COURT OF APPEALS DECISION DATED AND FILED

October 6, 2009

David R. Schanker
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. 2008AP1747-CR

Cir. Ct. No. 2005CF1819

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK W. BAILEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mark W. Bailey appeals from a corrected judgment of conviction for the second-degree sexual assault of a child to challenge the denial of his suppression motion. The issue is whether Bailey's statements should be suppressed as involuntary because they were improperly induced by the

detective's promise that, in exchange for Bailey's cooperation, he would be able to return home. We conclude that the trial court found that no promises were made to Bailey, and that that finding is not clearly erroneous. We therefore affirm.

¶2 Bailey was charged with the second-degree sexual assault of his stepdaughter, who was between eleven and fourteen years old when the alleged assaults occurred. According to the complaint, which Bailey later allowed to be used as a factual basis for his plea, Bailey admitted to police that he had talked to his stepdaughter about the "birds and the bees," and had shown her his private parts and her own, explaining the functions of each and how they corresponded to one another. During these sessions, he also admitted that he touched her vagina. It is these statements that Bailey moved to suppress as involuntary in exchange for the police detective's promise that if he cooperated, he would be able to return home.

¶3 The trial court conducted a ***Miranda-Goodchild*** hearing, at which the investigating detective and Bailey testified.[1] The trial court denied the motion. Bailey later entered a no-contest plea to one count of second-degree sexual assault of a child, in violation of WIS. STAT. § 948.02(2) (2005-06).[2] The trial court imposed an eight-year sentence to run concurrent to any other sentence, comprised

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[1] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). If the defendant moves to suppress his or her statements because of law enforcement's failure to timely warn of the risks and consequences of self-incrimination (***Miranda***), or the voluntariness of the statements (***Goodchild***), the trial court conducts an evidentiary (***Miranda-Goodchild***) hearing to determine the validity of the accused's statements and whether suppression is warranted prior to trial or a dispositive plea.

[2] By entering a no-contest plea, the defendant does not claim innocence, but implicitly acknowledges the sufficiency of the State's evidence to establish guilt beyond a reasonable doubt. *See* WIS. STAT. § 971.06(1)(c) (2005-06); *see also* ***Cross v. State***, 45 Wis. 2d 593, 598–99, 173 N.W.2d 589 (1970).

of three- and five-year respective periods of initial confinement and extended supervision. Bailey appeals from the judgment to challenge the order denying his suppression motion pursuant to WIS. STAT. § 971.31(10) (2007-08).[3]

¶4 The following facts are taken from the testimony at the ***Miranda-Goodchild*** suppression hearing. Bailey returned home at about 1:00 a.m., after working his 3:00 p.m. to midnight shift. As he got out of his car, he was approached by a police officer who told him that a detective wanted to talk to him. The officer handcuffed Bailey and directed him to get into a police wagon. After waiting in that wagon for approximately three hours, Milwaukee Police Detective James Olson introduced himself. According to Bailey, Olson said, "we believe this is just parenting but we have some concerns. We would like to talk to you downtown." Olson admits seeing Bailey in the back of the police wagon, but denies telling him anything about a "parenting issue," or having "some concerns." Nevertheless, Bailey was transported to the Criminal Investigation Bureau of the Milwaukee Police Department, and met again with Olson in an interview room about three and a half hours later.

¶5 Olson advised Bailey of his ***Miranda*** rights at the beginning of the interview. Bailey testified that he was tired and had "a bad headache." Although Olson claims that he gave Bailey a cup of coffee and a cup of water during the interview, Bailey denies that he was given anything to drink. Bailey admitted

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

however, that Olson was courteous, never raised his voice, and "[n]ever got in [his] face."

¶6 The disputed and consequential part of the interview is Bailey's claim that Olson promised him he could go home if he cooperated. Bailey testified that Olson "said I could go home when this was done. That he didn't believe there was much here." Bailey also testified that "I wanted to call home and [Olson] said I wouldn't recommend that. Call where you work. Tell them you might be in tonight. That this isn't worth losing your job over." During cross-examination, Bailey admitted that

> [Olson] said there is a possibility I might not be going home. That he was going to run it past [the prosecutor] and see if – it was – his words were I have to run this pas[t] the D.A. to see if it will clear but he's pretty level headed and I think you will be going home. We just want to make sure.

Olson admitted that he may have offered to call Bailey's "work," but denied saying anything to Bailey about going home.

¶7 Bailey moved to suppress his statements. The trial court denied the motion, finding that "[n]o promises or threats were made to him." It found that:

> [t]he answers to the questions were coherent. He was not cuffed. He appeared to be awake and alert and understood what he was doing and he stated that he was tired, kind of sleepy, had a headache, but still understood based upon the observations that were made.
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> ….
>
> [A]s far as the statement was concerned the Court believes that based upon the totality of the circumstances balancing the characteristics of the defendant and whatever pressures were applied or what was said, that that statement was a voluntary product of free and unconstrained will reflecting any deliberateness of thought, and not coerced or a product of any type of improper practices.

¶8 "The fourteenth amendment prohibits involuntary statements because of their inherent unreliability and the judicial system's unwillingness to tolerate illegal police behavior." ***State v. Pheil***, 152 Wis. 2d 523, 535, 449 N.W.2d 858 (Ct. App. 1989) (citation omitted).

> The ultimate determination of whether a confession is voluntary under the totality of the circumstances standard requires the court to balance the personal characteristics of the defendant against the pressures imposed upon him by police in order to induce him to respond to the questioning.

State v. Clappes, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (citation omitted).

> [C]oercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment, but coercive activity does not, in and of itself, establish involuntariness.… [A] trial court should not undertake the balancing analysis [between personal characteristics and coercive police activity] unless some improper or coercive police conduct has occurred.

State v. Deets, 187 Wis. 2d 630, 635-36, 523 N.W.2d 180 (Ct. App. 1994) (citations omitted).

¶9 We review the trial court's denial of a suppression motion pursuant to a mixed standard of review. *See* ***Clappes***, 136 Wis. 2d at 235. We defer to the trial court's factual findings unless they are clearly erroneous, and review the voluntariness of the statements independently of the trial court's conclusion. *See* ***id.***

¶10 This entire dispute revolves around the conflicting testimony of Bailey and Olson on whether Olson promised Bailey he could go home if he cooperated. Bailey testified that Olson promised him he could go home if he cooperated, and later testified that Olson told him that he would have to first "run

this pas[t] the D.A." for his approval. Olson denied saying anything about the possibility of Bailey going home.

¶11 The trial court did not expressly comment on either witness's credibility.

> When a trial court does not expressly make a finding necessary to support its legal conclusion, an appellate court can assume that the trial court made the finding in the way that supports its decision. Where it is clear under applicable law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony, its failure to grant the relief is tantamount to an express finding against the credibility of the defendant.

State v. Echols, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993) (citations omitted). In denying Bailey's suppression motion, the trial court found that "[n]o promises or threats were made to [Bailey]." The trial court necessarily found that Olson's testimony was credible in concluding that Bailey's statements were voluntary. *See **id.***

¶12 We independently conclude that Bailey's statements were voluntary. The trial court's factual finding that "[n]o promises or threats were made" is not clearly erroneous. Its denial of Bailey's motion necessarily rests on its implicit finding that Bailey's testimony was not credible. *See **id.***

By the Court.—Judgment affirmed.

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