COURT OF APPEALS
DECISION
DATED AND FILED

November 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1475-CR **Cir. Ct. No. 2005CF108**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN EDWARD EGERSON, II,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. John Egerson, pro se, appeals a judgment of conviction for three counts of false imprisonment and one count each of armed burglary, battery, theft of moveable property, and mistreatment of animals, all as party to a crime and as a repeater. Egerson argues the circuit court erred by

admitting telephone conversations recorded without his consent in Michigan. We disagree and affirm.

Background

¶2 This case arises out of Egerson's participation in a home burglary in the Town of Peshtigo. Egerson, along with another man, broke into the home of James and Margaret Harper. The two men threatened the Harpers and their daughter at gunpoint, restrained all three with duct tape, shot the family dog, and stole various items. The day after the burglary, Ashley Sadowski, a resident of Menominee, Michigan, told the Marinette County Sheriff's Department she helped the men prepare for the burglary and locate the Harpers' house. Sadowski later agreed to record her telephone calls with Egerson, which she taped from her home in Michigan with equipment supplied by detective Anthony O'Neil of the Marinette County Sherriff's Department in Wisconsin.

¶3 Egerson filed a motion to prohibit the State from introducing the recordings at trial, arguing the conversations were not admissible as evidence under Wisconsin's Electronic Surveillance Law (WESCL), WIS. STAT. §§ 968.27-968.37.[1] The circuit court held O'Neil was authorized to assist Sadowski in recording the conversations,[2] and that the WESCL permits one-party consent recordings as evidence.

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

[2] Although we agree with the circuit court that the recordings were lawfully obtained, we take a different route to that conclusion. Accordingly, we need not address whether O'Neil was authorized to assist Sadowski in recording the conversations in Michigan.

Discussion

¶4 Whether evidence should be suppressed is a question of constitutional fact. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. When reviewing questions of constitutional fact, "we uphold a circuit court's factual findings unless they are clearly erroneous…." ***State v. Samuel***, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423. However, whether these facts meet the constitutional standard is a question of law, which we review independently. ***Knapp***, 285 Wis. 2d 86, ¶19.

¶5 The manner and method of obtaining evidence is governed by the law of the jurisdiction where it is secured. ***State v. Townsend***, 2008 WI App 20, ¶7, 307 Wis. 2d 694, 746 N.W.2d 493. However, "the rules of evidence governing admissibility are those of the forum state." ***State v. Kennedy***, 134 Wis. 2d 308, 320, 396 N.W.2d 765 (Ct. App. 1986). Therefore, this case presents two issues: (1) whether Michigan law permitted Sadowski to unilaterally tape her telephone conversations with Egerson; and (2) whether the recordings are admissible as evidence under Wisconsin law.

1. Recording Under Michigan Law

¶6 Egerson argues the recordings were obtained illegally because Michigan's eavesdropping statute does not permit an individual to record his or her phone conversations unless all parties to the conversation consent or law enforcement is involved. He further argues detective O'Neil was not authorized to act as a law enforcement officer in Michigan.

¶7 As the State correctly points out, however, the Michigan Court of Appeals has held that the eavesdropping statute[3] "unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to 'the private discourse of others.'" ***Sullivan v. Gray***, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982) (quoted source omitted). Thus, Michigan law permits one-party consent recordings. The State also correctly points out that the Michigan eavesdropping statute does not require the involvement of law enforcement. Therefore, Michigan law permitted Sadowski to tape her conversations with Egerson, regardless of whether detective O'Neil was authorized to act as a law enforcement officer in Michigan.

2. Admissibility under Wisconsin law

¶8 The admissibility of the recordings is governed by the WESCL. *See* ***State v. Maloney***, 2005 WI 74, ¶¶34-35, 281 Wis. 2d 595, 698 N.W.2d 583 (videotapes obtained in accordance with the WESCL held admissible at trial). This law provides:

> (2) It is not unlawful under ss. 968.28 to 968.37:
>
> ….
>
> (b) For a person acting under color of law to intercept a wire, electronic or oral communication, where the person is

[3] MICHIGAN COMP. LAWS § 750.539c (2004), provides: "Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both." Section 750.539a(2) defines "eavesdrop" or "eavesdropping" as follows: "'Eavesdrop' or 'eavesdropping' means to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse…."

> a party to the communication or one of the parties to the communication has given prior consent to the communication.
>
> (c) For a person not acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.

WIS. STAT. § 968.31(2)(b)-(c).

¶9 Egerson argues the WESCL required Sadowski to act under the color of law,[4] which she did not do because detective O'Neil was not authorized to act as a law enforcement officer in Michigan. We disagree.

¶10 While WIS. STAT. § 968.31(2)(b) permits one-party consent recordings when a person acts under the color of law, § 968.31(2)(c) requires only that the conversations not be intercepted "for the purpose of committing any criminal or tortious act … or for the purpose of committing any other injurious act." There is no evidence Sadowski committed or intended to commit a crime by recording her conversations. The only question, then, is whether she acted to commit "any other injurious act." Our supreme court has resolved this issue, holding that an individual who assists the police in collecting evidence does not

[4] Egerson relies exclusively on our unpublished decision in ***State v. Duchow***, No. 2005AP2175-CR, unpublished slip op. (WI App April 3, 2007), which carries no precedential authority. WIS. STAT. RULE 809.23(3). Moreover, the dispositive issue for the court of appeals was that the recording had not been obtained in cooperation with a law enforcement investigation, which is not the case here. The supreme court later reversed the decision on other grounds. ***State v. Duchow***, 2008 WI 57, ¶2, n.4, 749 N.W.2d 913.

commit an injurious act for the purposes of § 968.31(2)(c). ***Maloney***, 281 Wis. 2d 595, ¶36.

¶11 In ***Maloney***, Tracy Hellenbrand, the girlfriend of a man under investigation for his wife's murder, "offered to wear a concealed recording device … to prove Maloney's innocence." ***Id.***, ¶7. Working with Wisconsin authorities, she videotaped conversations between herself and Maloney in Las Vegas. ***Id.*** Rather than proving his innocence, the videotapes contained inculpatory evidence. ***Id.***, ¶8. Maloney argued Hellenbrand had not acted under the color of law and that the videotapes were therefore inadmissible. ***Id.***, ¶16. The supreme court declined to determine whether Hellenbrand acted under the color of law. Instead, it held WIS. STAT. § 968.31(2)(c) required only that Hellenbrand "consented to [the conversations'] interception by police and did not do so for the purpose of committing an illegal act." ***Id.***, ¶35.

¶12 Like Hellenbrand, Sadowski consented to the interception of her conversations and did not do so for the purpose of committing an illegal act. Although Hellenbrand, unlike Sadowski, consented to prove the innocence rather than the guilt of another party, ***Maloney*** does not require this distinction. Rather, the ***Maloney*** court held simply that an individual who voluntarily aids the authorities in a lawful investigation does not commit an injurious act against the investigated person simply by participation in the investigation. ***Maloney***, 281 Wis. 2d 595, ¶36. Sadowski participated in a lawful investigation against Egerson. Accordingly, her conversations were recorded in accordance with the WESCL and were therefore admissible as evidence.

By the Court.—Judgment affirmed.

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