COURT OF APPEALS DECISION DATED AND FILED

December 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 2005AP2450-CR

Cir. Ct. No. 2003CF4495

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVIN LEE BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed; attorney sanctioned.*

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

¶1 FINE, J. Devin Lee Brown appeals from a judgment entered on a jury verdict convicting him of first-degree intentional homicide. *See* WIS. STAT. § 940.01(1)(a). He contends that the trial court erred in not suppressing his confession, which he claims was not voluntary, and, also, that he was deprived of

his right to confrontation when the trial court received into evidence statements made by a witness who, when testifying at trial, claimed a loss of memory. We affirm.

I.

A.

¶2 A jury convicted Brown of shooting and killing Lamar Ashley. As material to the issues raised by Brown's appeal, Brown was arrested at his home at 6:20 Saturday morning, August 2, 2003. Police, after first telling Brown his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), interviewed and interrogated him starting at 9:42 that morning. Both Brown and the interrogating officers testified at the evidentiary hearing held by the trial court to determine whether Brown's statements during those interrogations were admissible. Although Brown claimed both that he had asked for a lawyer and that an officer beat him until he confessed, the trial court believed the officers and not Brown. We accept the trial court's credibility determinations. *See* WIS. STAT. RULE 805.17(2) (trial court's findings of fact must be upheld on appeal unless "clearly erroneous") (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Brown contends, however, that the extent and duration of the officers' questioning of him made his statements not voluntary. Thus, we focus on that aspect of the Record, drawing, where appropriate, from the trial testimony, which is properly considered by us in determining the merits of a suppression appeal. *See* ***State v. Truax***, 151 Wis. 2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989) ("[W]e are not limited to the facts as presented at the suppression hearing and may examine pertinent trial evidence as well.").

¶3 As noted, the first time the police questioned Brown was at 9:42 a.m. on August 2, a little more than three hours after he was arrested. This first questioning lasted four hours and ended at 1:42 p.m. Brown was questioned by John Wesley, a Milwaukee police detective along with Wesley's partner, Louis Johnson, also a Milwaukee police detective. Wesley testified that the interrogation room was about "average" and was approximately twelve-foot square. The room had no windows.

¶4 According to Wesley, Brown was still in the clothes he was wearing when he was arrested that morning, and was not handcuffed. Wesley testified that Brown told him he was not tired, waived his rights under the ***Miranda*** decision, and that Brown was not forced to do so. Wesley also testified that he told Brown he could have a bathroom break whenever he wanted one, but that Brown never asked for one during that first interview. Wesley also told the trial court that he gave Brown a soda, and that Brown did not want any food.

¶5 During that first interview, Brown told the officers that seven months before Ashley was killed, two persons came into his mother's house and robbed Brown, his brother Antwan Franklin, and a third person in the house, and that Brown later was told that Ashley had instigated the robbery. During Brown's first interrogation, Brown's brother was telling other officers that Brown had admitted to him that he, Brown, had shot Ashley. Brown denied in that first interrogation that he shot Ashley.

¶6 After the first interrogation, the officers put Brown in a holding cell, where he stayed for approximately seven hours, until 8:45 p.m., when he was brought back to an interrogation room. There, until 2:14 a.m. on Sunday, August 3, with a fifteen-minute break and also a bathroom break, Brown was questioned

by Milwaukee police detectives Scott Gastrow and Erik Villarreal. Gastrow told the trial court that before he started to talk to Brown, he reminded Brown of his rights under ***Miranda***, and that Brown waived them. Gastrow also testified that they gave Brown a soda and asked whether he wanted food. Brown said he was not hungry because he had already eaten, presumably during the seven-hour break, and told the officers that he was not tired. Shortly before that second interview ended at a quarter past two, Gastrow told Brown that other officers would be questioning him again. According to Gastrow, Brown did not object: "We indicated that some--another--most likely another team of detectives would be talking to him yet, and he indicated that that would be okay with him, and he didn't appear to be tired." When asked by the prosecutor whether he asked Brown whether Brown was tired, Gastrow replied, "[y]es," and Brown "said he was fine." Later, at the trial, Villarreal testified that if Brown had wished to go back to the holding cell rather than talk with the new detectives they would have permitted him to do so. In response to a question asked by Brown's lawyer, Villarreal testified that although as he perceived it Brown did not "indicate" that he wanted to talk to the new detectives, "he did not ask to stop either." Gastrow denied threatening or harming Brown, and testified that Brown never asked for a lawyer. Villarreal testified that Brown spoke with him and Gastrow willingly and never indicated that he did not want to talk to them. As in the first interrogation, Brown denied that he shot Ashley.

¶7 Milwaukee police detective Mark Peterson was the next officer to interrogate Brown. He told the trial court that he went into the interrogation room to see Brown at 2:45 a.m. on the morning of August 3, and explained: "The purpose of meeting Mr. Brown was two things; one, either to continue to talk to Mr. Brown if he choose [*sic*] to do so. If he did not choose to do so, it was to take

him back up to the fifth floor to the holding area." Brown was not handcuffed, and used the bathroom before Peterson started the interview. Peterson testified that he asked Brown whether he wished to talk or whether he was tired, and, according to Peterson, Brown said that he "did … want to continue to talk" and was not tired. Peterson also reminded Brown of his ***Miranda*** rights, which Brown said he understood. According to Peterson, Brown said that he wished to talk to him.

¶8 Peterson's interrogation of Brown lasted until 4 a.m., and Brown admitted to shooting Ashley after Peterson told him that his brother Antwan Franklin told the police that Brown admitted to him that he, Brown, had done so. Peterson told the trial court that he did not threaten Brown or promise him anything in order to get him to confess, and that Brown did not ask to speak to a lawyer. Peterson also testified that his interrogation of Brown was in a "[n]ormal tone": "There was no yelling, no screaming. Just a casual conversation."

¶9 Brown was returned to a holding cell at 4 a.m. From 1:25 Sunday afternoon, August 3, to 2:05 that afternoon, Brown was interrogated by Louis Johnson, another Milwaukee police detective. Johnson, too, reminded Brown of his rights under ***Miranda***, and, again, according to Johnson, Brown said he understood and agreed to talk. Brown appeared to Johnson to be cooperative and did not say that he was tired. Johnson also said that he did not threaten Brown or promise Brown anything to get him to talk to him. Brown again said that he shot at Ashley. Johnson told the trial court that he went to talk to Brown because he wanted Brown to tell him where the gun was. Although Brown said he tossed the gun into a sewer and took the police officers to the sewer into which he claimed to have thrown it, no gun was ever found.

¶10 As noted, Brown testified at the suppression hearing. He claimed that Peterson beat him until he agreed to confess to killing Ashley. Brown also claimed that Peterson told him that a confession would spare him from "spend[ing] the rest of my life in prison." Peterson denied hitting Brown or threatening him or telling him that he would be imprisoned for life unless he confessed. As we have seen, the trial court believed the officers and not Brown, finding that Brown's testimony was "manifestly incredible," and determined that Brown's confession was voluntary. Brown claims on appeal that it was not.

B.

¶11 "In reviewing the voluntariness of a statement, we examine the application of constitutional principles to historical facts. We defer to the circuit court's findings regarding the factual circumstances surrounding the statement. However, the application of constitutional principles to those facts presents a question of law subject to independent appellate review." ***State v. Jerrell C.J.***, 2005 WI 105, ¶16, 283 Wis. 2d 145, 155, 699 N.W.2d 110, 115 (citations omitted). The State has the burden of proving by a preponderance of the evidence that a defendant's confession was voluntary. ***State v. Hoppe***, 2003 WI 43, ¶40, 261 Wis. 2d 294, 310, 661 N.W.2d 407, 415. ***Hoppe*** sets the standard:

> A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist.
>
> The pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation. Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness.

> We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary. The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers.
>
> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

Id., 2003 WI 43, ¶¶36–39, 261 Wis. 2d at 309–310, 661 N.W.2d at 414–415 (citations omitted).

¶12 Brown argues that the extent and length of the questioning was "inherently coercive," and that he "had just turned 18 in May, 2003, three months before the interrogations." He also points out that "[h]e did not finish high school, though he had obtained a GED."[1] Although the Record supports Brown's contention that when he was interrogated by the officers he did not, as indicated by the presentence investigation report prepared for the companion case not at issue on this appeal where he was convicted of possessing marijuana, have a "'formal juvenile criminal record,'" Brown admitted during the suppression hearing that he was aware of his rights under ***Miranda*** before the officers

[1] "GED" is the acronym for "general educational diploma" or general high-school "equivalency diploma." *See* ***State ex rel. Saenz v. Husz***, 198 Wis. 2d 72, 74 & n.1, 75, 542 N.W.2d 462, 463 & n.1 (Ct. App. 1995).

interviewed and interrogated him.[2] Brown also indicated that 2:30 a.m. was his normal bedtime "[d]uring the summer."

¶13 Brown has pointed to nothing in this Record that any of the trial court's findings of fact are "clearly erroneous." Although Brown's defense lawyer did not contradict the prosecution's assertion during the August 8, 2003, bail hearing that Brown had three prior convictions, that assertion is, as we have seen, contradicted by the presentence report. Nevertheless, the trial court's comment during its extensive oral decision denying Brown's suppression motion that Brown was "an individual who does have experience with the criminal justice system and who has been Mirandized before" is accurate. Thus, as noted earlier, the trial court's findings of fact are binding on us unless clearly erroneous. Under our *de novo* review of the constitutional issue, we agree with the trial court that the State proved by a preponderance of the evidence that Brown's confession was voluntary under the totality of the circumstances. Although Brown was in custody for more than a day before he confessed, and was extensively interrogated, he was, as the trial court found, not mistreated, allowed bathroom breaks, and given food and drink as well as long periods of rest during which he had time to think about whether he should cooperate with the detectives and continue to talk to them or whether he should stop talking and ask for a lawyer. *See* ***Schilling v. State***, 86 Wis. 2d 69, 88–89, 271 N.W.2d 631, 641 (1978) (non-continuous interrogation over forty-five hours not coercive).

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[2] The presentence report indicates that Brown's "initial encounter with the juvenile Criminal Justice System had occurred on 04/18/01" when police saw him get out of a stolen car. He was arrested, but not "formally charged." Rather, Brown "signed a Deferred Prosecution Agreement," which placed him in "the First Time Juvenile Offender Program."

¶14 In an apparent concession that the trial court's findings are supported by the evidence, Brown contends that we should extend to police interrogations of adults the taping requirements that the supreme court imposed on juvenile interrogations in ***Jerrell C.J.*** *See* ***Jerrell C.J.***, 2005 WI 105, ¶58, 283 Wis. 2d at 172, 699 N.W.2d at 123 ("All custodial interrogation of juveniles in future cases shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention."). We may not do so. ***State v. Kramer***, 2006 WI App 133, ¶17, ___ Wis. 2d ___, ___, 720 N.W.2d 459, 464–465 (court of appeals may not adopt exclusionary rule of adults equivalent to that adopted by the supreme court for juveniles). We are bound by ***Kramer***. *See* **Cook v. Cook**, 208 Wis. 2d 166, 190, 560 N.W.2d 246, 256 (1997) ("court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals."). Further, although WIS. STAT. § 972.115 declares that "it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony," § 972.115(2)(a), and establishes extensive procedures in connection with that policy, the statute first applies to custodial interrogations of adults "conducted on January 1, 2007," 2005 Wis. Act 60, § 51(2). It does not apply to Brown.

II.

¶15 As we have seen, Brown also contends that he was denied his constitutional right to confrontation. We disagree.

A.

¶16 One of the witnesses who testified at the trial was twenty-two-year-old Eulos Rounds, who, when he spoke with the police in early July of 2003 said that he was at Brown's house when Ashley was shot and that Brown said that he

was the one who shot him. In an offer-of-proof hearing requested by the State with the jury not present, Rounds told the trial court that he remembered talking to police officers, and identified his signature on two documents prepared by the police as a result of those conversations. When asked about the substance of his statements reified on the documents, however, Rounds said he did not remember the events encompassed by the statements—namely, his assertions about Brown's earlier involvement with Ashley and Brown's admission that he had shot Ashley.[3]

¶17 After the offer of proof, and with the jury present, Rounds identified Brown in the courtroom, and testified that he had known Brown and Brown's brother Antwan Franklin for some four years. As he did during the offer of proof when the jury was not present, Rounds then denied remembering that he told the police that Brown admitted shooting Ashley. He did, however, again identify his signature on the documents that recounted his statements. The State then offered into evidence, and the trial court received, Rounds's statements to the police as prior inconsistent statements under WIS. STAT. RULE 908.01(4)(a)1, which permits the receipt into evidence statements that are "[i]nconsistent with the declarant's testimony" and the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." The trial court received the statements into evidence and indicated that it had raised "Crawford issues and Mr. Rounds' statement" with the lawyers at a sidebar conference that was not

[3] During the first part of the State's offer of proof in connection with Eulos Rounds, Rounds had not been sworn. This was rectified when during that offer of proof Rounds, as reflected by the court reporter's transcription, "affirmed to tell the truth." He then essentially repeated what he had told the trial court at the offer of proof before being sworn. Although he had objected to testifying, explaining that he wanted to "plead the Fifth on future retaliation," Rounds, represented by counsel, was sworn, again affirming to tell the truth, once the jury came back into the courtroom.

recorded.[4] The trial court specifically found that Rounds's claimed inability to remember was feigned, and cited ***State v. Lenarchick***, 74 Wis. 2d 425, 436, 247 N.W.2d 80, 87 (1976) ("where a witness denies recollection of a prior statement, and where the trial judge has reason to doubt the good faith of such denial, he may in his discretion declare such testimony inconsistent and permit the prior statement's admission into evidence").

B.

¶18 As noted, Brown claims that the trial court deprived him of his right to confrontation by receiving into evidence things Rounds told the police, asserting that Rounds's claimed lack of memory deprived him of the requisite opportunity for effective cross-examination, and relies on, in a fairly undeveloped argument, ***Crawford v. Washington***, 541 U.S. 36 (2004). His contention is without merit.

¶19 The opportunity for cross-examination is the crux of a defendant's right to confrontation. ***Id.***, 541 U.S. at 61. Here, Brown's lawyer cross-examined Rounds for some twelve transcript pages, although, as Brown asserts, Rounds claimed not to remember during most of that cross-examination. Yet, as we have previously indicated, "the Confrontation Clause does not guarantee that the declarant's answers to those questions will not be tainted by claimed memory loss, real or feigned." ***State v. Rockette***, 2006 WI App 103, ¶24, ___ Wis. 2d ___, ___,

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[4] It is not clear whether Brown's trial lawyer objected to the receipt into evidence of Rounds's out-of-court statements to the police on hearsay grounds only or on both hearsay and confrontation grounds because much of the trial court's discussion with the lawyers was at unrecorded sidebar conferences. We assume that Brown's trial lawyer objected both on hearsay and confrontation grounds.

718 N.W.2d 269, 277. Accordingly, the trial court did not err in receiving into evidence Rounds's prior statements to police officers concerning Brown's involvement in the shooting death of Ashley.

III.

¶20 Brown's appellate lawyer, Terry Evan Williams, as required by WIS. STAT. RULE 809.19(2)(a) certified in his main brief on this appeal that he submitted "an appendix that complies" with that rule "and that contains … (3) the findings or opinion of the trial court, and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues." *See* RULE 809.19(2)(b). This certification is false. Williams's appendix did not have the trial court's extensive oral decision on the issue of whether Brown's confession was voluntary, and also did not have the trial court's oral rulings with respect to receipt into evidence of Rounds's statements to the police in connection with Brown's involvement in the shooting of Ashley.

¶21 Filing a false certification with this court is a serious infraction not only of the rule, but also violates SCR 20:3.3 ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal."). Accordingly, we sanction Williams and direct that he pay $150 to the clerk of this court within thirty days of the release of this opinion. *See* WIS. STAT. RULE 809.83(2) ("Failure of a person to comply … with a requirement of these rules … is grounds for … imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.").

By the Court.—Judgment affirmed; attorney sanctioned.

Publication in the official reports is not recommended.