COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0680-CR **Cir. Ct. No. 99-CF-2448**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM RAY TOLES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed*.

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. William Ray Toles appeals a judgment of conviction. The issues relate to whether his statement to police should have been suppressed. We affirm.

¶2 Toles pled guilty to one count of armed robbery while concealing his identity. Before entering that plea, Toles moved to suppress an inculpatory statement made to investigators and any physical evidence obtained as a result of that statement. The court denied the motion.

¶3 Toles argues that the police officer did not have reasonable suspicion to support the initial seizure of Toles, and that by bringing Toles to the police station, the officer arrested him without probable cause. The State disputes these arguments, and further argues that even if Toles's analysis is correct on these points, his statement should not be suppressed because the connection between the officer's conduct and the statement is sufficiently attenuated to dissipate the taint from the allegedly illegal action. We agree that the connection was sufficiently attenuated.

¶4 The attenuation concept was explained in ***State v. Tobias***, 196 Wis. 2d 537, 544-46, 538 N.W.2d 843 (Ct. App. 1995). When dealing with a defendant's statement, the threshold requirement is the voluntariness of the challenged statements. ***Id.*** In addition, there are several factors we consider to determine whether the causal chain is sufficiently attenuated to dissipate the taint of the allegedly illegal conduct: (1) the time elapsed between the alleged illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. ***State v. Simmons***, 220 Wis. 2d 775, 781, 585 N.W.2d 165 (Ct. App. 1998). Ultimately, the determinative issue is whether the evidence came about from the exploitation of the alleged illegality or instead by means sufficiently distinguishable to be purged of the primary taint. ***Id.*** The burden of showing admissibility rests on the prosecution. ***Tobias***, 196 Wis. 2d at 545. Whether evidence should be suppressed

because it was obtained pursuant to a Fourth Amendment violation is a question of constitutional fact that we review independently. ***Id.*** at 546.

¶5 We first address whether Toles's statement was voluntary. On appeal, Toles concedes that he confessed freely after hearing ***Miranda*** warnings. This concession appears justified, in light of the testimony describing the circumstances under which he gave the statement to detectives at the jail.

¶6 We next consider the other factors. The first is the time elapsed between the claimed illegal stop and arrest of Toles and the making of his statement. Toles was stopped and brought to the police station late on a Thursday evening or early the following morning, and the interrogation and statement occurred approximately five days later, on the following Tuesday afternoon.

¶7 The State argues that this five-day gap is sufficient attenuation because it is longer than the ninety-minute period we held was sufficient in ***Tobias***, 196 Wis. 2d at 548-49. However, in ***Tobias*** we noted that the temporal relationship between the arrest and the confession may be an ambiguous factor, and that if there are no relevant intervening circumstances, a prolonged detention may be a more serious exploitation of an illegal arrest than a short one. ***Id.*** at 548. Furthermore, in a recent decision rejecting the State's argument that sufficient time had passed, we again questioned whether this is the proper framework to apply when there are no intervening circumstances. ***State v. Vorburger***, 2001 WI App 43, ¶29, 241 Wis. 2d 481, 624 N.W.2d 398, *review granted*, 2001 WI 88, 246 Wis. 2d 165, 630 N.W.2d 219 (Wis. May 8, 2001) (No. 00-0971-CR). We reasoned: "Because an unlawful arrest may be ongoing, there is arguably no temporal distance between an unlawful arrest and consent obtained from the individual during the course of that arrest, unless there are intervening

circumstances or other developments leading to probable cause." ***Id.*** Accordingly, it appears that a long detention should be considered as attenuating only when there are intervening circumstances. We turn to that factor next.

¶8 The State argues that there was an intervening circumstance in this case, namely, that Toles was informed of potentially incriminating evidence in the form of preserved shoe prints from the scene of the robbery. According to a detective, Toles asked whether these could be identified with specific shoes, and when informed that they could, Toles was "concerned" about that, and confessed shortly thereafter. The State argues that this situation is similar to our conclusion in ***Tobias***, where we held that the defendant's confession was induced by confrontation with inculpatory evidence independently obtained. ***Tobias***, 196 Wis. 2d at 550-51.

¶9 Toles argues that the shoe evidence did not make his confession attenuated because, while the shoe impressions may have been obtained independently from his arrest, his shoes against which the impressions would have been compared were fruits of the illegal stop and arrest and were available for comparison only because of Toles's detention. We reject this argument. A detective testified that at the time of the interrogation, he had not yet compared the impressions with Toles's shoes. This is significant because it suggests that Toles's shoes had not yet been seized or searched. Toles was not presented with the fact of a match between the impression and his shoes, but only with the implication that a match *might* be made. If the shoe impression had any impact on Toles's confession, it came from his own realization that a match was a possibility, not because police had seized and examined his shoes. Accordingly, we conclude that the discussion of the shoe impression was an intervening circumstance making the confession attenuated.

¶10 The final factor is the purpose and flagrancy of the alleged misconduct. The State argues that the allegedly improper stop and arrest in this case were similar to the conduct we considered acceptable for attenuation purposes in ***Tobias***, 196 Wis. 2d at 551-53. We agree. Even if the officer lacked sufficient legal grounds to stop Toles and detain him at the police station, the officer's actions were taken with at least some reasoned basis and in a relatively restrained manner. Therefore, we conclude that Toles's confession was sufficiently attenuated from the allegedly improper stop and arrest so that suppression of the confession is not required.

¶11 Toles's next argument is that he was subjected to an improper parole hold, which was placed in effect starting an hour or two after his detention by police. Because Toles's confession occurred while he was detained on that hold, he argues that the confession should be suppressed. The parties agree that the parole hold was proper if the facts and circumstances of the case show that it was reasonable and that this is a question we review without deference to the circuit court. *See* ***State v. Goodrum***, 152 Wis. 2d 540, 545-46, 449 N.W.2d 41 (Ct. App. 1989).

¶12 The State argues that the hold decision is supported by all the facts known to the officer who requested the hold. However, in ***Goodrum***, we were not evaluating the decision of the officer to request the hold, but rather the decision of the agent to grant the request for a hold. ***Goodrum***, 152 Wis. 2d at 547. Our analysis focused on the agent's evaluation of the information provided by officers. ***Id.*** at 547-48. Therefore, we confine our analysis to the information known to the agent, not the officer.

¶13 In this case, the officer sought the hold late at night, and therefore he made the request to an "after hours" telephone number operated by the Department of Corrections. That number was staffed by a limited-term employee "program assistant," rather than a probation and parole agent. The program assistant did not recall the specifics of Toles's case, but she testified that she normally does not ask for details of why the person is a suspect and does not decide whether the officer's suspicion is justified. The officer testified, and the circuit court found, that he informed the program assistant that Toles and another man "were suspects in two armed robberies," that "they matched the description," and that he "explained the situation as to where they were found and what they were doing that night and the night before." Toles does not argue that this testimony was not credible.

¶14 Toles argues that the hold was unreasonable because the program assistant did not know anything about him and did not attempt to make her own evaluation of the facts which supported the officer's suspicions. If she had, she would have been aware of what Toles regards as the insufficient factual support to make the officer's suspicion reasonable. We conclude that the hold was reasonable. It is immaterial whether the program assistant actually made an evaluation about Toles. The test of reasonableness in search and seizure matters is objective. *See, e.g.*, ***State v. Secrist***, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999) (probable cause for search and probable cause to arrest are objective tests). Therefore, the question is whether the program assistant could reasonably have placed a hold based on the information she was given.

¶15 In this case, the program assistant was told that Toles was suspected of armed robbery, that he matched a description and that he was engaged in certain activities that could be considered suspicious. We said in ***Goodrum*** that the

probation and parole agent was justified in relying on information provided by police, ***Goodrum***, 152 Wis. 2d at 547, and therefore we do not think it was necessary for the program assistant to be aware of the factual details that would enable her to draw her own conclusion as to, for example, whether Toles really did match a description of the robbery suspect. The information provided by the officer in this case was sufficient to enable a reasonable person to authorize a parole hold.

¶16 Toles's next argument is that he was not given a proper ***Miranda*** warning when he was interrogated in jail by police detectives. However, Toles did not raise this argument before the trial court. Even constitutional claims may be waived by failing to raise them before the trial court. ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). Accordingly, we deem this issue waived for appellate review.

By the Court.—Judgment affirmed.

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