

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP1648-CR

Cir. Ct. No. 2003CF105

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID BORST,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. David Borst has appealed from judgments convicting him of three counts of sexual exploitation of a child as a persistent repeater and three counts of exposing a child to harmful material. The sole issue is whether the trial court erred in denying Borst's motion to suppress oral and written

statements made to the police on November 1, 2002, the day of his arrest. We conclude that the suppression motion was properly denied and affirm the judgments.¹

¶2 An evidentiary hearing was held on Borst's motion to suppress on May 22, 2003. The sole witness was Dean Artus, a detective for the City of Oshkosh Police Department. Artus testified that Borst was taken into custody on a probation hold at approximately 3:40 p.m. on November 1, 2002. Artus testified that his first contact with Borst was on the sidewalk at the site where he was arrested. Artus stated that he informed Borst that an apprehension request had been issued for him and that Artus was investigating allegations that Borst had taken some photographs of young children. Artus testified that Borst was handcuffed and placed in the squad car, at which time Artus read him his rights as set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶3 The form used by Artus to read Borst his *Miranda* rights was introduced into evidence at the suppression hearing. Both the form and Artus' testimony indicated that Artus initially informed Borst of his rights at 3:45 p.m. According to Artus, Borst stated that he understood his rights but was not willing to answer any questions. The form was signed by Borst at 3:48 p.m., after he initialed sections indicating that he understood his rights but was not willing to answer questions or make a statement. Artus testified that Borst gave no indication that he had any difficulty understanding Artus or communicating with

¹ The State also argues that any error in the admission of Borst's statements was harmless. Because we conclude that the statements were properly admitted, we need not address this issue.

him and that, even before Artus read the *Miranda* rights, Borst indicated that he had heard his rights before and understood them.

¶4 Artus testified that at 3:48 p.m., he discontinued all conversation with Borst and Borst was transported to the county jail by two other officers. Artus testified that he then prepared a search warrant and executed a search of Borst's residence. Artus testified that he placed a hold on Borst's telephone privileges until the search was completed because he did not want any evidence to be destroyed.

¶5 Artus testified that he returned to the jail after the execution of the search warrant and met with Borst in an interview room at approximately 7:20 p.m. Artus indicated that he told Borst that the police had obtained a search warrant and searched his home. Artus testified that he asked Borst whether, based on the findings of the search, which included photographs of children, he now wanted to speak with Artus. Artus testified that he produced the same *Miranda* warnings that he had read at 3:45 p.m. and told Borst that he was going to read the form to him again and ask him again whether he wished to speak to Artus. Artus testified that Borst stopped him from reading the form, stating that he had heard and understood the rights, and there was no need for Artus to read them to him again. Artus testified that he then asked Borst if he wanted to make a statement or answer questions and Borst stated that he was willing to talk to Artus.

¶6 Artus testified that he then wrote a line on the form indicating that Borst wanted to talk to him and that the time was 7:24 p.m. He testified that Borst initialed the line and did not appear to have any difficulty understanding him. Artus testified that he then conversed with Borst regarding the evidence that had been recovered from his home and the circumstances surrounding the taking of the

photographs. Artus testified that Borst appeared to willingly answer his questions, and that a six-page statement was ultimately reduced to writing by Artus and corrected and signed by Borst. Artus testified that, as indicated at the end of the written statement, the interview ended at 9:20 p.m. He testified that Borst never asked for an attorney at any time, never indicated that he wanted to stop talking or answering questions, and never indicated that he was tired or uncomfortable, needed to use the restroom, or anything else of that nature. When asked if Borst indicated why he was willing to talk, Artus testified that Borst stated that since the police had the photographs, they “had him anyway, or something to that effect.”

¶7 Borst contends on appeal that his statements should have been suppressed because his right to remain silent was not scrupulously honored as required under *Michigan v. Mosley*, 423 U.S. 96 (1975). Determining whether a defendant’s right to remain silent has been scrupulously honored requires the application of constitutional principles to the facts of the case and is subject to independent appellate review.² *State v. McNeil*, 155 Wis. 2d 24, 44, 454 N.W.2d 742 (1990), *aff’d on other grounds*, 501 U.S. 171 (1991).

¶8 “The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence.” *State v. Hartwig*, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985). However, the police may again interrogate a defendant after the right to silence has been invoked, provided the right to silence is scrupulously honored. *Id.* The purpose of this protection is to shield the

² At a suppression hearing, the trial court’s findings of fact will not be disturbed unless they are clearly erroneous. See *State v. Badker*, 2001 WI App 27, ¶8, 240 Wis. 2d 460, 623 N.W.2d 142 (Ct. App. 2000). However, in this case the trial court resolved no disputed issues. Artus was the only witness, and his testimony was undisputed.

defendant from repeated efforts to wear down his resistance and make him change his mind about remaining silent. *State v. Badker*, 2001 WI App 27, ¶12, 240 Wis. 2d 460, 623 N.W.2d 142 (Ct. App. 2000).

¶9 *Mosley* outlines a five-factor framework to consider in analyzing whether a defendant's invocation of his right to silence was scrupulously honored: (1) whether the original interrogation was promptly terminated when the defendant invoked his right to silence; (2) whether the interrogation was resumed only after the passage of a significant period of time; (3) whether the suspect was given complete *Miranda* warnings at the outset of the second interrogation; (4) whether a different officer resumed the questioning; and (5) whether the second interrogation was limited to a crime that was not the subject of the earlier interrogation. See *McNeil*, 155 Wis. 2d at 44. However, these factors do not establish a test which can be woodenly applied, and the presence or absence of the factors is not exclusively controlling. *Badker*, 240 Wis. 2d 460, ¶12. "The essential issue is whether, under the circumstances, the defendant's right to silence was scrupulously honored." *Hartwig*, 123 Wis. 2d at 285.

¶10 Based upon this analytical framework, we conclude that Borst's suppression motion was properly denied. It is undisputed that Artus immediately terminated any questioning of Borst when Borst stated that he did not want to answer questions at the time of his initial arrest. In addition, while Artus did not reread Borst's *Miranda* rights at the second encounter, the undisputed testimony at the suppression hearing indicated that he would have done so if Borst had not

interrupted and told Artus that it was unnecessary because he understood them.³ Because the record thus supports a determination that Borst understood his rights and that Artus would have read them a second time were it not for Borst's intervention, this factor supports the trial court's decision denying the suppression motion.

¶11 We also conclude that the amount of time that passed between Borst's initial invocation of his right to silence and the resumption of questioning supports the trial court's decision. The passage of three and one-half hours compares favorably to the two-hour interval which was deemed adequate in *Leach v. State*, 83 Wis. 2d 199, 210-11, 214, 265 N.W.2d 495 (1978).

¶12 Admittedly, the questioning of Borst that commenced at 7:20 p.m. was conducted by the same detective who heard Borst invoke his right to silence at the time of his arrest, and it dealt with the same offenses. Borst argues that having the same detective who witnessed him invoke his right to silence reapproach him three and one-half hours later to discuss the same crime was coercive. However, absent other evidence of overbearing or coercive police tactics, it is not dispositive that the same officer conducted a second interview involving the same crime as previously discussed. *See State v. Turner*, 136 Wis. 2d 333, 359-60, 401 N.W.2d 827 (1987).

¶13 The fact that Borst invoked his right to silence in front of Artus at the time of his arrest does not render the subsequent interview coercive under the

³ This was also consistent with Borst's statement at the time of his initial arrest, when he told Artus that he had heard his rights before and understood them. The evidence is undisputed that, despite Borst's statement, Artus read Borst his *Miranda* rights when he was apprehended.

circumstances of this case. It is undisputed that Artus was involved in the execution of a search warrant at Borst's home after Borst was transported to jail and that incriminating evidence was discovered. It was logical and reasonable for Artus to reapproach Borst to tell him about the search and to ask him if he wanted to speak to the police in light of what was discovered. Under these circumstances, the fact that Artus reapproached Borst cannot be deemed a coercive attempt to wear down Borst's exercise of his right to silence, nor did it communicate to Borst that Artus would keep returning until he obtained a waiver of Borst's right to silence.⁴

¶14 The record thus supports a determination that Borst's initial invocation of his right to silence was honored and that he made his later statements only after being reminded of his *Miranda* rights and voluntarily deciding to waive them. Because the majority of the *Mosley* factors support the determination that Borst's right to silence was scrupulously honored, and because the circumstances surrounding the questioning of Borst provide no basis to conclude that he was coerced into speaking to the police, we affirm the trial court. In doing so, we strongly rebuke Borst's appellate counsel for submitting an appellant's brief which contains numerous misstatements, some apparently the result of careless error and some bordering on misrepresentation.⁵ Counsel is cautioned to be more careful

⁴ In alleging that the environment was coercive, Borst also relies on Artus' testimony that a hold was placed on his telephone privileges until after the search was conducted and the interview ended. However, Artus' testimony does not assist Borst because nothing in the record indicates that Borst ever asked to make a telephone call. In addition, Artus' testimony specifically states that Borst did not request an attorney.

⁵ For example, counsel misstates numerous dates in his brief. He also argues that from the time of Borst's arrest until questioning ended at 9:20 p.m., he was not provided with food, water or other creature comforts. In addition, at page nine of his brief, he states that Borst "unambiguously requested an attorney at 3:48 p.m." Nothing in the evidence presented at the suppression hearing supports these claims.

and accurate in representing facts in the future and to include adequate citations to the record as required by WIS. STAT. RULE 809.19(1)(d) and (e) (2003-04).⁶

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁶ All references to the Wisconsin Statutes are to the 2003-04 version.

