COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP10-CR **Cir. Ct. No. 2005CF6782**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY L. TOLIVER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Timothy Toliver appeals from the judgment of conviction entered against him. He argues on appeal that the trial court erred when it denied his motion to suppress statements he made to the police because

the statements were coerced and the police did not electronically record the interviews. Because we conclude that the trial court did not err, we affirm.

¶2 Toliver was charged with two counts of armed robbery, use of force, as a party to a crime, and two counts of armed robbery with a reasonable belief that he used a threat of force, as a party to a crime. Prior to entering his plea, Toliver moved to suppress the in-custody statements he had made to the police. The court denied the motion. Toliver then pled guilty to two counts of armed robbery with a reasonable belief that he used a threat of force, and the other two counts were dismissed and read in. The court sentenced him to six years of initial confinement and eight years of extended supervision on each count to be served concurrently.

¶3 Toliver argues now that the trial court erred when it denied his motion to suppress because the police used coercive tactics to obtain his confessions, and because the statements should have been electronically recorded under ***State v. Jerrell C.J.***, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110. Specifically, he argues that the actions of the police when they interrogated him were coercive given his age, mental capability, and background, and rendered his confessions involuntary.

¶4 In reviewing the voluntariness of a statement, we examine the application of constitutional principles to historical facts. ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. We defer to the circuit court's findings regarding the factual circumstances surrounding the statement. ***Id.*** However, the application of constitutional principles to those facts presents a question of law subject to independent appellate review. ***Id.***

> 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.

Id., ¶36 (citations omitted).

¶5 Our inquiry is "whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation." ***Id.***, ¶37 (citation omitted). "We apply a totality of the circumstances standard" that balances "the personal characteristics of the defendant" against the pressures applied by the police. ***Id.***, ¶38 (citations omitted).

> 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., ¶39 (citation omitted). This standard recognizes that "the amount of police pressure that is constitutional is not the same for each defendant." ***Id.***, ¶40. It is the State's burden to prove voluntariness by a preponderance of the evidence. ***Id.***

¶6 At the hearing on the motion to suppress, the police officer who interrogated Toliver, Officer Ruud, testified.[1] She stated that she interviewed

[1] In its brief, the State variously refers to the officer as Officer Ruud and Officer Rudd. The record shows that her name is spelled Ruud.

Toliver twice. The first interview began about three hours after he was arrested, at 9:32 p.m., and lasted until 2:10 a.m. She interviewed him again the following day from 5:25 p.m. to 11:25 p.m. She stated that she read him his ***Miranda*** rights before each interview, and that he did not ask to speak to a lawyer.[2] She said that Toliver was not handcuffed during the interviews, was intelligent and cooperative, and did not appear to have any trouble reading or comprehending. She said that he initially told her that he had not used any drugs or alcohol, but later said that he had smoked marijuana. She stated that she gave him bathroom breaks and food, and that she did not threaten him or raise her voice to him.

¶7 Toliver also testified. He said, among other things, that Officer Ruud did not read him his ***Miranda*** rights, and that he asked for an attorney three times during the first interview. He also said that he was scared, that Officer Ruud told him that he could go to jail for the rest of his life, that she did not read his statements to him, and he did not know what he was signing.

¶8 The trial court found that Officer Ruud's testimony was more credible than Toliver's testimony. Specifically, the court found that Toliver understood his rights and waived them. The court also found that because Toliver was over sixteen at the time (he was seventeen years and seven months old), the requirement of ***Jerrell C.J.*** that the interview be recorded did not apply.

¶9 The court concluded that Toliver gave his statements voluntarily. The court noted his age, his experience with the juvenile justice system, and that his intelligence was in the low to average range. The court considered the tactics

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

used by the police, including the length of the interviews, and found that Toliver was given breaks during the interviews, that Officer Ruud did not badger him, accuse him of lying or use a strong voice. The court found that Toliver was cooperative and polite, and that he voluntarily admitted his involvement. The court denied the motion to suppress.

¶10 Based on these findings of fact, and considering the totality of the circumstances, we conclude that the police did not engage in coercive tactics or apply "improper pressures," and that Toliver's statements were "the product of a free and unrestrained will." ***Hoppe***, 261 Wis. 2d 294, ¶¶36-37. We agree with the trial court that Toliver made the statements voluntarily.

¶11 We also conclude, but for a reason different from the trial court's, that the police were not required to record Toliver's statement under ***Jerrell C.J.*** *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985). In ***Jerrell C.J.***, the supreme court held that the police must record all custodial interrogations of juveniles. ***Jerrell C.J.***, 283 Wis. 2d 145, ¶3. The court used "the term 'juvenile' in a manner consistent with the Juvenile Justice Code." ***Id.***, ¶3 n.3 (quoting WIS. STAT. § 938.02(10m) (2001–02)). The Code states in pertinent part that: "for purposes of investigating or prosecuting a person who is alleged to have violated a state … criminal law …, 'juvenile' does not include a person who has attained 17 years of age." ***Id.***

¶12 In this case, the trial court ruled that police did not have to record Toliver's statement because the rule only applied to juveniles under the age of sixteen. We conclude, however, that the police did not have to record Toliver's interrogation because Toliver had attained the age of seventeen at the time of the interviews. For the reasons stated, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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