

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0408

STATE OF MONTANA,

Plaintiff and Appellee,

v.

CANDICE LEA DAVIS,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jennifer B. Lint, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
MARDELL PLOYHAR
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
mployhar@mt.gov

DUSTIN M. CHOUINARD
Markette & Chouinard P.C.
P.O. Box 515
Hamilton, MT 59840-0515

ATTORNEY FOR DEFENDANT
AND APPELLANT

WILLIAM E. FULBRIGHT
Ravalli County Attorney
AMANDA SMITH
Deputy County Attorney
205 Bedford, Suite C
Hamilton, MT 59840

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS	2
I. The offense and investigation.....	2
II. The motion to suppress evidence.....	5
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
I. Standard of review	11
II. Davis was legally seized based on particularized suspicion until she was formally arrested after taking field sobriety tests and breath tests, at which time there was probable cause to support her arrest	12
III. The district court did not err in denying Davis’s motion to suppress statements made after she was transported to the investigation room because Davis has not demonstrated that she was subjected to custodial interrogation before she was read <i>Miranda</i> warnings	17
CONCLUSION	23
CERTIFICATE OF COMPLIANCE.....	24

TABLE OF AUTHORITIES

Cases

<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984)	18
<i>City of Billings v. Peterson</i> , 2004 MT 232, 322 Mont. 444, 97 P.3d 532	21
<i>City of Missoula v. Kroschel</i> , 2018 MT 142, 391 Mont. 457, 419 P.3d 1208	passim
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	passim
<i>Rhode Island v. Innis</i> , 446 U.S. 291 (1980)	17
<i>State v. Bailey</i> , 2021 MT 157, 404 Mont. 384, 489 P.3d 889	13, 14, 20
<i>State v. Gittens</i> , 2008 MT 55, 341 Mont. 450, 178 P.3d 91	21
<i>State v. Kelm</i> , 2013 MT 115, 370 Mont. 61, 300 P.3d 687	22
<i>State v. Maile</i> , 2017 MT 154, 388 Mont. 33, 396 P.3d 1270	18, 20
<i>State v. Marcial</i> , 2013 MT 242, 371 Mont. 348, 308 P.3d 69	14
<i>State v. Munson</i> , 2007 MT 222, 339 Mont. 68, 169 P.3d 364	18
<i>State v. Schlichenmayer</i> , 2023 MT 79, 412 Mont. 119, 529 P.3d 789	12, 13

Other Authorities

Montana Code Annotated

§ 46-5-403	13
§ 61-7-107	15
§ 61-7-109(3)	14
§ 61-8-301	15

Montana Constitution

Art. II, § 11.....	12
Art. II, § 25.....	17

United States Constitution

Amend. IV.....	12
Amend. V.....	17, 19, 22
Amend. VI.....	17

STATEMENT OF THE ISSUES

1. Whether an officer illegally seized Davis when he obtained particularized suspicion that she was driving under the influence during an investigation of her traffic accident, and he transported her to a nearby investigation room to complete the field sobriety tests due to extremely cold and windy weather.

2. Whether the court erred in denying Davis's motion to suppress any statements made after she was placed in handcuffs and transported to an investigation room when she did not identify any statements made in response to custodial interrogation.

STATEMENT OF THE CASE

Appellant Candice Lea Davis was charged by citation in Ravalli County Justice Court with two misdemeanor counts of driving under the influence (DUI), reckless driving, two misdemeanor counts related to her failure to provide notice she had caused an accident resulting in property damage, and operating a vehicle with expired registration. (Doc. 1 at 3-8, Citations.)¹ Davis was convicted on all counts in the justice court at a bench trial. (Doc. 1 at 23, Mins. of 6/20/22 Trial.)

¹ The justice court record is contained in district court document 1.

Davis appealed to the district court for a trial de novo. (Doc. 1 at 11, Notice of Appeal.) In the district court, Davis filed a motion to suppress and dismiss. (Doc. 4.) The court denied the motion after receiving a response from the State and hearing testimony at an evidentiary hearing. (Docs. 9, 21.)

Davis entered into a plea agreement whereby she pled no contest to a single count of DUI. (Docs. 43.1-46.) The plea agreement provided that Davis reserved her right to appeal the denial of her motion to suppress. (Doc. 46 at 2.) The agreement provided that she would be entitled to withdraw her guilty plea if she prevailed on appeal. (*Id.*) The court accepted the plea and imposed the recommended sentence. (Doc. 47.)

STATEMENT OF THE FACTS

I. The offense and investigation

The citations alleged that, at approximately 1:00 a.m., Davis drove off the left side of the road, struck mailboxes on the left side, crossed over the road, and then drove off the right side of the road, where she became stuck on rocks. (Doc. 1 at 5.) Davis walked home and then drove back to the scene of the crash in a different vehicle. (Doc. 1 at 4.)

Later that morning, the crash was reported, and officers responded to the scene. (1/4/23 Tr. at 5.) Montana Highway Patrol Trooper Andrew Barbera

arrived around 3:30 a.m., and another local officer was already present. (*Id.* at 6, 9.) Trooper Barbera observed Davis’s SUV high-centered on a rock berm, and two other vehicles were present. (*Id.* at 6.) Davis was in the passenger seat of a truck, with a male in the driver’s seat. (*Id.* at 7.) An extension cord had been tied to both the truck and the SUV. (*Id.*)

When Trooper Barbera spoke to Davis, he “quickly smelled the odor of an alcoholic beverage from inside the vehicle.” (*Id.* at 7.) He also noticed that Davis had red and watery eyes. (*Id.*) When Davis talked to Trooper Barbera, she repeatedly tried to cover her mouth with her jacket or look away, in an apparent attempt to mask the odor of her breath. (*Id.* at 8, 26-27.)

Trooper Barbera asked Davis what happened, and she replied, “Deer.” (*Id.* at 7-8.) He asked her where she was coming from. She said she was driving home from her job at a restaurant, which Trooper Barbera knew served alcohol. (*Id.* at 11.) When he asked her if she had anything to drink, she said she had her “shifter,” which he knew is an end-of-shift drink or shot consumed before leaving work. (*Id.*) Trooper Barbera investigated the crash and discovered that Davis had drifted off of the left side of the road, struck a mailbox, gone over to the right side of the road, and hit a berm. (*Id.* at 42.)

After gathering that information, Trooper Barbera informed Davis that she was under investigation for driving under the influence. (*Id.* at 11-12.) He

attempted to administer the standardized field sobriety tests, starting with the horizontal gaze nystagmus (HGN) test. (*Id.* at 12.) He did not complete the test on the side of the road because it was extremely cold and windy, and he and Davis were shivering. (*Id.* at 10, 13, 29-30.) Instead of continuing with the tests in such poor conditions, Trooper Barbera transported Davis to an investigation room connected to the Ravalli County Detention Center (RCDC) that is designed to help officers administer the standardized field sobriety tests. (*Id.* at 14.)

Trooper Barbera placed handcuffs on Davis before transporting her, but he informed her that she was not under arrest and that he was transporting her because of the conditions. (*Id.* at 15.) He placed Davis in handcuffs because he was trained to always place suspects in handcuffs for safety reasons. (*Id.* at 16.)

The drive to the investigation room lasted only minutes. (*Id.*) Once there, Trooper Barbera removed Davis's handcuffs. (*Id.* at 18, 21.) He informed her again that she was being investigated for driving under the influence. (*Id.*) He then administered the tests. (*Id.* at 18-19.) Based on the results of the field sobriety tests, Trooper Barbera determined that Davis was impaired. (*Id.* at 20.)

Trooper Barbera then obtained two breath samples from Davis. (*Id.* at 21.) After obtaining the results of breath tests, he read her the *Miranda* warning and placed her under arrest. (*Id.* at 21-22.)

II. The motion to suppress evidence

In the district court, Davis filed a Motion and Brief to Suppress and Dismiss in which she argued that her statements should be suppressed because she was subjected to custodial interrogation without being informed of her *Miranda* rights. (Doc. 6 at 4.) Davis acknowledged that *Miranda* warnings are not required during brief roadside DUI investigations, but she argued that *Miranda* attached when she was detained, handcuffed, placed in a patrol car, and transported to the RCDC. (*Id.* at 5-6.) She asserted she was interrogated after that time, but she did not specifically identify any statements that constituted interrogation or identify when interrogation occurred. (*Id.* at 5.) Davis also argued that she was unlawfully arrested when she was transported to the Ravalli County Detention Center (RCDC) before being tested for impairment. (*Id.* at 4.) She argued that her arrest was not supported by probable cause. (*Id.* at 7.) Davis argued that because the evidence obtained after she was transported should be suppressed, the DUI charges should be dismissed. (*Id.* at 9.)

In its response, the State recounted the information Davis provided to law enforcement from the side of the road, including her admission that she drove the vehicle that was stuck, that she drove a second vehicle after getting the first one stuck, and that she had a double shot of alcohol before she began driving. (Doc. 9 at 2-3.) The State argued that Trooper Barbera's detention of Davis was justified

because he initially had particularized suspicion that she had crashed her vehicle and, based on the roadside investigation, Trooper Barbera developed particularized suspicion to support a DUI investigation. (*Id.* at 4-6.) Further, the State argued that it was appropriate for Trooper Barbera to transport Davis indoors to conduct the field sobriety tests because of the inclement weather. (*Id.* at 5-6.) The State argued that Davis was not arrested until after she had conducted the field sobriety tests indoors, at which time Trooper Barbera had probable cause to believe she had committed DUI. (*Id.* at 8.)

The State argued that Davis was not entitled to *Miranda* warnings earlier in the investigation because she was not in custody. (*Id.* at 6-7.) The State noted that roadside DUI investigations do not require *Miranda* warnings, and the field sobriety tests conducted indoors were simply an extension of the roadside investigation necessitated by the weather conditions. (*Id.*) The State agreed, however, that any statements Davis made “while handcuffed and in Trooper Barbera’s patrol car are likely not admissible and, due to their minimal evidentiary value, does not object to their suppression.” (*Id.* at 7.)

In Davis’s reply, she argued that Trooper Barbera did not have the authority to transport Davis to the investigation room because he did not have probable cause. (Doc. 12 at 1-5.) Davis also argued that any statements she made in the investigation room were inadmissible because she was in custody. (*Id.* at 5-7.)

Davis did not specifically identify statements that were made while she was in the patrol car or the investigation room. (*See generally id.*)

The district court held an evidentiary hearing on Davis's motion to suppress on January 4, 2023. (1/4/23 Tr.) Trooper Barbera testified about his investigation, providing the facts set out above. (*See generally* 1/4/23 Tr.) He explained that he suspected that Davis was under the influence when he was investigating the crash at the scene because he quickly smelled the odor of alcohol coming from inside the vehicle she was in, she was trying to mask her face when talking, and she had bloodshot and watery eyes. (*Id.* at 42.) His investigation of the crash also caused him to suspect that she was intoxicated because she had drifted off the road, which is consistent with impaired driving. (*Id.*) Also, Davis admitted that she had consumed alcohol, and she had been driving home from an establishment that served alcohol. (*Id.*)

He also testified that he did not consider Davis to be in custody when he handcuffed her to transport her. (*Id.* at 35.) Instead, she was being detained for an investigation. (*Id.*) He noted that when they arrived at the investigation room, he removed the handcuffs and advised her that she was not under arrest. (*Id.* at 36.)

Trooper Barbera explained that officers sometimes transport drivers to the investigation room to conduct the field sobriety tests when conditions are bad because they want to give people the best conditions in which to perform the tests.

(*Id.* at 13-14, 30.) Requiring a person to perform the test when they are shivering could produce inaccurate results. (*Id.* at 39.) For example, Trooper Barbera explained that if a person is shivering, it may appear that they are swaying, which is a sign of intoxication, when they are really just cold. (*Id.* at 30.) Or, if he is shivering, a person may perform poorly on the HGN because he is not holding his hand straight enough. (*Id.*) Trooper Barbera explained that he is trained to conduct the investigation in a specific order, so he does not ask a suspect to provide a preliminary breath test sample before conducting the field sobriety tests. (*Id.* at 31-32, 40.)

Trooper Barbera did not recall what questions he asked Davis while conducting the field sobriety tests, but he did not believe he had asked anything outside of what was relevant to administer the tests. (*Id.* at 19.) He recalled asking only whether she had anything in her mouth and whether she had consumed any alcohol since she had crashed. (*Id.*)

The district court issued an order denying Davis's motion to suppress. (Doc. 21.) The court found that "Trooper Barbera had valid particularized suspicion to extend the stop at each step." (*Id.* at 4.) The court noted that Trooper Barbera had particularized suspicion to investigate the crash. (*Id.* at 5.) He then developed particularized suspicion to investigate Davis "for DUI based on his observations that: the vehicle drifted off the roadway and not swerved off the

roadway as stated by Defendant; the Defendant's eyes were red and watery; the Defendant smelled like alcohol; the Defendant appeared to be trying to mask the odor of her breath by covering her mouth with her coat, only when she spoke to Trooper Barbera; the Defendant stated she was traveling from a workplace Trooper Barbera knew served alcohol; and the Defendant stated she consumed an alcoholic beverage before leaving work.” (*Id.*) The court explained that because the weather conditions made roadside testing difficult, “the duration of the investigation correlated with the time necessary to conduct these tests under the circumstances of the stop.” (*Id.*) The court further concluded that “delaying the field sobriety tests until securing a location that was more hospitable for the Defendant and the Trooper, but also provided the Defendant the best opportunity to provide accurate results was not only reasonable, but humane.” (*Id.*)

The court also concluded that Davis was not subjected to custodial interrogation in violation of *Miranda*. The court concluded that Davis was not in custody for purposes of *Miranda* until her actual arrest at the detention center. (*Id.* at 8-10.) The court noted that Trooper Barbera told her when she was taken to the detention center that she was not under arrest and was still under investigation. (*Id.* at 9.) The court further noted that Trooper Barbera removed Davis's handcuffs when they arrived at the detention center. (*Id.*) The court found that the “purpose for putting the Defendant in the patrol vehicle [w]as not to create a custodial

situation, it was for the safe transport to a location where the field sobriety tests could be done in more hospitable conditions.” (*Id.* at 9-10.)

The court also concluded that Davis was not subject to custodial interrogation. (*Id.* at 10.) The Court stated that Trooper Barbera testified that he did not interrogate the Defendant in the patrol car or at the detention center, so even if Davis was in custody, no custodial interrogation occurred. (*Id.* at 11.)

SUMMARY OF THE ARGUMENT

Davis has not demonstrated that the district court erred when it denied her motion to suppress because she has not demonstrated that she was illegally seized or that she was subjected to custodial interrogation. To begin with, Trooper Barbera was authorized to temporarily seize Davis to investigate her traffic accident and related offenses. During the initial roadside investigation, Trooper Barbera gained particularized suspicion to believe Davis had been driving under the influence. Based on additional facts supporting that suspicion, Trooper Barbera was authorized to continue detaining Davis to investigate that offense. Because the weather conditions made it very difficult to accurately and safely conduct field sobriety tests, Trooper Barbera was authorized to transport Davis to a nearby investigation room to complete the DUI investigation. Placing Davis in handcuffs, pursuant to the safety protocol, and transporting her to the investigation room did not transform the

temporary investigative stop into an arrest because Davis was specifically informed that she was not under arrest and that she was instead being transported to complete the investigation, and the scope of the investigation did not exceed the scope of a typical DUI investigation.

The State acknowledges that, contrary to the district court's conclusion, Davis likely was in custody for purposes of *Miranda* when she was placed in the patrol car and transported to the investigation room in the detention center. But Davis has not met her burden on appeal to demonstrate that the court erred in denying her motion to suppress, because she has not demonstrated that she made statements in response to custodial interrogation before being informed of her *Miranda* rights. She is also not entitled to suppression of the results of her field sobriety tests or breath tests because the Fifth Amendment protection from compelled self-incrimination does not apply to real or physical evidence. As a result, she has failed to demonstrate that the court erred when it denied her motion to suppress.

ARGUMENT

I. Standard of review

This Court reviews a district court's grant or denial of a motion to suppress to determine whether the court's findings are clearly erroneous and whether those

findings were correctly applied as a matter of law. *State v. Schlichenmayer*, 2023 MT 79, ¶ 11, 412 Mont. 119, 529 P.3d 789.

II. Davis was legally seized based on particularized suspicion until she was formally arrested after taking field sobriety tests and breath tests, at which time there was probable cause to support her arrest.

Davis was temporarily detained for investigative purposes until she was placed under arrest after she performed field sobriety tests and Trooper Barbera obtained the results from two breath tests. That temporary seizure was permissible because Trooper Barbera had particularized suspicion to believe that she had been driving under the influence.

The Fourth Amendment to the United States Constitution and article II, section 11, of the Montana Constitution prohibit unreasonable searches and seizures. A “seizure” “occurs when a government officer ‘in some way’ restrains a person’s liberty by means of physical force or show of authority that, under the totality of the circumstances, would cause an objectively reasonable person to believe that the person is not free to leave the presence of the officer.” *City of Missoula v. Kroschel*, 2018 MT 142, ¶ 10, 391 Mont. 457, 419 P.3d 1208. To comply with the constitutional provisions, government seizures must generally occur pursuant to a judicial warrant issued on probable cause. *Id.* Warrantless seizures are per se unreasonable unless an exception to the warrant requirement applies. *Id.*

An exception to the warrant requirement allows officers to temporarily seize individuals to investigate an offense. Under this exception, an officer may briefly stop and detain a person for investigative purposes “if, based on *specific and articulable facts known to the officer*, including rational inferences therefrom based on the officer’s training and experience, the officer has an objectively reasonable, particularized suspicion that the person is engaged, or about to engage, in criminal activity.” *Kroschel*, ¶ 11 (emphasis in original).

An investigative stop “may last only as long as is reasonably necessarily to confirm or dispel the predicate suspicion for the stop, and law enforcement’s means of detainment and investigative questions may not exceed the scope of the predicate suspicion for the stop.” *State v. Bailey*, 2021 MT 157, ¶ 21, 404 Mont. 384, 489 P.3d 889; *see also* Mont. Code Ann. § 46-5-403 (“A stop . . . may not last longer than is necessary to effectuate the purpose of the stop.”). But “the State’s compelling interest in ‘effective law enforcement’ demands that officers in the field have reasonable ‘latitude’ to reach, follow up on, and confirm or dispel initial suspicions of criminal activity.” *Kroschel*, ¶ 13. Further, the stop may be prolonged, and the scope of the investigation may be broadened, “if additional objective data of wrongdoing” is discovered. *Schlichenmayer*, ¶ 16 (citation and quotation marks omitted); *Bailey*, ¶ 21.

For example, in *Bailey*, this Court held that an officer was authorized to expand his investigation of a traffic accident into a DUI investigation after he observed signs that Bailey had consumed alcohol. *Bailey*, ¶ 26. The officer stopped Bailey because Bailey’s vehicle matched the description of a vehicle that had crashed. *Bailey*, ¶ 4. Because it was cold and easier to conduct the crash investigation from his vehicle, the officer asked Bailey to sit in the back of his patrol vehicle. *Bailey*, ¶ 6. The officer observed that Bailey had bloodshot and watery eyes and was emitting the odor of alcohol, and Bailey admitted to drinking two beers and that he had alcoholic beverages in his vehicle. *Bailey*, ¶ 8. This Court concluded that the officer was authorized to expand the investigation into a DUI investigation and held that the seizure did not escalate into a formal arrest when the officer had Bailey sit in the back of the patrol vehicle. *Bailey*, ¶¶ 26, 37.

The district court correctly concluded that Davis was lawfully seized until she was formally arrested. Trooper Barbera initially went to the scene to investigate a traffic crash, which he had a duty to do. *See Bailey*, ¶ 36; *State v. Marcial*, 2013 MT 242, ¶ 17, 371 Mont. 348, 308 P.3d 69; Mont. Code Ann. § 61-7-109(3). When he arrived, he observed that Davis’s vehicle was high-centered on a rock berm off of the road. (1/4/23 Tr. at 6.) When he spoke to her, he “quickly smelled the odor of an alcoholic beverage from inside the vehicle.” (*Id.* at 7.) He also observed that she had red and watery eyes and that she tried to cover her mouth to mask her breath

when talking. (*Id.* at 7-8.) Davis told Trooper Barbera that before the crash she had been driving home from her job at an establishment that serves alcohol, and she had consumed an end-of-the shift drink. (*Id.* at 11.) Trooper Barbera also investigated the crash and discovered that Davis had drifted off the left side of the road, crashed into a mailbox, gone over to the right side of the road, and become stuck on a berm. (*Id.* at 42.) Trooper Barbera knew, from his experience, that drifting off the road in that manner is consistent with impaired driving. (*Id.*)

This information provided probable cause to believe that Davis had failed to report damage she caused to property, as required by Mont. Code Ann. § 61-7-107, and had driven recklessly, in violation of Mont. Code Ann. § 61-8-301. The information also provided him with particularized suspicion that Davis was driving under the influence, which justified his continued investigation of her. Based on these facts, the court correctly found that “Trooper Barbera had valid particularized suspicion to extend the stop at each step.” (Doc. 21 at 4.)

Further, transporting Davis to a nearby investigation room did not transform the investigation into an arrest. Even though Davis was transported to an investigation room, the investigation remained a temporary detention, for investigatory purposes, until Davis was formally arrested. Significantly, Trooper Barbera informed Davis before transporting her that she was not being arrested and was instead being investigated for DUI. (1/4/23 Tr. at 15.)

Trooper Barbera placed Davis in handcuffs pursuant to protocol, but he informed her that he was doing that to transport her, and she was not under arrest. (*Id.* at 15-16.) When they arrived at the investigation room, Trooper Barbera removed the handcuffs and again advised Davis that she was being investigated for DUI. (*Id.* at 18.) If testing had dispelled Trooper Barbera's suspicions, Davis would have been released.

Transporting Davis was also within the reasonable scope and duration of the investigation. As Trooper Barbera explained, he could not accurately conduct the field sobriety tests on the side of the road while both he and Davis were shivering. (1/4/23 Tr. at 30, 39.) Because he had substantial evidence indicating that Davis was impaired, it was important for Trooper Barbera to be able to continue his investigation in a warm and safe location. Indeed, the State's compelling interest in effective law enforcement requires law enforcement to have the latitude to transport a suspect to a warm and safe location to complete an investigation when circumstances require.

Once at the investigation room, Trooper Barbera proceeded with the investigation in the same manner as he would have if he had been able to complete the roadside field sobriety tests. The investigation continued to be within the scope of a typical DUI investigation. The court correctly concluded that Trooper Barbera was authorized to transport Davis to continue his DUI investigation in the investigation room because the evidence gave him particularized suspicion that she

was under the influence and the investigation could not reasonably be completed outdoors.

III. The district court did not err in denying Davis’s motion to suppress statements made after she was transported to the investigation room because Davis has not demonstrated that she was subjected to custodial interrogation before she was read Miranda warnings.

The Fifth Amendment of the United States Constitution and article II, section 25 of the Montana Constitution prohibit compelled self-incrimination. *Kroschel*, ¶ 22. To protect from compelled self-incrimination, law enforcement officers may not subject a person to custodial interrogation until they have advised the person, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), of the person’s rights to remain silent and to consult an attorney under the Fifth and Sixth Amendments and obtained a waiver of those rights. *Kroschel*, ¶ 22. Statements elicited in violation of *Miranda* are not admissible in criminal proceedings. *Id.*

“For purposes of the Fifth Amendment, ‘interrogation’ means express or implied questioning initiated by a law enforcement officer.” *Kroschel*, ¶ 23. The term includes express questioning and “any words or actions on the part of police (other than those normally attendant to arrest [or] custody) that the police should know are reasonably likely to elicit an incriminating response.” *Id.* (quoting *Rhode Island v. Innis*, 446 U.S. 291 (1980)).

A person is in “custody” for purposes of the Fifth Amendment, “only when formally arrested by police or when police otherwise restrict the person’s freedom of action in a manner or degree similar to a formal arrest.” *Kroschel*, ¶ 24. The analysis depends on the totality of the circumstances. *Id.* This Court has set out a variety of facts pertinent to the determination of whether a person is in custody:

the language used by the officers; the location or physical surroundings where the questioning occurs; whether the individual consented to speak with the officers; the degree of pressure applied to detain the individual; whether the individual was moved to another area; whether the officers informed the individual that he or she was not under arrest and was free to leave or could ask the officer to leave; whether there was a threatening presence of several officers; whether the officers used coercive tactics such as hostile tones of voice, the display of weapons, or physical force; the duration of the detention; and the extent to which the individual was confronted with evidence of guilt.

State v. Munson, 2007 MT 222, ¶ 23, 339 Mont. 68, 169 P.3d 364; *see also State v. Maile*, 2017 MT 154, ¶ 12, 388 Mont. 33, 396 P.3d 1270. While ability to leave is a factor, “the ultimate inquiry is not whether a reasonable person would feel free to leave, but rather whether there was a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *Maile*, ¶ 12 (citation omitted).

Relying on *Berkemer v. McCarty*, 468 U.S. 420 (1984), this Court has held that roadside investigations are typically not custodial. *Kroschel*, ¶ 25; *Maile*, ¶ 14. This Court has explained that while a temporary investigative stop is “both

inherently coercive to a degree and a significant restriction on a person's freedom of action for the duration of the stop," it is not similar to a formal arrest "due to the brief duration, limited scope of permissible questioning, public or non-secluded setting, and expectation of imminent release typically associated with such a stop." *Kroschel*, ¶ 25. The mere fact that police strongly suspect the individual of criminal activity and are investigating an offense "does not raise the coercive nature of a temporary stop to a level commensurate with that of a police interrogation incident to formal arrest." *Id.* Because a temporary investigative stop does "not present the same danger of coerced self-incrimination as the more prolonged, incommunicado police interrogation that warrant[s] . . . the prophylactic procedural rule of *Miranda*," such stops generally do not rise to the level of a Fifth Amendment custodial interrogation. *Kroschel*, ¶ 25.

A temporary investigative stop may ripen into a custodial interrogation, however, "if the circumstances of the detention and related questioning evolve to approximate the more coercive nature of an incommunicado police interrogation incident to a formal arrest." *Kroschel*, ¶ 26. In *Kroschel*, this Court held that a police encounter with a student at the football stadium escalated into a custodial encounter when she was questioned by two officers who threatened her with prosecution on a jailable offense, told her they were going "to the station,"

forcefully guided her down the stairs, ordered her friend to leave, and moved her to a secluded and confined area for indefinite questioning. *Kroschel*, ¶¶ 27, 30-31, 36.

In contrast, this Court concluded that questioning conducted by Montana Fish, Wildlife, and Parks game wardens at a game checkpoint was not custodial when the wardens asked the defendant to step away from his friend's vehicle to question him but did not place him in handcuffs or remove him from the public setting. *Maile*, ¶¶ 17-20. This Court noted that the length of the investigation exceeded that of a normal roadside investigatory stop, but concluded that it did not ripen into a custodial interrogation because the detainment "remained public, routine, and temporary in nature, never exceeding the scope of a wildlife crime investigation." *Maile*, ¶¶ 19-20.

This Court also held in *Bailey* that a crash investigation, which evolved into a DUI investigation, was not custodial when an officer asked Bailey to sit in the officer's patrol vehicle to answer questions. *Bailey*, ¶ 38. This Court noted that the trooper's questions were public, routine, and temporary in nature, and they were confined to the context of the trooper's escalating suspicions of Bailey's alcohol consumption. *Id.* This Court also noted that the trooper never told Bailey that he was not free to leave or that he was under arrest, and the trooper never handcuffed Bailey or used any force. *Id.* This Court concluded that these facts were consistent with those of an investigative stop and, therefore, did not implicate *Miranda*. *Id.*

In the district court, the State agreed that any statements Davis made while being transported in the patrol car were likely not admissible, but the State argued that statements made after handcuffs were removed from Davis in the investigation room were admissible. (Doc. 9 at 6-7.) On appeal, the State acknowledges that Davis was likely in custody when she was handcuffed and transported in a patrol car, and her encounter at the investigation room remained custodial. Therefore, the district court's conclusion that Davis was not in custody until her formal arrest in the interrogation room is incorrect.

But Davis has not met her burden on appeal to demonstrate that the district court's denial of her motion to suppress was erroneous, because she has not demonstrated that she was subjected to custodial interrogation before she was given her *Miranda* warnings. An appellant bears the burden of establishing error on appeal, and a trial court's decision is presumed correct. *City of Billings v. Peterson*, 2004 MT 232, ¶ 19, 322 Mont. 444, 97 P.3d 532. This Court has declined to consider a defendant's argument that statements made after his arrest and before he was given *Miranda* warnings should be suppressed when the defendant failed to identify any particular statements that were made in the interim and did not provide an analysis of whether such statements were volunteered or made pursuant to custodial interrogation. *State v. Gittens*, 2008 MT 55, ¶ 19, 341 Mont. 450, 178 P.3d 91.

Davis has similarly failed to establish that the district court erred in concluding that she was not subject to custodial interrogation. The district court found that “Trooper Barbera testified that he did not interrogate the Defendant in the patrol car or at the Detention Center.” (Doc. 21 at 11.) Davis has not demonstrated that finding is clearly erroneous. Davis asserts that “*Miranda* should be applied to all statements and testing that occurred after Davis was handcuffed by Barbera[,]” (Appellant’s Br. at 14) but, like Gittens, she fails to identify any statements that were made in response to custodial interrogation. She thus fails to establish that the court erred.

Further, *Miranda* warnings are not required before field sobriety tests or breath tests because neither constitute custodial interrogation. *State v. Kelm*, 2013 MT 115, ¶¶ 30-31, 370 Mont. 61, 300 P.3d 687. The Fifth Amendment protects against compelled self-incrimination. It “offers no protection against compulsion . . . to assume a stance, to walk, or to make a particular gesture.” *Kelm*, ¶ 30. “Consequently, a mere request that the suspect perform a series of sobriety tests, done without any interrogation of the suspect, does not constitute a custodial interrogation and does not require law enforcement officers to read a suspect his or her *Miranda* rights prior to administering those tests.” *Kelm*, ¶ 30 (internal quotations omitted). Similarly, the Fifth Amendment does not protect against

compulsion to perform a breath test because the results of breath tests are “physical or real” evidence, rather than protected self-incrimination. *Id.*

Because Davis has failed to demonstrate that she was subject to custodial interrogation before she was given *Miranda* warnings, she has failed to meet her burden to demonstrate that the district court erred in denying her motion to suppress.

In the alternative, if this Court concludes that Davis made any statements in response to custodial interrogation after she was placed in Trooper Barbera’s patrol vehicle and before she was given *Miranda* warnings, requiring this case to be remanded, only statements made during that time should be suppressed. Specifically, statements Davis made to Trooper Barbera during the roadside interrogation and the results of field sobriety testing and breath testing should not be suppressed.

CONCLUSION

Davis’s conviction for DUI should be affirmed because she has not demonstrated that the court’s denial of her motion to suppress was erroneous.

Respectfully submitted this 19th day of January, 2024.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Mardell Ployhar
MARDELL PLOYHAR
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,495 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ *Mardell Ployhar*

MARDELL PLOYHAR

CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-19-2024:

Dustin M. Chouinard (Attorney)
601 South First Street
Hamilton MT 59840
Representing: Candice Lea Davis
Service Method: eService

William E. Fulbright (Govt Attorney)
205 Bedford St #C
Hamilton MT 59840
Representing: State of Montana
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Mardell Lynn Ployhar
Dated: 01-19-2024