COURT OF APPEALS
DECISION
DATED AND FILED

October 04, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2063-CR **Cir. Ct. No. 2002CF1551**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN L. MCCULLOUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN and TIMOTHY G. DUGAN, Judges. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Kevin L. McCullough pled guilty to one count of delivery of heroin, fewer than three grams, second or subsequent offense, contrary to WIS. STAT. §§ 961.41(1)(d)1 and 961.48 (2001-02).[1] The court sentenced McCullough to thirteen years of imprisonment, comprised of seven years of initial confinement and six years of extended supervision. Prior to pleading guilty, McCullough moved to suppress statements given to police. After a lengthy evidentiary hearing, the circuit court denied the motion, concluding that McCullough was not in custody when he gave his initial statements to the police and that his subsequent waiver of his ***Miranda*** rights was valid.[2] On appeal, McCullough renews his arguments on the suppression issue and also contends that the court erroneously exercised sentencing discretion.[3] We affirm.

Background

¶2 During the early morning hours of March 15, 2002, police and medical personnel responded to an incident at 3214 West Fardale in Milwaukee. As Sergeant Timothy Wilger was leaving that address, McCullough approached and asked him for assistance. McCullough told Wilger that his girlfriend, who

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

The judgment of conviction does not include a reference to WIS. STAT. § 961.48, the "second or subsequent offenses" sentence enhancer. The record indicates that McCullough was charged with delivery of heroin as a second or subsequent offense, that McCullough pled guilty to that charge, and that he was sentenced on that charge. Upon remittitur, the court shall enter an amended judgment of conviction correctly setting forth the nature of McCullough's conviction.

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

[3] McCullough may appeal from the denial of a suppression motion despite his guilty plea. *See* WIS. STAT. § 971.31(10) (2003-04). The Honorable Michael B. Brennan denied the suppression motion. McCullough was sentenced by the Honorable Timothy G. Dugan, and Judge Dugan also denied the postconviction motion.

was in an apartment across the street, was not breathing. Wilger followed McCullough into the apartment where he found McCullough's girlfriend, Anita Marrari, lying on a bed, unresponsive. Emergency personnel were unable to revive Marrari, and it was determined that she died of a heroin overdose.

¶3 Wilger and Officer William Savagian both spoke with McCullough in the apartment. Approximately two hours after the initial police contact, Savagian escorted McCullough to his police squad car and Detective Mark Peterson spoke with McCullough in the car. At about 4:00 a.m., Savagian drove McCullough to the Crime Investigation Bureau (CIB) in downtown Milwaukee. Peterson interviewed McCullough a second time starting approximately at 7:00 a.m. until shortly after 8:00 a.m. After about a thirty-minute break, Peterson returned to the interview room. Prior to any further questioning, Peterson read McCullough his ***Miranda*** rights. McCullough then gave a statement in which he admitted injecting Marrari with heroin shortly before her death. Additional facts will be set forth below as necessary.

Discussion

¶4 McCullough moved to suppress statements made to the police in three discrete locations – the apartment, the squad car, and the CIB. In each instance, McCullough contended he was in custody at that point in time, and the statements must be suppressed because he had not been given the ***Miranda*** warnings. He also contended that the inculpatory statement he made after the ***Miranda*** warnings were given should be suppressed because the waiver was invalid.

¶5 Wilger, Savagian and Peterson testified at the suppression hearing. The circuit court found each police witness to be an honest and credible witness.

McCullough also testified at the hearing, and the court expressly found that McCullough was not credible. In its decision, the court stated that McCullough "appeared nervous, and fidgety" while testifying and "twisted his fingers consistently, picked his nails, paused during his testimony, and shifted in his chair." The court also observed that McCullough's "hands had tremors." The court stated that "[w]hile these observations are consistent with the mannerisms of a long-term heroin addict, they are also consistent with that of an incredible witness." This court must accept the circuit court's credibility assessment. *See* ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994). Therefore, whenever the testimony of the police witnesses varies from McCullough's testimony, this court must accept the police testimony.

¶6 For ease of discussion, we first set forth our standard of review and the controlling legal principles. We then will apply those principles to each location, referencing the relevant factual findings when appropriate. Finally, we will address McCullough's challenge to the admissibility of his post-***Miranda*** statement.

A. Standard of Review

¶7 When reviewing a circuit court's suppression ruling, we accept that court's findings of historical fact unless they are clearly erroneous. *See* ***State v. Morgan***, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 648 N.W.2d 23. As noted earlier, when the circuit court acts as the finder of fact, it is the ultimate arbiter of witness credibility and of the weight to be given to each witness's testimony. ***Plesko***, 190 Wis. 2d at 775. Whether a person is "in custody" for ***Miranda*** purposes is a question of law, which we review *de novo* based on the facts as found by the circuit court. ***Morgan***, 254 Wis. 2d 602, ¶11.

B. "In Custody"

¶8 A person is "in custody" when he or she is deprived of his or her freedom of action in any significant way. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). To determine whether a person is "in custody," the court considers the totality of the circumstances, including the defendant's freedom to leave; the purpose, place and length of the interrogation; and the degree of restraint. ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). When considering the degree of restraint, the court considers whether handcuffs were used, whether a weapon was drawn, whether a frisk was performed, whether the suspect was restrained, whether the suspect was moved to another location, whether questioning took place in a police vehicle, and the number of officers involved. ***Id.*** at 594-96. The court focuses on whether a reasonable person would consider himself or herself "in custody," and "the standard is the objective one of the reasonable person, not the subjective one of the suspect in the particular case, who may assume he or she is being arrested because he or she knows there are grounds for an arrest." ***Morgan***, 254 Wis. 2d 602, ¶23.

C. The Apartment

¶9 The circuit court concluded that McCullough was not in custody when he was in the apartment with Wilger and Savagian. We agree. McCullough initiated the contact with police when he asked for help. Wilger asked him what had happened, and McCullough told him that he and Marrari had taken heroin earlier in the day. We concur with the circuit court's observation that the "questioning which took place by [Wilger or Savagian] was administrative in nature to aid others' investigation, not investigative itself." Furthermore, Wilger "posed no follow-up questions as if he were doing an investigation." General on-

the-scene questioning as to facts surrounding a crime do not fall within the ambit of ***Miranda***. *See* ***State v. Esser***, 166 Wis. 2d 897, 901-02, 480 N.W.2d 541 (Ct. App. 1992). While McCullough was told to "stand by" until detectives arrived to talk with him, he was free to walk around the apartment. He was not restrained or touched, and no weapons were drawn. Under the totality of the circumstances, we conclude that a reasonable person in McCullough's position would not have considered himself to be "in custody" while he waited in the apartment.

D. The Squad Car

¶10 After detectives arrived at the apartment, Peterson asked Savagian to take McCullough to Savagian's squad car. Savagian escorted McCullough down the stairs to the squad car. Savagian assumed that he explained to McCullough that he was being taken to the squad car so a detective could speak to him, but he did not specifically recall if he told McCullough that. Savagian did not touch McCullough or handcuff him while taking him to the squad car. Savagian did not draw his weapon.

¶11 When they arrived at the squad car, Savagian opened the rear door, and McCullough entered the rear seat. The front and rear seats of the squad car were separated by a plexiglass divider that could only be opened by a person in the front seat. Neither rear door could be opened by a person seated in the rear seat of the squad car. Savagian sat in the front seat of the squad car and waited for Peterson to arrive. The plexiglass divider was closed and Savagian did not talk with McCullough during that period.

¶12 When Peterson arrived, he got into the driver's seat and Savagian left to wait in another vehicle. Peterson then spoke with McCullough for about fifty minutes. McCullough remained unhandcuffed during this conversation.

Peterson did not threaten McCullough during this conversation or tell him he was under arrest. Peterson asked questions about Marrari, her children, and the day's events. Peterson told McCullough that the investigation was "on-going" and asked McCullough whether he had "any problem" with going "downtown" to answer questions. McCullough responded that he did not. At Peterson's request, Savagian then drove McCullough to the CIB.

¶13 The circuit court determined that McCullough was not in custody while seated in the squad car and while being transported to the CIB. We disagree. Viewing the totality of the circumstances, we conclude that a reasonable person in McCullough's position would have considered himself to be in custody while in the squad car and while being driven to the CIB.

¶14 McCullough was taken from his apartment, a location in which he undoubtedly felt comfortable, to a marked police squad car. He was not left alone in the squad car, with Savagian remaining in the car until Peterson arrived. Although McCullough was not handcuffed, it is undisputed that once McCullough entered the rear seat of the squad car and the door was closed, he could not leave the vehicle. A plexiglass divider that McCullough could not open separated him from Savagian and Peterson. We conclude that when police removed McCullough from his apartment and placed him in a locked squad car from which there was no voluntary exit, he was "deprived of his … freedom of action in [a] significant way," and therefore, "in custody" for ***Miranda*** purposes. *See* ***Miranda***, 384 U.S. at 444.

E. The CIB

¶15 Having determined that McCullough was in custody in the squad car outside his apartment, we need not dwell long on whether he remained in custody

while at the CIB. Like the squad car from which McCullough could not exit, the CIB is a secured location. While McCullough still was not handcuffed, there is little question that McCullough's "freedom of action" was severely limited. When they arrived at the CIB, Savagian escorted McCullough to an interview room, passing through several security doors for which Savagian used a pass card. As he did in the squad car, Savagian remained with McCullough until Peterson arrived approximately two hours later. When Peterson arrived, he questioned McCullough extensively about McCullough's "comings and goings" earlier in the day. We conclude that a reasonable person would have considered himself in custody at the CIB.

*F. Admissibility of Post-**Miranda** Statement*

¶16 We next consider whether McCullough's subsequent inculpatory statement, made to Peterson after the ***Miranda*** warnings were given, must be suppressed. McCullough contends that his waiver of the ***Miranda*** rights was not valid. He relies on ***Missouri v. Seibert***, 542 U.S. 600, 124 S. Ct. 2601 (2004). We conclude that ***Oregon v. Elstad***, 470 U.S. 298 (1985), not ***Seibert***, is controlling. Therefore, we reject McCullough's contention.

¶17 In ***Elstad***, the Supreme Court considered "whether an initial failure of law enforcement officers to administer … [***Miranda***] warnings …, without more, 'taints' subsequent admissions made after a suspect has been fully advised of and has waived his ***Miranda*** rights." ***Id.*** at 300. The court held that "a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" does not render a subsequent statement inadmissible. ***Id.*** at 309. Although "the unwarned admission must be suppressed, the admissibility of any subsequent

statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." ***Id.***

¶18 In ***Seibert***, the Supreme Court considered "a police protocol for custodial interrogation that calls for giving no [***Miranda***] warnings … until interrogation has produced a confession." ***Seibert***, 542 U.S. at __, 124 S. Ct. at 2605. The Court noted that ***Miranda*** warnings, "inserted in the midst of coordinated and continuing interrogation, … are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" ***Id.***, 542 U.S. at __, 124 S. Ct. at 2611, (quoting ***Moran v. Burine***, 472 U.S. 412, 424 (1986)). Thus, the Court held that Seibert's postwarning statements were inadmissible. ***Seibert***, 542 U.S. at __, 124 S. Ct. at 2613.

¶19 In ***Seibert***, Missouri had relied on ***Elstad*** to defend its "question-first strategy." ***Id.***, 542 U.S. at __, 124 S. Ct. at 2611. The Supreme Court rejected Missouri's argument, characterizing the police actions in ***Elstad*** as "a good-faith ***Miranda*** mistake, … open to correction by careful warnings before systematic questioning" whereas in ***Seibert***, an "unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill." ***Id.***, 542 U.S. at __, 124 S. Ct. at 2612.

¶20 Justice Kennedy's concurring opinion in ***Seibert*** aptly illustrates the distinctions between that case and ***Elstad***.

> ***Elstad*** reflects a balanced and pragmatic approach to enforcement of the ***Miranda*** warnings. An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and

> good police work may involve referring to prior statements to test their veracity or to refresh recollection.
>
> ….
>
> [In ***Seibert***], police used a two-step questioning technique based on a deliberate violation of ***Miranda***. The ***Miranda*** warning was withheld to obscure both the practical and legal significance of the admonition when finally given.… The strategy is based on the assumption that ***Miranda*** warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained.

Id., 542 U.S. at __, 124 S. Ct. at 2615 (Kennedy, J., concurring).

¶21 In this case, the circuit court found that "[t]here is no credible evidence of any coercive or improper police behavior during the entire ten hours from when the defendant sought police aid to when the interview at the CIB concluded." That finding is not clearly erroneous. Although we conclude that McCullough was "in custody" when he was interviewed in the squad car and at the CIB, Peterson's "simple failure to administer the warnings [was] unaccompanied by any actual coercion or other circumstances calculated to undermine [McCullough's] ability to exercise his free will." *See* ***Elstad***, 470 U.S. at 309. The facts of this case indicate that Peterson made "a good-faith ***Miranda*** mistake." *See* ***Seibert***, 542 U.S. at __, 124 S. Ct. at 2612. When Peterson determined that more thorough questioning was needed, he gave McCullough the ***Miranda*** warnings. McCullough's waiver of those rights was valid, and therefore, his admission that he injected Marrari with heroin need not be suppressed.

G. Sentence

¶22 McCullough contends that the circuit court did not properly exercise sentencing discretion. McCullough argues that the court's sentencing rationale

does not meet the requirements set forth by the supreme court in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. We are not persuaded.

¶23 Sentencing is committed to the discretion of the circuit court and our review is limited to determining whether the court erroneously exercised its discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971).[4] This exercise of discretion contemplates a process of reasoning based on facts that are of record or that are reasonably inferred from the record and a conclusion based on a logical rationale founded upon proper legal standards. ***Id.*** at 277. A strong public policy exists against interfering with the circuit court's discretion in determining sentences and the trial court is presumed to have acted reasonably. ***State v. Wickstrom***, 118 Wis. 2d 339, 354, 348 N.W.2d 183 (Ct. App. 1984). To obtain relief on appeal, the defendant has the burden to "show some unreasonable or unjustified basis in the record for the sentence imposed." ***State v. Borrell***, 167 Wis. 2d 749, 782, 482 N.W.2d 883 (1992).

¶24 The three primary factors a sentencing court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court may also consider the following factors:

> (1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of

[4] In ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, the supreme court reaffirmed the sentencing standards established in ***McCleary v. State***, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). McCullough was sentenced before ***Gallion*** was decided, and the supreme court in ***Gallion,*** stated that it applied only to "future cases." ***Gallion***, 270 Wis. 2d 535, ¶¶8, 76. In any event, the ***Gallion*** court did "not make any momentous changes" to Wisconsin sentencing jurisprudence. ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20. Therefore, we examine McCullough's sentence against ***McCleary*** and its progeny.

> presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention.

Id. at 623-24. The circuit court need discuss only the relevant factors in each case. ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993). The weight given to each of the relevant factors is within the court's discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 662, 469 N.W.2d 192 (Ct. App. 1991). After consideration of all relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984).

¶25 McCullough faults the sentencing court for not explaining why seven years of initial confinement was an appropriate sentence when "some lower amount [would be] more appropriate for an addict" and for "overemphasiz[ing] the effect that the defendant's drug use had on children when there was no evidence of the harmful effect tied directly to the defendant." McCullough states that "[t]his case involves a heroin addict" who is not violent and who has never "deal[t] drugs." He suggests that the court imposed a "very harsh" sentence because it "was reacting to [Marrari's] death." Finally, McCullough contends that the court "gave excessive weight" to the effect of the crime on Marrari's and McCullough's children and engaged in "conjecture and speculation" as to the effect on the children.

¶26 The court began its sentencing comments by acknowledging that it was required to consider the nature of the offense, McCullough's character and the interests of the public. The court discussed the nature of the offense and concluded that delivery of heroin was a "serious offense" because drugs are

"destroying the lives of individuals, of families [and] of children." The court stated that children of addicts know their parents are "using" and that the parents are "just setting those kids up" to "follow [their] example." The court recognized that addicted parents are less able to properly care for their children, and in this case, the couple's children had been "taken out of the home" because Marrari and McCullough were using drugs and unable to care for them. Finally, the court noted that Marrari had died as a result of McCullough's conduct, leaving the children motherless.

¶27 The court discussed McCullough's prior criminal record which included a previous heroin-related offense and a "resisting" offense. The court noted that Judge Brennan had concluded that McCullough was not a credible witness during the suppression hearing. The court recognized "some positive things," namely, that McCullough had started treatment and was "making progress." On the other hand, McCullough had "tested positive" during the pendency of the case, showing that his compliance with the pretrial condition that he not use drugs had been "sporadic." That noncompliance led the court to conclude that McCullough could not be supervised in the community and that his treatment needs should be addressed in a "structured, confined setting." The court also stated that the period of extended supervision would give McCullough the "opportunity to continue treatment in the community under greater resources than [available during] probation." Finally, the court recognized that Marrari's death demanded that "a punishment component" be included in the sentence.

¶28 We conclude that the court properly exercised sentencing discretion. The court's consideration of the impact of drug addiction on children in general, and on Marrari's children in particular, was proper. McCullough's contention that the sentencing court engaged in "conjecture and speculation" borders on frivolity.

The court considered the appropriate factors and imposed a reasonable sentence that was substantially less than the forty-five year potential maximum sentence.[5] The court set forth its reasons for imposing the selected sentence, and this court will not disturb a sentence merely because the court did not explicitly state that seven years of initial confinement will best meet McCullough's needs.

¶29 Finally, we reject McCullough's contention that the sentence was harsh and excessive. A sentence is excessive when it is "so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). McCullough's description of the offense as "simple delivery" of heroin ignores reality – Marrari died as a result of that "simple delivery." In light of that reality, and the other factors identified by the sentencing court, the sentence imposed in this case is not excessive.

By the Court.—Judgment and order affirmed.

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

[5] At the time of this offense, the maximum sentence for the delivery of heroin, less than three grams, was twenty-two years and six months. *See* WIS. STAT. § 961.41(1)(d)1. The "second or subsequent offenses" enhancer of WIS. STAT. § 961.48 doubled the maximum allowable sentence.