

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NICHOLAS EVAN CHRZAN,

Defendant-Appellee.

UNPUBLISHED

January 27, 2005

No. 250137

Oakland Circuit Court

LC No. 03-189471

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent because I am not persuaded that the State has demonstrated that the trial court clearly erred in its adjudication of the facts presented in this matter. While I believe that the majority is correct in their assertion that “[t]he ultimate question whether a person was ‘in custody’ for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently but a reviewing court after de novo review of the record.” *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001), lv den 465 Mich 894; 635 NW2d 318 (2001); quoting *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997), citing *Thompson v Keohane*, 516 US 99; 116 S Ct 457; 133 L Ed 2d 383 (1995)., findings “concerning the circumstances surrounding the giving of the statement are factual findings that are reviewed for clear error”. *Id.* at 219.

In this case, the trial court granted defendant’s motion to suppress upon its finding that under the totality of the circumstances, defendant reasonably did not believe he was free to leave. In addition, the trial court held that the officer’s statement to defendant that he would not be arrested that day no matter what he said was made with the express intent to elicit defendant’s cooperation. Given the age of the defendant at the time of the questioning, the fact that he had his wisdom teeth pulled earlier in the day and was still experiencing considerable pain, and the fact that the officers awoke him from a sound sleep to question him, all indicate that the trial court’s factual findings are correct. Therefore, in the absence of any demonstration that the trial court’s finding of facts were clearly erroneous, I would affirm the decision of the trial court.

/s/ Stephen L. Borrello