COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP879-CR
2006AP880-CR

Cir. Ct. No. 2003CF642
2003CF767

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN J. ZARM,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kevin Zarm appeals judgments, entered upon jury verdicts, convicting him of six counts of arson of a building, three counts of solicitation to commit burglary, two counts of armed burglary, three counts of

burglary, two counts of first-degree reckless endangerment, four counts of second-degree reckless endangerment and five counts of theft of movable property—all counts arising from two Marathon County Circuit Court cases. Zarm argues the trial court erred by denying his pretrial motion to suppress statements. We reject Zarm's arguments and affirm the judgments.

BACKGROUND

¶2 During the summer of 2003, the Wausau area suffered a string of arson fires generally set in unattached garages. Many of the burned garages also showed signs of burglary by forced entry.[1] Zarm was eventually charged in Marathon County Circuit Court case No. 2003CF642 with four counts of arson of a building, three counts of first-degree reckless endangerment, three counts of armed burglary, one count of solicitation to commit burglary and five counts of theft of movable property. In Marathon County Circuit Court case No. 2003CF767, Zarm was charged with six counts of arson of a building, six counts of burglary of a building, five counts of first-degree reckless endangerment, two counts of solicitation to commit burglary and two counts of misdemeanor theft. Zarm's pretrial motion to suppress statements was denied. After a jury trial, Zarm ultimately was convicted and sentenced for six counts of arson of a building, three counts of solicitation to commit burglary, two counts of armed burglary, three counts of burglary, two counts of first-degree reckless endangerment, four

[1] Sometime during the evening of September 10-11, 2003, Sylvia Grade was killed just outside her unattached garage, located in the same general area where many of the arsons had occurred. On April 13, 2007, Zarm was convicted upon a jury's verdict of first-degree intentional homicide for the death of Grade, burglary and misdemeanor theft. Zarm's conviction for those crimes is not the subject of this appeal.

counts of second-degree reckless endangerment and five counts of theft of movable property. This appeal follows.

DISCUSSION

A. Suppression of Statements

¶3 Zarm argues the trial court erred by failing to suppress statements he gave to law enforcement on the following dates in 2003: September 18, September 22, October 7, October 9, October 10, October 11 and October 15. In reviewing an order allowing statements into evidence, this court upholds the trial court's findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2005-06). However, the application of constitutional principles to the facts as found is a question of law this court decides independently. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47 (Ct. App. 1995). The State has the burden of proving by a preponderance of the evidence that a defendant was sufficiently advised of his or her ***Miranda***[2] rights and knowingly, intelligently and voluntarily waived those rights.

¶4 The safeguards of ***Miranda***, however, apply only when a suspect is "in custody." A person is "in custody" for ***Miranda*** purposes when that person's "freedom of action is curtailed to a degree associated with formal arrest." ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984); ***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

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

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.

¶5 The test is "whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances." ***Gruen***, 218 Wis. 2d at 593. The "reasonable person" is one "neutral to the environment and to the purposes of the investigation—that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." ***State v. Morgan***, 2002 WI App 124, ¶23, 254 Wis. 2d 602, 648 N.W.2d 23. In other words, "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." ***Id.***

September 18, 2003

¶6 On September 17, 2003, police officers interviewed Zarm at his apartment for approximately one-half hour. After the interview, one of the officers, Detective Bill Kolb, learned that there was an Oneida County warrant for Zarm's arrest. Realizing that he need to ask Zarm some follow-up questions, Kolb and another detective returned to Zarm's apartment on September 18. Zarm allowed the officers into his apartment and, during his interview with them, made the challenged statements. It is undisputed that the officers did not read Zarm his ***Miranda*** rights before talking to him. In fact, Kolb did not tell Zarm of the

existence of the warrant until after questioning was completed, at which time, Zarm was arrested on the warrant.[3]

¶7 Zarm argues this encounter was tantamount to a custodial interrogation. Specifically, Zarm claims that regardless whether the officers informed him of the warrant, Zarm was in constructive custody because the officers intended to arrest him. The test, however, is whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances. ***Gruen***, 218 Wis. 2d at 593. An officer's unarticulated plan to arrest a suspect at the conclusion of an interview has no bearing on whether a reasonable person in the defendant's position would have considered himself or herself to be in custody. *See* ***State v. Mosher***, 221 Wis. 2d 203, 219, 584 N.W.2d 553 (Ct. App. 1998). Here, Zarm did not know the officers had the warrant in hand. Therefore, the trial court properly denied Zarm's motion to suppress the challenged September 18 statements.

September 22, 2003

¶8 Zarm challenges the entirety of what he describes as a five-hour interview conducted in the Oneida County jail on the morning of September 22, 2003. The trial court viewed a videotape of the interview and found that Zarm was informed of his ***Miranda*** rights and validly waived them. The court further found that although Zarm made ambiguous and equivocal references to counsel,

[3] After his arrest and transport to the Marathon County Jail, Zarm attempted suicide in his holding cell. While being attended by ambulance personnel, Kolb asked Zarm why he attempted to take his life. Zarm indicated he was upset by his girlfriend's crying. Kolb then asked Zarm if he had killed Grade, and Zarm denied it. The trial court suppressed these questions and answers that followed Zarm's suicide attempt.

he did not make an unequivocal request for counsel until a point in the interview identified by the court as page 79 of the video transcript. The court consequently suppressed those statements following Zarm's unequivocal request for counsel. *See* ***Edwards v. Arizona***, 451 U.S. 477 (1981) (police must immediately cease questioning suspect who clearly invokes ***Miranda*** right to counsel).

¶9 Zarm nevertheless claims, without further argument, that "the entirety of the interrogation should have been suppressed." Zarm, however, cites nothing in the record to contradict the court's finding that his references to counsel were equivocal and thus insufficient to constitute an invocation of the right to counsel. *See* ***Davis v. United States***, 512 U.S. 452 (1994) (a suspect must clearly and unambiguously request counsel in order for the ***Edwards*** rule to apply). Inadequate argument will not be considered. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46 n.3, 292 N.W.2d 370 (Ct. App. 1980).

October 7, 2003

¶10 Zarm's attorney contacted law enforcement indicating that his client had agreed to be interviewed subject to certain conditions. At approximately noon on October 7, 2003, investigator William Boswell and detective Craig Dunbar picked up Zarm at his residence and drove him to the police department, where his counsel was waiting. It is undisputed that Zarm was read and waived his ***Miranda*** rights before a polygraph test was administered. Zarm then asked to speak to Dunbar and he did so in counsel's presence. Zarm was ultimately arrested at approximately 3:45 p.m. and his counsel departed. A few minutes later, Dunbar was informed that Zarm wanted to speak with him again. Dunbar met Zarm in the police library, removed Zarm's handcuffs and asked whether Zarm was willing to speak without his attorney present. Zarm answered affirmatively and the two

talked for "a couple of hours." On each of five occasions when Zarm mentioned his attorney, Dunbar stopped him to clarify whether Zarm wanted to have his attorney present before continuing, and each time Zarm said no.

¶11 On appeal, Zarm initially argues that the police initiated the follow-up conversation with Zarm. Based on the record, the trial court found, however, that the continued discussions were initiated by Zarm. The trial court, not the appellate court, is the ultimate arbiter of weight and credibility. WIS. STAT. § 805.17(2). Zarm nevertheless argues that the Sixth Amendment right to counsel was implicated. The trial court correctly concluded, however, that because Zarm had not yet been charged, the Sixth Amendment right to counsel did not apply. *See* ***State v. Dagnall***, 2000 WI 82, ¶¶52-53, 236 Wis. 2d 339, 612 N.W.2d 680 (Sixth Amendment right to counsel arises after adversary judicial proceedings have been initiated by filing of criminal complaint or issuance of arrest warrant).

¶12 Here, Zarm asked to speak with Dunbar. An accused person may initiate contact with authorities without consulting his or her attorney. ***Edwards***, 451 U.S. at 485. Further, Zarm did not invoke his right to have counsel present or to otherwise discontinue the interview despite the earlier ***Miranda*** warnings, and the repeated opportunities to interrupt the interview. Based on this record, we conclude that the trial court properly denied Zarm's motion to suppress the October 7 statements.

October 9, 2003

¶13 With respect to October 9, the trial court found that during his initial appearance that day, Zarm indicated by gestures to detectives that he wanted to talk with them. After the initial appearance, Dunbar was told that Zarm had asked to talk with him. When Dunbar met with Zarm, Dunbar read him the ***Miranda***

rights form and Zarm initialed each portion and signed it, waiving each of those rights. Dunbar further ensured that Zarm did not want his attorney present, and confirmed Zarm's wishes each time he mentioned his attorney during the interview. Eventually, Zarm did request to have his attorney present, at which time the attorney was called to the jail. Counsel conferred with Zarm and informed the officers that he had instructed his client not to talk to law enforcement anymore. The attorney then left the jail and Dunbar exited by way of a back hallway. As Dunbar walked down the hallway, Zarm called out to him indicating that he wanted to speak to him again. When Dunbar told Zarm that his attorney did not want him speaking to law enforcement, Zarm indicated that he did not care. Dunbar consequently obtained another waiver of ***Miranda*** rights form, and Zarm again signed it. During the subsequent interview, each time Zarm mentioned his attorney, he was again asked whether he wanted his attorney present, and each time he said no.

¶14 At the suppression motion hearing, the trial court noted that waiver of counsel after the Sixth Amendment right attaches must be reviewed skeptically. The court further acknowledged, however, that a defendant may nevertheless initiate contact with law enforcement without his attorney and statements made thereafter may be admissible. ***Dagnall***, 236 Wis. 2d 339, ¶54. Based on the record, the court concluded that Zarm initiated the contacts of October 9, and affirmatively waived his rights to counsel and silence before speaking to law enforcement.

¶15 On appeal, Zarm does not challenge the trial court's findings or claim they are unsupported by the record. Rather, he argues that his attorney's notice to police that he instructed Zarm not to speak to law enforcement should supersede Zarm's waiver of his right to counsel. Citing ***State v. Bernstein***, 231

Wis. 2d 392, 605 N.W.2d 555 (Ct. App. 1999), Zarm contends that counsel's notice to law enforcement was an assertion of Zarm's constitutional right. As the trial court properly noted, however, ***Bernstein*** is inapplicable because it concerned counsel's waiver of a right to a jury trial in a case involving the commitment of a sexually violent person. Because Zarm initiated the contacts of October 9, and affirmatively waived his rights to counsel, the trial court properly denied the motion to suppress his statements.

October 10, 2003

¶16 On October 10, Zarm again asked to speak with Dunbar. The trial court found that Zarm was informed of his ***Miranda*** rights and once again waived them. When Zarm suggested having his girlfriend, Deb Brown, present so he could confess to her about the fires, Dunbar made the arrangements. Upon Brown's arrival, Zarm was again advised of and waived his ***Miranda*** rights. Brown testified at the suppression motion hearing that Zarm kept asking her what to do while Dunbar asked Zarm to do what Zarm said he would—make a statement regarding the fires. Brown testified that she "mouthed" to Zarm that he should ask for his attorney and when Zarm later asked her if he should talk to his attorney, she told him "yes." Brown recalled that the topic of calling Zarm's attorney came up at least twice, and on each occasion, Dunbar would stop and clarify whether Zarm wanted to call his attorney or continue. Each time, Zarm wanted to continue. Dunbar eventually ended the conversation and after Brown left, Zarm indicated he wanted to continue talking with Dunbar. The two continued talking, though none of the conversation concerned the fires. Rather, Dunbar indicated that he continued the conversation at Zarm's request in order to gain his trust.

¶17 The trial court concluded that Brown's and Dunbar's respective hearing testimony was consistent. Because Zarm initiated contact with law enforcement and voluntarily waived his right to counsel, the court properly denied his motion to suppress the challenged October 10 statements.

October 11, 2003

¶18 Zarm again asked to speak with Dunbar. Zarm was given and waived his ***Miranda*** rights. Apparently, however, Zarm merely wanted to be able to go to a portion of the jail where he could smoke and, when Dunbar refused, Zarm indicated he did not want to talk anymore and the conversation ended. The trial court concluded that Zarm had initiated contact with Dunbar and voluntarily waived his right to counsel. The motion to suppress any statements from the brief conversation between Zarm and Dunbar was properly denied.

October 15, 2003

¶19 Detective Kolb went to the jail to inform Zarm that police had executed a search warrant at his apartment and to serve Zarm with a copy of the warrant. While Zarm read the warrant, he made spontaneous comments regarding a tackle box and some other matters. Zarm does not challenge these comments and the court properly concluded that they were spontaneous utterances, not obtained in violation of Zarm's Sixth Amendment right to counsel. During Kolb's visit to the jail, however, Zarm asked if Dunbar was available. Because Dunbar did not have time to meet with Zarm, Dunbar introduced two other officers to Zarm. After the introductions, Zarm was read and waived his ***Miranda*** rights. During this interview, there was discussion regarding a tackle box that had been taken from the scene of one of the fires. Later, when he was refused a cigarette, Zarm indicated he wanted to speak with an attorney. The trial court allowed the

statements about the tackle box, but suppressed any statements Zarm made after he asked for an attorney. On appeal, Zarm does not challenge the trial court's factual findings, but merely claims, without further argument, that the entire interrogation should have been suppressed. As noted above, inadequate argument will not be considered. *See* ***Shaffer***, 96 Wis. 2d at 545-46 n.3. Even on the merits, however, we discern no error in the trial court's factual findings and conclusions of law.

B. Per Se Rule of Exclusion

¶20 Zarm claims that the holding of ***State v. Jerrell C.J.***, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110, should be extended to interrogations of adults. There, our supreme court exercised its supervisory power to require that "all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention." ***Id.***, ¶59. Zarm, however, provides no basis for this court to extend the ***Jerrell C.J.*** holding to adults, and this court has no supervisory power to impose such a requirement. In any event, even if the holding of ***Jerrell C.J.*** were to apply to Zarm's case, our supreme court expressly stated that the rule for the recording of juvenile interrogations only applied in future cases. Such a rule for adult interrogations would presumably only apply in future cases as well.

C. Suppression of Evidence Seized Pursuant to Search Warrants

¶21 Zarm challenges the evidence seized from his home on grounds that the warrants were tainted by reliance on the suppressed portion of the September 22, 2003 interview as well as suppressed bloodhound evidence. Zarm does not specify what evidence should be suppressed nor to which search warrants he is referring. In any event, search warrants for Zarm's residence were obtained

on September 21, October 8 and 15, and December 5, 2003. None of the warrants were based on suppressed statements from the September 22, 2003 interview. In fact, the October 15 warrant did not rest on any of Zarm's statements.[4]

¶22 Zarm alternativly contends that warrants were tainted by suppressed dog tracking evidence. Only the September 21 warrant included a report of the dog tracking evidence that was ultimately excluded from trial. That evidence, however, was not barred because it was illegally or unconstitutionally obtained. Rather, it was excluded because the trial court concluded its prejudicial value would outweigh its probative value. "[S]uppression of evidence is normally required only when evidence has been obtained in violation of a constitutional right or in violation of a statute that specifically requires suppression as a remedy." ***State v. Fahey***, 2005 WI App 171, ¶7 n.3, 285 Wis. 2d 679, 702 N.W.2d 400. We therefore reject Zarm's challenges to the search warrants.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

[4] To the extent Zarm may have intended to challenge the September 21, 2003 warrant's reference to statements Zarm made on September 18, 2003, the trial court found that the only unlawfully obtained evidence included in the warrant application was Zarm's explanation for his suicide attempt and denial of involvement in Grade's murder. *See supra*, fn.3. The court properly concluded, however, that because there was sufficient evidence apart from the suppressed statements to independently justify issuance of the warrant, the evidence seized as a result of that warrant would not be suppressed. *See e.g.*, ***Murray v. United States***, 487 U.S. 533, 540 (1988); ***State v. Lange***, 158 Wis. 2d 609, 628 n.3, 463 N.W.2d 390 (Ct. App. 1990).