COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 4, 1996

No. 95-3270-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARTHUR FOSTER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. RADCLIFFE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Arthur Foster appeals a judgment of conviction on two counts of first-degree intentional homicide. Foster challenges the trial court's denial of his pretrial motion to suppress his inculpatory statements to Meloney Raebel. He alleges that because Raebel acted as an agent of the police, the admission of his statements violated his Fifth Amendment right to counsel.[1]

[1] The Fifth Amendment provides that no "person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. When a criminal suspect invokes the right to counsel, the police must stop questioning the suspect until he or she initiates discussions with the

Because we conclude that Raebel did not act as an agent of the police, the judgment of conviction is affirmed.

Foster was charged with two counts of first-degree intentional homicide as party to the crime, contrary to § 940.01(1), STATS., for the murders of an elderly couple in their home on December 4, 1994. He entered an ***Alford***[2] plea on June 8, 1995, and was sentenced to two consecutive life terms of imprisonment on July 14, 1995.

Foster and two juveniles went to the home of Donald and Kathleen Deiss on December 4, 1994. They gained entry by feigning car trouble and asking to use the telephone. Once inside, Foster fatally shot Mr. Deiss twice in the head, and Mrs. Deiss once in the back of the head with a rifle. Foster and the juveniles then stole approximately $600 from the home.

On December 6, 1994, the Pierce County Sheriff's Department arrested Foster and transported him to the jail for questioning regarding the homicides of Donald and Kathleen Deiss. There Foster waived his ***Miranda***[3] rights, and was interrogated by law enforcement officers until he invoked his right to counsel less than two hours later. During Foster's discussion with the police, no incriminating statements were made.

Meloney Raebel was a friend of Donna Foster, the defendant's mother. Raebel and the Fosters resided together at Donna Foster's trailer home. Raebel was with Foster when he was arrested. She, too, was questioned by the police with regard to the double homicide. Raebel drove with an officer to the trailer home, where the police then executed a search warrant.

While the police executed the search warrant, Donna Foster asked Raebel to seek permission from officer Robert Rhiel to go talk with Foster at the

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police. ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981).

[2] ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

jail. Raebel agreed and Rhiel consented. Rhiel transported Raebel to the jail shortly after 1 a.m. on December 7, 1994. The conversation between Raebel and Foster took place in the attorney conference room at the jail and was not tape recorded. Shortly thereafter, Raebel emerged and told the officer that Foster admitted shooting Donald and Kathleen Deiss in their home on December 4, 1994. Raebel gave a detailed recollection of the conversation in a written statement to police. It was this inculpatory statement Foster unsuccessfully moved to suppress.

The issue on appeal is whether Raebel acted as an agent of the police. The state concedes that if Raebel was acting as an agent of the police, Foster's incriminating statements to Raebel must be suppressed. Foster contends that although the police did not directly request Raebel to talk to him, a review of the totality of the circumstances requires us to conclude that Raebel was acting as an agent of the police at the time of her conversation with Foster.

We review the trial court's historical findings of fact with deference, and will not upset those findings on appeal unless they are clearly erroneous. *See* ***State v. Lee***, 122 Wis.2d 266, 274, 362 N.W.2d 149, 152 (1985). However, the trial court's determination that Raebel did not act as an agent of police involves a question of law, subject to independent review by this court. *See* ***id.***

We recognize that the point at which a citizen acts on behalf of law enforcement is a "gray area" not easily subjected to "any bright-line test." ***Id***. at 275-76, 362 N.W.2d at 152-53. As stated by the court, "An inculpatory statement will be suppressed if the police intentionally create a situation, by directing, controlling or involving themselves in the questioning of a person in custody by use of a private citizen, which is likely to induce an accused to make incriminating statements without the assistance of counsel." ***Id.*** at 275, 362 N.W.2d at 153. Conversely, a confession to the police will not be suppressed when prompted by the advice of a third party in the absence of influence by the authorities on these communications or if the influence is only incidental. ***Id.***

Foster challenges the trial court's conclusion that Raebel was not a police agent. At oral argument, he focused on the totality of the circumstances surrounding Raebel's request to talk with him in the jail. When the police were

conducting a thorough search of the trailer home and its surroundings in the early morning hours of December 7, 1994, Rhiel asked Raebel and Donna Foster if there was anyone with whom Foster may have talked about the homicides. Foster interprets this as a request by Rhiel that either Raebel or Donna Foster talk with Foster in the jail. In consenting to the request, Foster argues, Raebel effectively became an agent of the police. Also, Foster contends the extensive police search at the trailer influenced Raebel to talk to him.

Although each case must be decided on the basis of the totality of the circumstances, we consider a number of factors in order to determine whether an individual was an agent of the police. Specifically, we consider whether it was the citizen or the police who did the following: (1) initiated the first contact with the police; (2) suggested the course of action that was to be taken; (3) suggested what was to be said to the suspect; and (4) controlled the circumstances under which the citizen and the suspect met, and whether that control was extensive or incidental. ***Id.*** at 276-77, 362 N.W.2d at 153.

The trial court found that Raebel and Donna Foster initiated contact with the police, that the police did not suggest a course of action or questions to be asked, but that the police controlled the meeting. These findings are not clearly erroneous. *See* § 805.17(2), STATS. We defer to the court's determination that Donna Foster was not a credible witness. *See* ***id.***

We reject Foster's contention that the extensive police search and police comments made during the search influenced Raebel to contact Foster. Raebel's testimony shows that it was she and Donna Foster who initiated contact with the police about the conversation Raebel later had with Foster. This occurred at the Foster residence as the police executed the search warrant. Donna Foster, Raebel, and Rhiel were present at the time. At the motion hearing, Raebel testified that it was Donna Foster, rather than the police, who asked her to speak with Foster at the jail. Raebel's testimony was consistent with that of Rhiel, who testified that Raebel approached him in the trailer and asked him if she could go to the jail to speak with Foster because Donna Foster requested her to do so. The trial court found that the motivation for Raebel talking to Foster was that Donna Foster and Raebel "needed to know the truth" about Foster's involvement in the homicides. The trial court also specifically rejected any suggestion that the officer consented to Raebel contacting Foster for

the purpose of the police seeking information from Foster or an attempt to circumvent his right to counsel.

Additionally, the evidence does not suggest that the police told Raebel what action she should take or what she should ask Foster during their conversation. Raebel testified that the police did not tell her what to ask Foster, nor did they limit the time she had with Foster. Again, Rhiel's testimony coincided with that of Raebel.

Finally, we consider whether the police controlled the setting in which the conversation took place, and whether that control was extensive or incidental. Because Rhiel transported Raebel to the jail, and the conversation took place after hours in the jail where Foster was in custody, we agree that the police controlled the environment. However, the conversation was not tape recorded, no officers were present, and no time limits were placed on the conversation. These factors suggest that the police control was incidental. Further, the scene of the meeting was inevitable in light of Foster's incarceration for murder. The police, however, made no attempt to participate in the conversation and permitted the use of a conference room, not a jail cell.

After reviewing the totality of the circumstances and applying the trial court's factual findings, we are satisfied that the police involvement was not sufficiently extensive so that it could be said the actions of Raebel were the effective equivalent of actions by police. She was not a message carrier for the police or acting on their behalf. Nor did the police influence Raebel to talk to Foster. Rather, Raebel's contact with Foster was the result of Donna Foster and Raebel independently needing to know the truth from Foster as to whether he was involved in the homicides. When applying the ***Lee*** factors in this case, Foster's arguments must fail. Because Raebel did not act as an agent of the police when she spoke with Foster, the trial court properly denied Foster's motion to suppress. Therefore, the judgment is affirmed.[4]

[4] In the appellant's brief, counsel filed a no merit report concerning the trial court establishing Foster's parole eligibility date at the year 2050 after sentencing him to two consecutive terms of life imprisonment. Foster has not filed a response regarding this issue.

Counsel for Foster indicates that § 302.11(1)m, STATS., provides that there is no mandatory

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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release date for one sentenced to life imprisonment. Nonetheless, § 973.014(1)(b), STATS., requires the sentencing judge to set a parole eligibility date which cannot exceed the maximum term of imprisonment as provided by law. However, as counsel concludes, in spite of this inconsistency, it does not appear the trial court erroneously exercised its sentencing discretion by establishing a parole eligibility date in the year 2050.

We agree. In ***State v. Borrell,*** 167 Wis.2d 749, 764-67, 482 N.W.2d 883, 888-89 (1992), our supreme court observed that although the legislature established a minimum amount of time for a life sentence at approximately thirteen years and four months, under § 973.014(2), STATS., the legislature permits the sentencing court to use its discretion to set a parole eligibility date later than the absolute minimum where the circumstances warrant. Thus, the parole eligibility date determination is an essential and integral part of the court's sentencing decision. ***Id.*** Here, there are no facts to suggest that the trial court misused its sentencing discretion.