

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 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. 01-3209-CR

Cir. Ct. No. 00-CF-63

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KRISTAN S. FISCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County:
ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Kristan S. Fisch appeals from a judgment convicting her of attempted first-degree intentional homicide in the shooting of her husband. On appeal, she argues that the circuit court erroneously declined to suppress her inculpatory statement to police because she had previously invoked

her right to counsel during a custodial interrogation and Fisch's mother elicited the statement in her capacity as an agent of the police. We disagree and affirm.

¶2 The police asked Fisch to come to the police station on May 25, 2000, to discuss the April 28, 2000 shooting of her husband. During one of her meetings with the police, Fisch was given her *Miranda*¹ rights. After an hour and forty-five minutes, during which Fisch denied her involvement in the shooting, Fisch invoked her right to counsel, and the police stopped questioning her. Thereafter, Fisch's mother, Cynthia Spain, asked to see Fisch. At the conclusion of the Fisch-Spain meeting, Fisch asked to speak to the police officers about the case. The officers initially declined to speak with her because she had previously invoked her right to counsel. However, Fisch insisted that she wanted to speak with the officers. The officers then gave Fisch her *Miranda* rights again, Fisch waived them, and the officers took her inculpatory statement. Fisch later moved to suppress her statement.

¶3 At the close of the suppression hearing, the circuit court found that Spain was not an agent of the police. Spain wanted to speak with Fisch because Spain believed herself a possible suspect (having been in the house when the shooting occurred) and wanted to speak with Fisch about their versions of the shooting. Spain told Fisch to tell the truth about the shooting. The court found that the police did not coerce or threaten Spain to talk with Fisch or to obtain a confession from her. The court found that Fisch insisted on speaking to the police and was not coerced by Spain to do so. The court found that Fisch waived her *Miranda* rights and initiated contact with the police.

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

¶4 For purposes of this opinion, we assume without deciding that Fisch underwent custodial interrogation on May 25. It is undisputed that she was given her *Miranda* rights before she spoke with the officers the first time and that after she met with Spain and indicated a desire to speak with the police again, she again received her *Miranda* rights and waived them. Therefore, we focus on the role Spain played in eliciting Fisch's inculpatory statement.

¶5 The factors to be considered in determining whether a civilian has become an agent of the police for purposes of initiating questioning are:

- (1) whether it was the citizen or the police who initiated the first contact with the police;
- (2) whether it was the citizen or the police who suggested the course of action that was to be taken;
- (3) whether it was the citizen or the police who suggested what was to be said to the suspect; in other words, was the citizen, in essence, a message carrier for the police;
- (4) whether it was the citizen or the police who controlled the circumstances under which the citizen and the suspect met; whether the control was extensive or incidental.

State v. Nicholson, 187 Wis. 2d 688, 695, 523 N.W.2d 573 (Ct. App. 1994) (quoting *State v. Lee*, 122 Wis. 2d 266, 276-77, 362 N.W.2d 149 (1985)).

¶6 We will affirm the circuit court's findings of historical fact unless they are clearly erroneous. *Nicholson*, 187 Wis. 2d at 694. The court's findings of fact relating to these factors are supported in the record. The court found that Fisch initiated the contact with the police, and that Spain did not coerce her to do so. The record also indicates that Spain's presence at the police station was incidental to Fisch's presence. Fisch and Spain had both been scheduled for police interviews on May 25 but at different times. Fisch and Spain decided to travel to the police station together. The police told Spain that a judge would be more

inclined toward leniency with a person who cooperated and that they could not talk to Fisch. Spain then offered to speak with Fisch, but there was no testimony that Spain conveyed any messages from the police or used any language provided by the police. We note, as did the court in *Nicholson*, that it was Fisch who asked to speak to the police after meeting with her mother. *See id.* at 696. Even though the mother-daughter meeting took place at the police station, this does not indicate that Spain was acting as an agent of the police. *See id.*

By the Court.—Judgment affirmed.

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

