COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1923-CR **Cir. Ct. No. 2004CF6461**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW CHARLES STECHAUNER,

DEFENDANT-APPELLANT,

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

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

¶1 WEDEMEYER, P.J. Matthew Charles Stechauner appeals from a judgment entered after he pled no contest to one count of second-degree reckless homicide and one count of armed robbery with use of force, both as party to a

crime, contrary to WIS. STAT. §§ 940.06(1), 943.32(2) and 939.05 (2003-04).[1] He also appeals from an order denying his postconviction motion. Stechauner raises two issues—whether the trial court: (1) erred in denying his motion seeking to suppress statements he made to police at the hospital and in the squad car while being transported from the hospital to the home where the gun was located; and (2) erroneously exercised its sentencing discretion. Because admission of the statements Stechauner made at the hospital and in the squad car did not violate his constitutional rights, and because the trial court did not erroneously exercise its discretion when imposing sentence, we affirm.

BACKGROUND

¶2 On November 22, 2004, at about 7:15 p.m., Milwaukee Police Detective David Kolatski was dispatched to St. Francis Hospital to investigate a shooting victim. A nurse had notified police because she found a bag of bullets in the victim's pocket. When Kolatski arrived, he found Stechauner, who had a gunshot wound to his leg. The bag of bullets was missing and when Kolatski asked Stechauner about the bullets, Stechauner pulled the bag of bullets from his rectum. Stechauner told Kolatski that he had accidentally shot himself while riding in a vehicle with some friends on Mitchell Street. When an unmarked squad car pulled up behind this vehicle, Stechauner attempted to hide the gun but, in the process, he accidentally shot himself in the leg.

¶3 There was some discussion about where the gun was located. Stechauner told Kolatski that the gun was at the home of a friend of his and that

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

children lived there. Kolatski asked Stechauner to take him to the gun so it could be recovered to protect the children from danger. During the conversation at the hospital, Stechauner was never placed under arrest. There was a dispute as to whether he was handcuffed. Kolatski stated Stechauner was not handcuffed at the hospital. Stechauner claimed he was handcuffed to a hospital cart.

¶4 Stechauner was discharged from the hospital, with the use of crutches. He transported himself to the police car for conveyance. Stechauner had agreed to take police to the home of Eddie Mares to retrieve the gun. Once in the squad car, Stechauner was handcuffed. There is a dispute about the reason why he was handcuffed. Kolatski indicated it was for safety reasons as the officer driving the squad car was a small woman and Stechauner was a large man and an admitted gang member. Stechauner believed he was handcuffed because he was in custody.

¶5 Once they arrived at the Mares home near 32nd and Mitchell Streets, the police looked for the gun in the trash cans, but did not find it. Then Mares arrived at the scene and there was a confrontation between Mares and Stechauner. After the confrontation, the police were told to look for the gun under a rock near the steps which is where they found it. The gun was a sawed-off shotgun. At that point, Kolatski attempted to remove the casing from the weapon. Stechauner then shouted to Kolatski that you had to use a pliers to get the casing out. At this point, Kolatski suspected Stechauner may have committed a crime because he recalled there had been a series of armed robberies in the area, where a sawed-off shotgun had been used by a person who fit Stechauner's description.

¶6 Stechauner was transported back to the police station for questioning and placed under arrest at about 9:00 p.m. He was read his ***Miranda***[2] rights at 1:58 a.m. and interrogated about six incidents over the next nine hours. During this time, Stechauner gave inculpatory statements, which led to issuance of the complaint charging him with: (1) one count of first-degree reckless homicide, party to a crime relating to the November 13, 2004 beating of Pascual Cruz to death with a baseball bat; (2) two counts of armed robbery, use of force as party to a crime for the November 15, 2004 robbery of Gurcharn Singh (AK Food Mart), and the November 20, 2004 personal robbery of Luis Marteles's wallet and vehicle; and (3) possession of a firearm by a felon.

¶7 Stechauner pled not guilty and then filed a motion seeking to suppress the inculpatory statements he made. After conducting a suppression hearing, the trial court denied the motion and Stechauner agreed to enter no contest pleas to the amended charges noted above. He was sentenced to twenty-five years on the homicide count, consisting of fifteen years' initial confinement, followed by ten years' extended supervision. On the robbery count, he was sentenced to fifteen years, consisting of ten years' initial confinement, followed by five years' extended supervision. The sentences were consecutive to each other and consecutive to any other sentence.

¶8 Stechauner filed a postconviction motion, alleging that the trial court should have granted his motion seeking to suppress the inculpatory statements and for a modification of his sentence. The trial court denied the motion. Stechauner now appeals.

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

DISCUSSION

A. Motion to Suppress.

¶9 Stechauner's first claim is that the trial court erred in denying his motion to suppress. He contends that the statements he gave at the hospital and in the squad car were unconstitutionally obtained as he had not been advised of his ***Miranda*** rights. Stechauner contends that he was in custody at the hospital and in the squad car, and that the statements he gave were involuntary. The trial court found that Stechauner was not in custody at the hospital and therefore, any statements made at the hospital were admissible. The trial court found that Stechauner was in custody when he was in the squad car. However, the trial court found admissible the statements made about the location of the gun and Stechauner's statement regarding removing the casing as these statements were volunteered. The trial court's decision was based on its finding that the testimony of the police was credible and the testimony of Stechauner was not.

¶10 We review a motion to suppress in two steps. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We uphold the trial court's factual findings unless clearly erroneous, but we apply constitutional principles to the facts *de novo*. ***Id.*** Here, the facts are undisputed so only the legal question remains. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 315, 588 N.W.2d 8 (1999).

¶11 We start first with the statements made at the hospital. Stechauner contends that he was in custody and therefore should have been advised of his ***Miranda*** rights. Because he was not so advised, he contends that the inculpatory statements he made should have been suppressed. We are not convinced.

¶12 The safeguards of ***Miranda*** apply only when a suspect is "in custody." A person is "in custody" for ***Miranda*** purposes when one's "freedom of action is curtailed to a degree associated with formal arrest." ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984) (citation omitted); ***State v. Pounds***, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993). In assessing whether the person is "in custody," a court should consider the totality of the circumstances, including whether the person is free to leave, the purpose, place and length of the questioning, and the degree of restraint. *See* ***State v. Gruen***, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). Because "custody" is determined by an objective standard, the subjective belief of the suspect and the subjective intent of the police are irrelevant. ***Stansbury v. California***, 511 U.S. 318, 323-24 (1994); ***Pounds***, 176 Wis. 2d at 321.

¶13 Here, the trial court found that Stechauner was not in custody at the hospital and that the police testimony was more credible. The trial court is the arbiter of credibility as it is in a better position to assess who is being truthful. ***Leciejewski v. Sedlak***, 116 Wis. 2d 629, 637, 342 N.W.2d 734 (1984). The police testified that Stechauner was not in custody at the hospital, that he was not handcuffed or restrained in any way, and that he was not considered a suspect at that time. Stechauner contradicted that testimony, claiming he was handcuffed and believed he was in custody. In reviewing the trial court's findings, we conclude that they are not clearly erroneous. The testimony of the police supports the trial court's findings that Stechauner was not in custody when he spoke with police at the hospital.

¶14 In addressing the statements at issue after Stechauner was placed in the squad car, the trial court made the following findings of fact. It found that the statement as to the location of the gun was provided after the confrontation

between Stechauner and Mares. The trial court indicated that this statement was not provided as a result of police interrogation or questioning. Further, the trial court found that the statement Stechauner made about how to remove the casing was a voluntary statement he made after he saw the detective struggling to remove the casing. This statement, too, was not the product of police interrogation. The detective did not ask Stechauner how to remove the casing; rather, Stechauner, on his own, shouted out this information to the officer. Again, these findings are not clearly erroneous as the testimony of the police at the suppression hearing supports the trial court's findings.

¶15 Based on the foregoing, we conclude that the trial court did not err in denying Stechauner's motion seeking to suppress inculpatory statements he made at the hospital and at the Mares home. The hospital statements were made while Stechauner was *not* in custody and the subsequent statements were voluntary and not the product of police questioning.[3]

¶16 Stechauner also contends that the statements he gave at the police station during the custodial interrogation were coerced and therefore involuntary. We are not convinced. In ruling on this challenge, the trial court found:

> I find that the testimony of the two detectives is the more credible testimony than that of the defendant. The burden of this hearing is that I find by a preponderance of the evidence that the defendant was given his rights.

[3] Stechauner also claims that he was seized in violation of the Fourth Amendment, because, according to Stechauner: (1) the police prevented him from seeing his mother; and (2) he was in a gown under medical care and therefore unable to leave. The State responds that Stechauner waived this argument by failing to present it to the trial court. Based on our review of the record, we conclude that Stechauner failed to sufficiently raise this issue. Our decision is based in part on the fact that the trial court never addressed this in deciding the suppression motion, or in denying the postconviction motion. Thus, we decline to address this issue. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

Detective Hensley testified that he had read Mr. Stechauner his rights from the Department of Justice card. He demonstrated how he had done that on the record. He indicated that Mr. Stechauner appeared to be coherent, that Mr. Stechauner indicated that he understood. He also indicated and it is a matter of stipulation Mr. Stechauner has on five previous occasions been convicted of offenses.

He has had significant experience in the system, has presumably been given his Miranda warnings on multiple prior occasions and is not new to the procedures.

The testimony that is contrary to the testimony of Detective Hensley, and I will note Detective Dineen's testimony supports that of Detective Hensley that Mr. Stechauner was given his Miranda warnings, that he appeared to understand them, that he appeared to … be coherent, responsive. The testimony which would be contradictory is that of Mr. Stechauner.

And I agree that Mr. Stechauner's testimony … is not reasonable. That what he remembers [are] facts which do not have any bearing on the issues in this hearing. He remembers with some detail what the holding cell was like, that there was a sink and a toilet and no one else there and that there was a metal frame for a bed which was bare until somebody -- unless and until somebody brought bedding. That seems to be something he recalled with great detail, but obviously it is not relevant or material to the issues in this hearing.

Mr. Stechauner testified that he and several friends -- I believe it was four friends -- were driving around with a … pint of Hennessy. That from that pint, Mr. Stechauner himself took 15 shots and that this bottle was being shared among five people total.

That is not a substantial amount of alcohol for somebody Mr. Stechauner's size. And I don't see how 15 shots could have been gotten out of this pint, especially when it was being shared among the number of people that it was being shared among. Mr. Stechauner testified that he and his friends also shared three blunts during this period of time which was approximately two hours I believe.

Mr. Stechauner testified that he was high, that he also had used I believe Seroquel and Ecstasy and that while he was at the hospital he took three Vicodins before he was discharged. Quite frankly, I don't find this to be credible testimony.

I don't -- there's no other indication other than Mr. Stechauner's testimony that he was other than coherent, that he was under the influence of anything. He left the hospital at approximately somewhere around 8 or 8:30 I believe. The police had been sent to the hospital at 7:15. So from 7:15, it's apparent that Mr. Stechauner was not taking any additional substances of any kind on because he was in the company of the police.

So I believe that Mr. Stechauner, by the time he was giving this statement which began at 1:58 a.m., was not under the influence of any substances, that he was of his normal degree of understanding.

I find that he was given his rights, that based upon the testimony of the police detectives, he did understand his rights. I find further that the signatures on Exhibit 3 are signatures made by Mr. Stechauner after the Miranda rights and at the other points in the statement that they are written.

I find that the information in the statement was information given by Mr. Stechauner. There's no other explanation for the facts in the pedigree sheet. Mr. Stechauner's position is that the police researched it and looked it up. But that is not reasonable. And I believe that testimony or that information was given by Mr. Stechauner as was the other information which is in the police report.

I do, as I indicated, find by a preponderance of the evidence that he was given his rights at the police station. I find further that he understood them…. Mr. Stechauner testified that he was being touched on the shoulder by Detective Hensley and told to come on, come on or something like that. I -- the police testified that that did not happen. I, as I indicated earlier, find that the testimony of the two detectives is more credible than that of Mr. Stechauner. So I do not find that there was any coercion or any force applied to Mr. Stechauner.

Mr. Stechauner disagrees that he was given anything to eat or drink or any cigarettes during this interrogation. The police testified that he had seven cigarettes, a candy bar and two Mountain Dews. I find that he did not request anything that he was denied. I find that he was given creature comforts during this period of questioning.

I find by the preponderance of the evidence that he did freely, voluntarily and intelligently waive his Miranda warnings and that any statements that he gave and I

> believe, as I said, that whatever is contained in the reports are statements of Mr. Stechauner. I find that they were freely, voluntarily and intelligently given.

¶17 When the state seeks to admit a defendant's custodial statement, constitutional due process requires that it make two discrete showings: (1) the defendant was informed of his ***Miranda*** rights, understood them, and knowingly and intelligently waived them; and (2) the defendant's statement was voluntary. ***State v. Lee***, 175 Wis. 2d 348, 359, 499 N.W.2d 250 (Ct. App. 1993). A defendant's assertion that his statements were involuntary places on the state the threshold burden to prove by a preponderance of evidence that his statements were voluntary. ***Id.*** at 360-63. To meet this burden, the state must show that the defendant made the statements willingly and not as a result of duress, threats, or promises. ***Id.*** at 360. Once the state has made a *prima facie* case of voluntariness, the burden shifts to the defendant to present rebuttal evidence. ***Id.*** at 360-61. If a defendant fails to present evidence of coercion in rebuttal, further inquiry about balancing the actions of the police with the personality of the defendant is inappropriate. ***State v. Deets***, 187 Wis. 2d 630, 635-36, 523 N.W.2d 180 (Ct. App. 1994).

¶18 Here, the trial court's findings are supported by testimony in the record, and in accordance with its credibility assessment. Stechauner makes various assertions, claiming he was drowsy, under the influence, and coerced by the police during the interrogation. There is nothing in the record to support Stechauner's assertions, except his own testimony, which the trial court found to be incredible. The record reflects that Stechauner's statements were voluntary and were the product of free and unconstrained will, not due to police pressure. *See* ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. Accordingly, the statements were properly ruled admissible.

B. Sentencing.

¶19 Stechauner also contends that the trial court erroneously exercised its sentencing discretion by imposing an unduly harsh and excessive sentence. We are not convinced.

¶20 When a defendant argues that his or her sentence is unduly harsh or excessive, we will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and 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).

¶21 The sentencing court must consider three primary factors: (1) the gravity of the offense; (2) the character of the offender; and (3) the need to protect the public. ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984). The trial court may also consider: the defendant's past record of criminal offenses; the defendant's history of undesirable behavior patterns; the defendant's personality, character and social traits; the presentence investigation results; the viciousness or aggravated nature of the defendant's crime; the degree of the defendant's culpability; the defendant's demeanor at trial; the defendant's age, educational background and employment record; the defendant's remorse, repentance or cooperativeness; the defendant's rehabilitative needs; the rehabilitative needs of the victim; the needs and rights of the public; and, the length of the defendant's pretrial detention. ***State v. Jones***, 151 Wis. 2d 488, 495-96, 444 N.W.2d 760 (Ct. App. 1989).

¶22 The weight to be given to each of the factors is within the trial court's discretion. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351

N.W.2d 758 (Ct. App. 1984). After consideration of all the relevant factors, the sentence may be based on any one of the primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). Because the trial court is in the best position to determine the relevant factors in each case, we shall allow the trial court to articulate a basis for the sentence on the record and then require the defendant to attack that basis by showing it to be unreasonable or unjustifiable. ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

¶23 Our review of the sentencing transcript demonstrates that the trial court considered the pertinent factors and imposed a reasonable sentence. The trial court addressed the three primary factors, noting the nature of these offenses, the absolute need to protect the community from such actions, and Stechauner's rehabilitative needs. The trial court imposed the maximum sentence possible on the homicide charge and a less-than maximum sentence on the armed robbery count. Neither the sentence itself nor the consecutive nature of the sentences are shocking to public sentiment. Stechauner used a baseball bat to beat to death an individual who was simply walking home. Stechauner did this despite his past criminal history and the opportunities he had to reform his criminal conduct. Stechauner committed an armed robbery of another unsuspecting citizen who just happened to be in the wrong place at the wrong time. Stechauner's conduct was "absolutely reckless" and showed a "total disregard for the safety and welfare of the people around" him. Despite these factors, the trial court also considered Stechauner's positive traits, his age and other mitigating factors.

¶24 Stechauner seems to complain that the trial court failed to put more weight on the positive factors. The trial court, however, is free to weigh the sentencing factors as it deems appropriate. Here, we cannot say there was an erroneous exercise of discretion. Stechauner also seems to challenge the

consecutive nature of the sentences. His challenge is without merit. He agreed to a plea agreement where the State would recommend consecutive sentences. The crimes involved separate events on different dates and the consecutive sentences to punish Stechauner for his criminal activity were reasonable.

¶25 Based on the foregoing, we conclude that the trial court properly exercised its sentencing discretion in this case and that the sentences imposed did not constitute excessive or unduly harsh punishment for the crimes involved.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.