COURT OF APPEALS
DECISION
DATED AND FILED

December 05, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP57-CR **Cir. Ct. No. 2004CF4421**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALONZO T. WEATHERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed*.

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

¶1 KESSLER, J. Alonzo T. Weathers appeals from a judgment of conviction for delivery of a controlled substance, cocaine, one gram or less, party to a crime, in violation of WIS. STAT. §§ 961.16(2)(b)(1), 961.41(1)(cm)(1g) and

939.05 (2003-04).[1] The charge resulted from a police informant ("Gloria") taking an undercover officer ("Jones") to a car driven by Weathers and also occupied by Judith Gilmore in the passenger seat. Gloria gave pre-recorded money to Gilmore and received five rocks of crack cocaine, handed to her by Gilmore. Gloria gave the cocaine to Jones. Jones heard Weathers yell at Gloria "Don't you ever bring no strange ass motherfucker to my car that I don't know."

¶2 Both Gilmore and Weathers were arrested shortly after the drug sale. Gilmore admitted selling Gloria five rocks of crack cocaine for fifty dollars. Additional crack cocaine, and the pre-recorded cash were recovered from Gilmore's person. Prior to and during the booking process, while Weathers was in custody and before ***Miranda***[2] warnings had been read to him, the officer who conveyed Weathers to the police station testified that Weathers repeatedly asked, "What am I under arrest for?" Weathers confirmed asking essentially that question, both at the scene of the arrest and at the police station. Initially, the officer told Weathers that he would tell him later when they were alone because there were other people there waiting in line for the booking process. Finally, in response to another similar inquiry by Weathers, the officer replied, "You know why you're under arrest" to which the officer testified Weathers replied, "All I did was drive [Gilmore] over to 4th and Center where [Gilmore] was supposed to bring a woman some cocaine, but that's all I did was drive [Gilmore]." Weathers vigorously disputes the substance of that statement, but testified that in response to the above-described officer's statement, Weathers said, "[T]he only thing they told

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

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

me—which one officer had told me—the only thing they told me—I was referring to what the detective had told me that I supposed [sic] to have took someone to sell some cocaine."

¶3 Weathers moved to suppress his statement. After an evidentiary hearing, the trial court denied the motion to suppress. The trial court made the following findings with respect to the circumstances surrounding the disputed statement:

> This was custodial, but it was not interrogation.… [Weathers] properly, understandably, wanted to know what he was charged with, and he kept asking what he was charged with.… The officer does have the authority to simply say, "You know what you're here for.…" Simply saying, "I think you know what you're here for" or "You know what you're here for" or "I'll tell you later when we're alone," none of those statements constitute interrogation.
>
> Now, I want to be clear to the officers, it could [constitute interrogation] if really what you do is calculate it to get a statement while someone's in custody, well, then, you have to give them Miranda warnings first. But I cannot find on the record here that that's what this officer did.
>
> ….
>
> The issue here for me this afternoon is whether the State has established that the … Miranda warnings were not required because this was not interrogation and, also, whether the statement made by Mr. Weathers was freely, voluntarily made, whatever the statement was. And I find that Miranda warnings were not required at that point and—because there was no interrogation, although Mr. Weathers was in custody. And, further, I find that whatever statement Mr. Weathers did give was free and voluntary.

¶4 Weathers thereafter pled guilty, was convicted and sentenced. He now appeals the denial of the motion to suppress. Because we conclude that

Weathers' statement was not the product of interrogation, or the functional equivalent of interrogation, we affirm.

¶5 Review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact. ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621. A question of constitutional fact is reviewed in a two-step process. First, we uphold a trial court's findings of fact unless they are clearly erroneous. Second, we apply the law to those facts without deference to the trial court. ***Id.***

¶6 Weathers argues that his statement should have been suppressed because it was the functional equivalent of interrogation under the holdings of ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980) and ***State v. Cunningham***, 144 Wis. 2d 272, 276, 423 N.W.2d 862 (1988). The Supreme Court in ***Innis*** extended the suppression of statements obtained in violation of the suspect's ***Miranda*** rights to the "functional equivalent" of interrogation which the Court defined as "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." ***Innis***, 446 U.S. at 301. An "incriminating response" can be either inculpatory or exculpatory, and is measured by whether the prosecution seeks to introduce the statement at trial. ***Id.*** at 309 n.5 (Stevens, J., dissenting).

¶7 The Wisconsin Supreme Court in ***Cunningham*** discussed the concept of a functional equivalent of interrogation in the context of police showing a suspect physical evidence of a crime (a revolver) and orally summarizing the State's case. ***Id.***, 144 Wis. 2d at 276. The court concluded that display of evidence and orally summarizing the case, in the circumstances present at the time, did not require suppression of the defendant's statements. The court

explained that ***Innis*** imposed an objective foreseeability test, formulated as "whether an objective observer could foresee that the officer's conduct or words would elicit an incriminating response." ***Cunningham***, 144 Wis. 2d at 278. Because the exchange must be viewed from the perspective of the suspect, another way of stating the test is "whether the police officer's conduct or speech could reasonably have had the force of a question on the suspect." ***Id***.

¶8 Here, it is undisputed that Weathers initiated the conversation by repeatedly asking why he had been arrested. When the officer finally responded that he thought Weathers knew why he had been arrested, the officer was not asking a question. For that response to become the functional equivalent of interrogation, an objective observer would have to conclude that the officer should have known that his response was reasonably likely to evoke an incriminating response from Weathers. In the context here, an objective observer would more likely anticipate a response along the lines of "if I knew, I would not be asking you?" or "quit playing games and just tell me!" than the response that actually occurred.

¶9 In addition, Weathers argues that the officer's comment is the functional equivalent of interrogation because it posits guilt by conveying the officer's opinion that Weathers is guilty. In ***State v. Bond***, 2000 WI App 118, 237 Wis. 2d 633, 614 N.W.2d 552, the supreme court concluded a defendant's statement should have been suppressed when he responded to a police officer's response to the defendant's question as to why he had been arrested. ***Id.***, ¶¶27-28. However, the court explained that the officer's remark posited guilt because it could have made sense only to the person who committed the crime for which Bond was arrested. ***Id.***, ¶17. Consequently, Bond's immediate acknowledgment that he understood the words used by the officer was an expected response and

thus the functional equivalent of interrogation prohibited by ***Innis***. ***Bond***, 237 Wis. 2d 633, ¶¶17-18.

¶10 We conclude that the officer's statement to Weathers, in response to Weathers' question, was not the functional equivalent of interrogation, and that Weathers' statement was admissible.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.