COURT OF APPEALS DECISION DATED AND FILED

November 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1565-CR

Cir. Ct. No. 99-CF-66

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TRAVIS S. OLSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ashland County: NORMAN L. YACKEL, Judge. *Affirmed*.

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

¶1 PER CURIAM. The State of Wisconsin appeals a pretrial order suppressing Travis Olson's statements to police. The State argues that because Olson was not in custody and because he never made an unequivocal request for an attorney, there was no violation of his right to counsel. In addition, the State argues that the statements were voluntary. We affirm the order.

BACKGROUND

¶2 On June 25, 1999, an Ashland police officer found electronic equipment in a dumpster. Olson's name was on some of the boxes, and he previously had reported similar items missing in a residential burglary. Sergeant Greg BeBeau attempted to contact Olson at Omer Nelson Electric. Omer Nelson employees informed BeBeau that Olson no longer worked at the store. BeBeau stated that he needed someone to identify the equipment, so some employees went to the police station. Olson also appeared at the station. The employees identified the equipment as belonging to the business, while Olson identified it as his. The employees stated that they had been trying to get the equipment back from Olson.

¶3 BeBeau decided to question Olson and obtained a ***Miranda***[1] waiver from Olson. BeBeau testified that at this point he did not consider Olson under arrest, and that he typically tells subjects they are free to leave if they are not under arrest. During questioning, Olson said that he wondered whether he should contact an attorney. BeBeau testified that when he told Olson the questioning would then have to stop, Olson said he wanted to talk to them. During this conversation, detective Thomas Long entered the room. Long testified that because Olson was being indecisive, Long came right out and asked Olson did he or did he not want an attorney. Olson said he did not and the questioning continued.

¶4 Sometime during the questioning either BeBeau or Long told Olson that there was enough probable cause to arrest Olson. Olson testified that the

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

officers told him that if he wanted an attorney he would have to go to jail. It was late on a Friday, and as a result, he would not be able to talk to an attorney until after the three-day holiday weekend. Because Olson did not wish to spend three days in jail, and because he was concerned about his security clearance with his Navy job, he continued to talk to the officers. Ultimately, he confessed. When questioning was concluded, Olson was allowed to leave.

¶5 Olson was charged with one count of felony retail theft, one count of obstructing a police officer and one count of false swearing. Olson moved to suppress the statements he made during the June 25 questioning, as well as statements made in a second session on July 6. The court granted the suppression motion and the State filed this interlocutory appeal.

¶6 When the parties submitted their briefs, we noted that the basis of the trial court's decision was unclear. The State claimed that the trial court had suppressed the statements based on a violation of ***Edwards v. Arizona***, 451 U.S. 477 (1981) (requiring the authorities to stop questioning when an accused asserts his or her right to counsel). However, Olson argued that the court suppressed the statements because they were involuntary. We returned the record to the trial court for a supplementary decision clarifying its order. The court filed a supplementary decision stating that its basis for granting the suppression motion was the involuntariness of Olson's statements.

STANDARD OF REVIEW

¶7 We will not disturb the trial court's findings of evidentiary or historical fact unless they are contrary to the great weight and clear preponderance of the evidence. ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). However, we independently review questions of fact that involve the application

of federal constitutional principals to the facts. ***Id.*** Thus, we independently review the facts in this case to determine whether any constitutional principles have been offended. ***Id.***

ANALYSIS

¶8 To determine whether a statement is voluntary, we look at whether it "was procured via coercive means or whether it was the product of improper pressures exercised by the police." ***Id.*** at 235-36 (quoting ***Barrera v. State***, 99 Wis. 2d 269, 291, 298 N.W.2d 820 (1980)). We examine the totality of the circumstances, "balancing the personal characteristics of the defendant against the pressures imposed upon him by the police in order to induce him to respond to the questioning." ***Id.*** at 236.

¶9 The State's initial premise for its appeal turns out to be incorrect. The trial court did not find an ***Edwards*** violation. Rather, the court concluded the statements were involuntary. On this point, the State also disagrees, arguing that Olson's statements were voluntary.

¶10 The State maintains that the physical circumstances surrounding the interview were not coercive. Olson was never threatened or denied access to food, water or toilet facilities. Furthermore, the State argues that the officers did not do anything to overpower Olson's will. According to the State, the officers did nothing more than tell Olson that the best way to avoid going to jail would be to tell the truth. This, the State contends, does not amount to coercion. Therefore, the State argues that Olson's statements were voluntary.

¶11 The trial court concluded the statements were involuntary for two reasons. First, the court found that Olson essentially indicated he wanted to stop

talking. The police responded by stating that they would then arrest him. They told him that all they wanted was the truth. If he would give them the truth, he could then go home. Second, the court found that when Olson asked what would happen if he asked for an attorney, he was told that questioning would stop, he would be arrested and he would have to spend the three-day weekend in jail. Among other things, Olson was concerned about how that would affect his Navy security clearance. The court concluded that both of these reasons induced Olson to continue talking and resulted in an involuntary statement.

¶12 The State first argues that the police did nothing improper or coercive, claiming that the police conduct simply amounted to telling Olson the truth. Indeed, a truthful statement by the police, in and of itself, is not improper. *See, e.g.,* ***United States v. Braxton***, 112 F.3d 777 (4th Cir. 1997). However, here the police did more than tell Olson they could arrest him. According to the court's findings, the police told Olson they would arrest him as a consequence of exercising his constitutional right to stop talking or to ask for an attorney. Furthermore, as an inducement to get him to forego those rights, the police promised not to arrest him. So the choice Olson faced was clear: (1) waive his rights so he could go home, or (2) exercise his rights and go to jail. This clear implication of a quid pro quo for a confession is improper and coercive. *See, e.g.*, ***Bruno v. State***, 574 So.2d 76 (Fla. 1991) (suggestions of leniency are objectionable when they suggest an express quid pro quo for a confession); ***State ex rel. Collins v. Superior Court***, 702 P.2d 1338 (Ariz. 1985) (confession may be rendered involuntary where defendant relies on a promise and is therefore induced to waive his Fifth Amendment rights); ***State v. Tamerius***, 449 N.W.2d 535 (Neb. 1989) (police telling a defendant he will not be arrested if he talks implies a benefit in exchange for information, and renders confession involuntary).

¶13 The State also argues that even if improper or coercive, the court failed to balance the police conduct against Olson's personal characteristics. *See* ***Clappes***, 136 Wis. 2d at 236. Nevertheless, in this case the court had an opportunity to observe and listen to Olson as he testified. Olson explained at length what he claimed the police did and how he reacted. The court specifically commented on Olson's concern about his security clearance. The court also commented about the long weekend in jail, implicitly finding that Olson was affected by that consideration. There was little testimony at the hearing about Olson's personal characteristics. However, based on the findings that the court did make, combined with the court's opportunity to observe and listen to Olson, we are satisfied that the court satisfactorily balanced the police conduct against Olson's characteristics.

By the Court.—Order affirmed.

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