had reasonable cause to arrest defendant for operating a vehicle while intoxicated under § 5.15(1).

The Motor Vehicle Code defines “operate” or “operating” as “being in actual physical control of a vehicle” whether licensed or not. MCL 257.35a. Thus, the plain language of the statute requires that for a person to be “operating” a vehicle the person’s actions must establish “actual physical control” of the vehicle. *Longeway*, 296 Mich App at 6.

In the case of a sleeping or unconscious driver, our Supreme Court concluded in *People v Wood*, 450 Mich 399, 404; 538 NW2d 351 (1995), “that ‘operating’ should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property.” Accordingly, “[o]nce a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk.” *Id.* at 404-405.

In *People v Burton*, 252 Mich App 130, 132; 651 NW2d 143 (2002), at approximately 1:30 a.m. a greenskeeper at a golf course discovered the defendant sleeping in the front seat of a pickup truck. The engine was running, and it was parked next to a golf cart storage building. After he was unable to awaken the defendant, the greenskeeper called 911, and two deputy sheriffs responded. When they arrived, the engine was still running; the lights were off, and the defendant was asleep behind the steering wheel. The officers roused the defendant and questioned him. When they opened the door, there was a strong odor of alcohol. The defendant admitted he had been driving and that he had been stranded in the parking lot; he also said he had driven his truck from one side of the parking lot to the other. The defendant failed a field sobriety test, was arrested, given *Miranda* warnings, and was taken to the sheriff’s department. *Burton*, 252 Mich App at 132-133. The defendant’s blood alcohol level registered at .17 and .18 on a Datamaster Breathalyzer. *Id.* at 133. This Court found insufficient evidence to support the defendant’s conviction of attempting to operate a vehicle while under the influence of intoxicating liquor or with an unlawful blood alcohol level at the time the officer’s found him. *Burton*, 252 Mich App at 141-142. The Court concluded that the evidence failed to establish that the defendant possessed the requisite specific intent because the evidence did not “sufficiently establish that [the] defendant was intending to use his truck as a motor vehicle as opposed to just a shelter.” *Id.* at 143. Thus, the Court found insufficient evidence that the defendant “was intending to ‘operate’ his truck, as that term was defined in *Wood*.” *Burton*, 252 Mich App at 143-144. The Court stated that “[w]hile there is a risk that defendant might have inadvertently shifted the truck into gear while he slept, we do not believe such a risk is deemed significant, within the meaning of *Wood*.” *Burton*, 252 Mich App at 144. The Court noted that “such an inadvertent act would not satisfy the specific intent element of the crime.” *Id.* at n 11.

Burton is distinguishable from this case in that it involved a specific intent crime. *Burton*, 252 Mich App at 141. In this case, defendant was not charged with attempting to commit an offense, invoking the need to establish specific intent. Instead, the question is whether defendant’s vehicle was “in a position posing a significant risk of causing a collision.” *Wood*, 450 Mich at 405. As in *Burton*, defendant’s truck was not in a position posing a

significant risk of causing a collision because his vehicle was in park and the risk of him shifting gear while he slept was not significant. *Burton*, 252 Mich App at 144-145. Although the *Burton* Court was considering whether the defendant intended to operate his vehicle, it expressly stated that “the evidence did not provide a basis for the jury to properly conclude that defendant’s truck was in a position posing a significant risk of causing a collision.” *Id.* at 144. Because defendant’s vehicle was not “in a position posing a significant risk of causing a collision,” he was not operating the vehicle when Officer Mark Cole found him. *Wood*, 450 Mich at 405.

The prosecution can, however, show that there was circumstantial evidence that the defendant drove the vehicle while intoxicated to the location where the police found him. See *People v Solmonson*, 261 Mich App 657, 662-663; 683 NW2d 761 (2004). In *Solmonson*, the police found the defendant unconscious in the driver’s seat of a vehicle on the side of a road with an open can of beer between his legs at 3:45 a.m. *Id.* at 660. The engine was off, but warm, and the keys were in the ignition. The defendant was alone and there were five full cans of cold beer on the passenger seat and an empty can in the back. The defendant failed sobriety tests and said he was coming from a neighboring county where he had been working. He never denied being the driver of the vehicle. At trial, the defendant argued that someone else drove him to the location, but presented no evidence in support of that theory. *Id.* at 662. The Court found that “the jury must have concluded from the circumstantial evidence and reasonable inferences that the prosecutor met his burden of proving defendant was operating the vehicle in an intoxicated state *before* the police arrived.” *Id.* at 663 (emphasis in original).

In *Stephen*, 262 Mich App at 215, a police officer found the defendant at the county fairgrounds asleep in his truck, which was wedged on a parking log. The vehicle’s engine was not running, the vehicle was in park, and the keys were in the defendant’s pocket. The defendant smelled of intoxicants and was confused. He stated that he had been drinking at a bar, had too much to drink, drove to the fairgrounds to sleep, struck the parking log while trying to leave the fairgrounds, and was unable to free his truck so he went to sleep. The police arrested the defendant for OUIL and operating a vehicle with a restricted license. This Court, citing MCL 764.15(1)(d) and MCL 257.625(9)(a)(ii), found that “defendant’s arrest was clearly valid because a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe a misdemeanor punishable by more than ninety-two days’ imprisonment occurred, and reasonable cause to believe the person committed it.” *Stephen*, 262 Mich App at 219. The Court held it was not necessary for the officer to have observed the defendant operating the vehicle for the defendant to be arrested and prosecuted for OUIL. *Id.*

In the present case, circumstantial evidence indicated that defendant operated his vehicle while intoxicated before the police arrived. At approximately 5:30 p.m., the police found defendant asleep in the driver’s seat of his vehicle at a car wash. The vehicle’s engine was running, the vehicle was in park, the headlights were on, and defendant’s foot was on the brake pedal. While defendant did not say he had driven there, the vehicle was registered to him and he did not say that someone else had driven him there. Defendant smelled of alcohol and was staggering. He failed four field sobriety tests. Defendant stated that he had been drinking at a bar. Defendant then recanted, saying he had been drinking while at work and that he had left

work at 5:00 p.m.² The citizen who called the police stated that defendant had been there “for some time.” In conducting an inventory search, the police discovered several small bottles of vodka, but there did not appear to be enough alcohol missing from the bottles to believe defendant had become intoxicated while sitting in the vehicle at the car wash. The police officer did not check the trash bin adjacent to the vacuum where defendant was parked. Based on this evidence, there was reasonable cause to believe an OUIL had been committed and that defendant committed it.³ Therefore, the district court did not abuse its discretion in denying defendant’s motion to dismiss. *Stephen*, 262 Mich App at 218-219.

II. SUPPRESSION OF STATEMENTS

Next, defendant argues that the district court erred in denying his motion to suppress his statement to Officer Cole that he was on his way home and had left work at 5:00 o’clock. The prosecution argued below that the statement was an admission by defendant that he recently drove his vehicle to the car wash. Defendant contends the statement is inadmissible because it was the product of custodial interrogation without benefit of *Miranda* warnings. We conclude that the district court did not err in refusing to suppress defendant’s statement because defendant was not in custody for purposes of *Miranda*.⁴

We review de novo the trial court’s ultimate ruling whether to suppress the evidence, but the court’s findings of fact are reviewed for clear error. *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011). Whether the police have subjected a suspect to custodial interrogation so as to require *Miranda* warnings presents a mixed question of law, and fact that this Court reviews de novo. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

Statements that an accused makes during a custodial interrogation are inadmissible unless the accused has first knowingly, voluntarily, and intelligently waived his or her Fifth Amendment rights. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). And before custodial interrogation, the suspect must be warned “that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” *Miranda*, 384 US at 444. But as explained by the Court in *Steele*, 292 Mich App at 316-317:

Miranda warnings are not required unless the accused is subject to a custodial interrogation. Generally, a custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. Whether an accused was in custody depends on the totality of the

² As discussed in Part II, we conclude that defendant’s statements are admissible.

³ Operating while intoxicated under § 5.15(1) is also a misdemeanor punishable by imprisonment for not more than 93 days. § 5.15(7) of Chapter 106 of the Troy City Code.

⁴ We note that defendant did not actually file a motion to suppress, but argued his statements should be suppressed in his reply to the prosecution’s response to his motion to dismiss.

circumstances. The key question is whether the accused could have reasonably believed that he or she was not free to leave. [Citations omitted.]

For purposes of providing *Miranda* warnings, “Interrogation” refers to either express questioning or its “functional equivalent,” meaning “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998), quoting *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980) Here, the police interrogated defendant by expressly questioning him. The issue remains whether defendant was in custody.

“[A] motorist detained for a routine traffic stop or investigative stop is ordinarily not in custody within the meaning of *Miranda*.” *Steele*, 292 Mich App at 317. “Roadside questioning by police officers for the purpose of determining whether a motorist is intoxicated does not constitute custodial interrogation and, therefore, *Miranda* rights do not attach.” *People v Jelneck*, 148 Mich App 456, 460; 384 NW2d 801 (1986). Thus, during the investigation of a suspected drunk driving incident, “the police do not need to advise a driver of the individual’s *Miranda* rights before or while they are conducting a field sobriety test.” *Burton*, 252 Mich App at 139. But this is not a bright-line rule. *Id.* at 139 n 8. In *Burton*, this Court concluded:

[B]efore his arrest a reasonable person in defendant’s place would have felt that he was seized within the meaning of the Fourth Amendment, [but] we also conclude that such a reasonable person would not have believed that he was in police custody to the degree associated with a formal arrest. The testimony establishes that the questioning of defendant before the field sobriety test was brief. Defendant was not handcuffed or confined to the officers’ patrol car while he was being questioned. While defendant was told that he was not going to be allowed to leave the scene, he was not told that this was because he was going to be arrested. Rather, the officers told defendant that they needed to conclude their investigation. We conclude that these circumstances are not the functional equivalent of a formal arrest. Accordingly, we hold that the statements made by defendant before his arrest were admissible. [*Id.* at 140 (citation omitted).]

Although a close question, we conclude based on the totality of the circumstances that defendant was not in custody when Cole elicited the statement at issue. *Steele*, 292 Mich App at 316-317. Defendant argues that because the questioning occurred after Cole administered the field sobriety tests, which defendant had failed, Cole already knew he was intoxicated. Thus, Cole was not asking questions to determine whether defendant was intoxicated. See *Jelneck*, 148 Mich App at 460. But as discussed in Part I, gathering information regarding defendant’s state of sobriety is only one-half of the equation whether, in this instance, defendant could be properly arrested and prosecuted for operating a vehicle while under the influence.

The reasons for exempting typical traffic stops from the requirements of *Miranda* are that such police-citizen encounters are “presumptively temporary and brief,” and usually occur in public where other citizens can monitor abusive police activity such that “the atmosphere surrounding an ordinary traffic stop is substantially less ‘police dominated’ than that surrounding the kinds of interrogation at issue in *Miranda* itself.” *Berkemer v McCarty*, 468 US 420, 437-

439; 104 S Ct 3138; 82 L Ed 2d 317 (1984). The *Berkemer* Court analogized traffic stops to so-called *Terry*⁵ stops because “the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.” *Id.* at 439. Further, “unless the detainee’s answers provide the officer with probable cause to arrest him, he must then be released.” *Id.* at 439-440. These noncoercive aspects of traffic stops prompted the *Berkemer* Court to hold that “persons temporarily detained pursuant to such stops are not ‘in custody’ for the purposes of *Miranda*.” *Id.* at 440. This Court has applied the reasoning of *Berkemer* to situations like the present one where the police have not stopped a vehicle but have found an apparently intoxicated person occupying a vehicle already stopped. *Burton*, 252 Mich App at 139.

As in *Burton*, 252 Mich App at 140, Cole’s questioning of defendant was brief, defendant was not handcuffed, and he was not confined to the patrol car. Unlike in *Burton*, Cole did not tell defendant that he was not allowed to leave. Cole also never told defendant that he failed the field sobriety tests, which might have led defendant to reasonably believe he was not free to leave. See *Steele*, 292 Mich App at 316-317. Further, the police were still investigating whether defendant was intoxicated, even though defendant already failed the field sobriety tests. *Jelneck*, 148 Mich App at 460. Moreover, even if the officers already had gathered sufficient evidence to conclude that defendant was intoxicated, they were still investigating whether defendant had recently operated his vehicle while intoxicated, since they did not actually see him driving. Cole testified that the questions were asked to determine whether defendant had operated a vehicle while intoxicated. Thus, Officer Cole was making a reasonable inquiry during a temporary detention, and posed a minimal number of questions “in an attempt to gather information confirming or dispelling the officer’s suspicions” of criminal activity. *Steele*, 292 Mich App at 319. “*Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.” *Berkemer*, 468 US at 437. Under the circumstances of this case, we conclude that defendant was not “in custody” for the purposes of triggering the need to give *Miranda* warnings. *Id.* at 440; *Steele*, 292 Mich App at 319. Accordingly, the district court did not err in refusing to suppress defendant’s statements.

We affirm and remand to the district court for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck

⁵ *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).