COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2382-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH GRIFFIN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

SNYDER, P.J.Keith Griffin appeals from a judgment of conviction for possession of THC (marijuana) in violation of § 161.41(3r), STATS., 1993-94. Griffin contends that the trial court erred when it denied his motion to suppress an incriminating statement given to a staff advocate at the Racine Correctional Institute (RCI). Griffin argues that because he had not received ***Miranda***[1] warnings prior to making his statement

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

and the statement was subsequently used in a criminal prosecution, the constitutional prohibition against self-incrimination was violated. Because we agree with the trial court that ***Miranda*** did not apply in this situation, we affirm.

On January 12, 1995, a cell occupied by Griffin and fellow inmate James Hannah was searched. Prison officials discovered two hand-rolled cigarettes in the cell wastebasket; the two cigarettes tested positive for the presence of THC. An incident report was prepared, and Griffin was served with a conduct report on January 14, 1995, alleging possession of intoxicants and drug paraphernalia. *See* WIS. ADM. CODE §§ DOC 303.43 & 303.44.

Several days after the marijuana was found in his cell, Griffin was interviewed by corrections officer Lieutenant Brian Chapman about an unrelated matter. After Chapman had finished questioning Griffin and had told a guard to return Griffin to his cell, Griffin volunteered the information that the marijuana found in his cell belonged to him, not to Hannah. Chapman testified that Griffin's statements were made without any prior mention of the marijuana discovery.

A formal hearing was held concerning the possession of intoxicants and the drug paraphernalia violations on February 1, 1995. Prior to that hearing, William Hudson, a social worker at RCI, was appointed "staff advocate" to assist Griffin in preparing for and participating in the prison disciplinary proceedings.[2] Griffin requested that staff advocate Hudson write his statement for the disciplinary hearing and then dictated the following:

[2] WISCONSIN ADM. CODE § DOC 303.76(1) provides, inter alia, that "if a formal due process hearing is chosen, the inmate may present oral, written, documentary and physical evidence, and evidence from voluntary eyewitnesses … [and] that he … has a right to the assistance of a staff advocate …."

> I Keith Griffin openly admit the content found in the waste paper can that I had used the night before. Mr. James Hannah had no knowledge of my indulgents [sic]. He wasn't in room to my knowledge. I believe he was at rec.

Griffin admitted to possession of the intoxicants at the hearing and was found guilty of both violations.

On July 12, 1995, a criminal complaint was filed charging Griffin with possession of the two THC cigarettes. At that time, Griffin moved to suppress the admission he made to staff advocate Hudson, as well as the original admission made to Chapman. Defense counsel contended that the statements should be suppressed because they were involuntary and they did not comply with ***Miranda***, and because Griffin was not warned that any statements he made to Chapman or a staff advocate could be used against him in criminal court. The motions were denied.[3] The trial court concluded that: "Based upon the role of the advocate as being an aid[e] … who is to help the inmate [and] based upon the fact that the utilization of those services is a voluntary decision on the part of the inmate without any consequences if they fail to do so … the actions of [the staff advocate] … did not constitute an interrogation or either questioning or conduct designed to elicit incriminating information." Griffin pled guilty and now appeals the trial court's determination.[4]

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[3] The subject of this appeal is only the latter statement, made to the staff advocate.

[4] Although not argued at the original motion hearing, defense counsel brought a motion at the start of the trial that Griffin's statement to the staff advocate should be suppressed because his relationship with the staff advocate was similar to that protected by the attorney-client privilege. The trial court denied the motion. After a jury was sworn, Griffin decided to accept the State's plea bargain.

The issue presented, whether Griffin's statements to staff advocate Hudson should have been preceded by ***Miranda*** warnings, is a question of constitutional fact and as such is decided without deference to the trial court. *See* ***State v. Arroyo,*** 166 Wis.2d 74, 79, 479 N.W.2d 549, 551 (Ct. App. 1991). The reviewing court has the duty to apply constitutional principles to the facts as found in order to ensure that the scope of constitutional protections does not vary from case to case. *See* ***State v. Turner,*** 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987).

We first address whether ***Miranda*** warnings are implicated under these facts. In ***Miranda,*** the Supreme Court held that certain procedural safeguards are necessary within the context of a custodial interrogation. *See* ***State v. Mitchell,*** 167 Wis.2d 672, 686, 482 N.W.2d 364, 369 (1992). "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." ***Miranda v. Arizona,*** 384 U.S. 436, 444 (1966). However, before any warnings need be given, it must be established that a defendant is *in custody* and *under interrogation*. *See* ***id.***

The State concedes that Griffin was in custody. However, the mere fact that an individual is in custody is not enough to invoke the ***Miranda*** rule. *See* ***Roney v. State,*** 44 Wis.2d 522, 531, 171 N.W.2d 400, 403 (1969). The issue is whether Griffin's discussion with the staff advocate amounted to an interrogation. The following language from ***Miranda,*** 384 U.S. at 478, is pertinent to our analysis:

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible.

> Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be *interrogated.* [Emphasis added.]

Hudson, the staff advocate, was a social worker who had been assigned to assist Griffin at a pending disciplinary hearing. It is important to note that the assistance of a staff advocate is made available to inmates facing prison discipline, but the acceptance of such assistance is completely voluntary on the part of the inmates. The staff advocate merely asked Griffin whether he wanted to "tell his side of the story." At that point, Griffin voluntarily offered the incriminating statement that is the subject of this appeal.

In applying the reasons for the application of the ***Miranda*** protections, it is clear that the coercive situations which implicate the need for such warnings were not present in the instant case. The "incommunicado police-dominated atmosphere" of concern to the ***Miranda*** Court was not a factor in the instant case. *See* ***id.*** at 456. ***Miranda*** provides protection for "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the [police] techniques of persuasion," *see* ***id.*** at 461, and it seeks to guard against situations where the goal of a police interrogation was to "put the defendant in such an emotional state as to impair his capacity for rational judgment." *See* ***id.*** at 465.

We conclude that the situation presented by a voluntary contact between an inmate and a staff person whose role is to assist the inmate in preparing for a prison disciplinary hearing does not present the coercive situation that concerned the Court in ***Miranda.*** Griffin was speaking to the staff advocate voluntarily. He was not required to make any kind of statement; he was not even required to use the services of a staff

advocate. Hudson testified at the suppression hearing that his role as an advocate is to act as a "gofer" and assist the inmate in "collect[ing] data to be able to use for the said person for his conduct report." Hudson also stated that there were no sanctions for an inmate's refusal to provide a statement with respect to a conduct report.

Griffin was free to refuse the services of the staff advocate. Hudson offered to help him "tell his side of the story" and that is what Griffin chose to do. Considering the facts of this case in light of the dangers ***Miranda*** seeks to guard against, we conclude that the protections of ***Miranda*** were not implicated.

We do not address whether there are other constitutional challenges to the voluntariness of Griffin's statement to the staff advocate unrelated to ***Miranda,*** as we conclude from the trial court record that he has waived any further constitutional challenges. We note that Griffin withdrew the argument that the use of his statement violated any other constitutional rights at the motion hearing:

> THE COURT: Are you contending that in the way in which Mr. Hudson obtained the statement that there was any violation of a constitutional right?
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> [DEFENSE COUNSEL]: I don't see how I could maintain that position.
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> ….
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> [DEFENSE COUNSEL]: Upon my investigation of the matter, your Honor, I don't think there are involuntariness aspects that can be reasonably addressed. It's strictly a Miranda matter ….
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> ….

> THE COURT: The motion was initially brought on both the grounds of voluntariness and also the grounds of compliance with Miranda. Counsel has indicated today that the issue of voluntariness is no longer being raised.

Cf. ***State v. Meado,*** 163 Wis.2d 789, 794 n.1, 472 N.W.2d 567, 569 (Ct. App. 1991) (withdrawal of a motion to dismiss based on the sufficiency of the complaint waived consideration of the issue).

We also note that Griffin argued before the trial court that an inmate's statements to a staff advocate should be subject to the attorney-client privilege because of "the nature of their position as it's described by administrative rule." That argument was not raised on appeal and is deemed abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.,*** 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981).

We hold that Griffin's statement to the staff advocate was not made during an interrogation, and therefore did not implicate the rule of ***Miranda.***

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.