COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP2161-CR **Cir. Ct. No. 2003CF5433**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRADFORD JAMES LYND,

DEFENDANT-APPELLANT.

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

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Bradford James Lynd pled guilty to one count of armed robbery, conspiracy. *See* WIS. STAT. §§ 943.32(2), 939.31 (2003-04). Pretrial, the circuit court denied Lynd's motion to suppress statements he gave to police. Postconviction, the circuit court denied Lynd's motion to withdraw his

guilty plea. On appeal, Lynd renews both arguments.[1] Neither are persuasive, and accordingly, we affirm the judgment of conviction and postconviction order.

Background

¶2 On September 11, 2003, several men, including Lynd, attended a party during which the conversation turned to committing armed robberies. The men discussed how to commit the robberies, and eventually, they left the party to implement their plans. The men traveled in two cars. Lynd drove one of the cars, designated as the back-up getaway car. During the evening's criminal activities, two persons were shot and killed. Lynd was charged with conspiracy to commit armed robbery.

Voluntariness of the Custodial Statement

¶3 After being taken into custody, Lynd gave an inculpatory statement. Lynd later moved to suppress, arguing that the statement was not voluntary and that police did not comply with ***Miranda v. Arizona***, 384 U.S. 436 (1966). After an evidentiary hearing, the circuit court found that Lynd was given his constitutional rights and that the statement was voluntarily given.

¶4 When determining whether a defendant's custodial statement may be admitted into evidence, the State must show by a preponderance of the evidence that: (1) the defendant was informed of his or her constitutional rights, understood them, and knowingly and intelligently waived them; and (2) the defendant's statement was voluntary. ***State v. Santiago***, 206 Wis. 2d 3, 18-19, 556 N.W.2d

[1] The court's order denying the suppression motion may be reviewed on appeal notwithstanding Lynd's guilty plea. *See* WIS. STAT. § 971.31(10) (2005-06).

687 (1996). Lynd does not raise a ***Miranda*** issue on appeal, and therefore, we need only consider whether the statement was voluntary.

¶5 A defendant's statement is voluntary if it is "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." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. "Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." ***Id.***, ¶37. In determining whether Lynd's statement was voluntary, we consider the totality of the circumstances. ***Id.***, ¶38. This test requires balancing the personal characteristics of the defendant against the pressures and tactics employed by law enforcement officers to induce the statement—pressures and tactics 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., ¶39 (citation omitted).

¶6 On appeal, Lynd argues that "undue psychological pressure" was created by his "fear … by being on probation and his affiliation with the Latin Kings coupled with his prior mental illness."[2] Lynd asserts that the involuntary

[2] Lynd told the detective that he had been diagnosed "bipolar," depressive, and paranoid schizophrenic. Lynd also told the detective that he had been "off" medication for three years.

nature of his statement is also "manifest by his refusal to sign" the statement at the end of the interview.

¶7 Lynd does not point to any evidence that the police engaged in coercion or improper conduct which exceeded his ability to resist. While police conduct need not be egregious or outrageous in order to be coercive, ***id.***, ¶46, a defendant must be able to point to some conduct on the part of the police that would render a statement involuntary. Lynd has not done so. We concur with the circuit court's assessment that the "only discomfort" Lynd experienced during the interview was a "self-inflicted concern" and fear that "other members of the Latin King gang [might] find[] out" that he gave a statement to police. The circuit court found that the interview was "fairly routine" and "standard." Lynd's fear of retribution by fellow gang members does not transform a routine interview into a coercive interview that produced an involuntary statement.

Postconviction Motion to Withdraw Guilty Plea

¶8 In a postconviction motion to withdraw his guilty plea, Lynd presented the affidavit of a co-actor, Javier Salazar, that purportedly exculpated Lynd. According to Salazar's affidavit, when the first victim was shot, "Lynd was getting gas for his vehicle … trying to locate the others [and] was not aware of any shooting." The affidavit further stated that "prior to the second shooting … Lynd was a passenger in his own car because he was too intoxicated to do anything, much less drive." Finally, the affidavit stated that "Lynd did not agree to carry out any criminal activities and that the shootings occurred without Lynd's knowledge or assistance."

¶9 As recounted in the criminal complaint, Salazar's statements to the police implicated Lynd in the planning and execution of the criminal activity.

Therefore, the circuit court correctly characterized Salazar's affidavit as newly discovered recantation evidence.

¶10 A defendant seeking to withdraw a guilty or no contest plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). This court reviews the circuit court's decision on post-sentence plea withdrawal for an erroneous exercise of discretion. ***Id.*** For plea withdrawal based on a claim of newly discovered evidence, the defendant must prove by clear and convincing evidence that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. ***Id.*** If those four criteria are met, the circuit court "must determine whether a reasonable probability exists that a different result would be reached in a trial." ***Id.*** Additionally, when the newly discovered evidence is a witness's claimed recantation, that recantation must be corroborated by other newly discovered evidence. ***Id.*** at 473-74.

¶11 In this case, the circuit court did not address the four criteria because it determined that "there is no reasonable probability that a different result would occur at trial." The circuit court noted that each of the other co-actors had implicated Lynd in the robberies, "and presumably, [a] jury would have heard this evidence at a trial." The circuit court further noted that Lynd's own inculpatory statement would be introduced at a trial, and "[g]iven the weight of the evidence of guilt, there is not a reasonable probability that a jury, looking at Salazar's 'exculpatory' testimony would have a reasonable doubt" as to Lynd's guilt. The circuit court also noted that Salazar's affidavit testimony was uncorroborated and

contrary to Lynd's own statement. Accordingly, the circuit court denied Lynd's motion.

¶12 We concur with the circuit court's discretionary decision. Evidence of Lynd's involvement was overwhelming. More importantly, Salazar's affidavit contradicted his earlier statements, and therefore, Lynd was required to present corroborating evidence. He did not do so, and therefore, the circuit court properly denied the motion.

By the Court.—Judgment and order affirmed.

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