COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0709-CR **Cir. Ct. No. 00-CF-1371**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. WEBER II,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Roggensack, Deininger and Lundsten, JJ.

¶1 ROGGENSACK, J. Timothy J. Weber was convicted of possession of tetrahydrocannabinols (THC) with intent to deliver, contrary to WIS. STAT.

§ 961.41(1m)(h)1 (2001-02).[1] He contends we should overturn his conviction because any incriminating statements he made during booking after his arrest and any physical evidence seized as a result of a search of his residence should have been suppressed. Because we conclude that the statements made during the booking process and the evidence seized during the search were lawfully obtained, we affirm the judgment of the circuit court.

BACKGROUND

¶2 Weber was convicted in Dane County Circuit Court of one count of possessing THC with intent to deliver. The circumstances that led to the conviction began with a sting operation during which he sold THC to an undercover law enforcement officer in Columbia County. He was arrested and taken to the Columbia County jail for booking where he was given ***Miranda***[2] warnings and invoked his right to have counsel present during custodial interrogation. The arresting officer did not question him about the drug sale that had occurred.

¶3 During the booking process, Weber gave his address as Troy Drive in Madison. When Lieutenant Smith, of the Columbia County Sheriff's Department, was told the address Weber gave during booking, Smith believed that Weber had given an incorrect address due to other information he had previously received. Therefore, he asked Weber whether he had given the correct address to the booking agent. Weber admitted he had not, and he then gave Smith his correct

[1] All further references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

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

address. Weber also volunteered other information that was not responsive to any question asked by Smith. According to Smith's uncontradicted testimony, Weber stated:

> [H]e had additional marijuana in his residence but only a small amount. [He] [a]lso asked what was going to occur because of his arrest. I advised him he had been arrested for two felony charges. [He] [a]sked me if that would involve prison time. I told him that it could. And then, he made a statement, something to the effect that he had been stupid, he was a small guy, it's always the smaller ones that get caught trying to make some money.

During this same conversation, Weber also offered to give Smith his house keys so that Smith could search his residence. Smith did not take the keys from him. Instead, he reminded Weber that he had asked for a lawyer. Smith told him that if he wished to speak with him, he would be happy to do so, but Weber had to talk to his lawyer first. Smith gave Weber his business card and told him that if he wanted to talk after Weber spoke to his lawyer, he could do so at the number on the card.

¶4 When Smith returned to his office, he called the Dane County drug enforcement team and told them that he had Weber in custody and that he thought Weber would be cooperative about his knowledge of drug activity in Dane County. He also relayed that he thought Weber would consent to the search of his apartment and that there may be drugs at that location. With this in mind, two detectives from the Dane County drug team came to the Columbia County jail. They knew that Weber had invoked his right to counsel. Therefore, when they spoke with him, they limited their interaction by prefacing any questions with the following advice:

> We advised him that it was our understanding that he had already been ***Mirandized*** and did not wish to answer any questions, that he wished to speak with an attorney first.

> We explained to him that we had no intention of asking him any questions about the drug investigation that he was currently incarcerated for or any other drug investigation. We told him that [we would] be interested in seeking his consent to search his apartment in Windsor.

Weber gave his consent to search his residence, orally, and he signed a consent-to-search form. He also gave permission to the officers to obtain the key to his residence from the jailer. The subsequent search revealed the marijuana that formed the basis for the conviction from which he now appeals.

¶5 Weber moved to suppress the physical evidence obtained in the search and his statements to Smith, based on an alleged violation of the procedures afforded under ***Miranda***. When the suppression motion was denied, Weber entered a plea of no contest. On appeal, he contends his conviction was based on statements he made during the booking process and on physical evidence seized at his residence, all in violation of his constitutional rights.

DISCUSSION

Standard of Review.

¶6 Whether an officer's request for consent to search or for a correct address during the booking process violates a defendant's constitutional rights, involves questions of constitutional fact and the application of constitutional principles to historic facts. We review, *de novo*, the circuit court's findings of constitutional fact or the application of constitutional principles to historic facts as questions of law. ***State v. Lee***, 122 Wis. 2d 266, 274, 362 N.W.2d 149, 152 (1985).

Consent to Search.

¶7 Weber first argues that his statement consenting to search his residence was obtained in violation of his Fifth Amendment rights.[3] The State contends that under ***State v. Turner***, 136 Wis. 2d 333, 401 N.W.2d 827 (1987), consent to search is not a testimonial utterance; and therefore, it does not implicate Fifth Amendment rights. Weber contends that ***Turner*** does not apply. Because ***Turner*** arises out of a challenge made under the provisions of ***Miranda v. Arizona***, 384 U.S. 436 (1966), we begin with a brief review of ***Miranda***.

¶8 The ***Miranda*** warnings advise a defendant of his or her right to silence and right to counsel. ***Id.*** at 479. ***Miranda***, based on the Fifth Amendment, provides a procedural device to protect against coercive self-incrimination in any criminal case. ***Oregon v. Elstad***, 470 U.S. 298, 304 (1985). As Fifth Amendment law has developed after ***Miranda***, the United States Supreme Court has explained that an accused's Fifth Amendment right to counsel during custodial interrogation is coupled with his right to silence. ***Edwards v. Arizona***, 451 U.S. 477, 482 (1981). As the Supreme Court has explained, in order to avoid a violation of the procedures it has established to protect Fifth Amendment rights:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused … having expressed his desire to deal with the police only through counsel, is not subject to further

[3] Weber also contends in his brief that his Sixth Amendment right to counsel was violated. However, at the time the questioning was done, he had not been charged in any criminal complaint nor had an arrest warrant been issued; therefore, the Sixth Amendment prescriptions were not then operative. ***Massiah v. United States***, 377 U.S. 201, 205-06 (1964); ***State v. Dagnall***, 2000 WI 82, ¶¶ 29-30, 236 Wis. 2d 339, 612 N.W.2d 680.

> interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85. Accordingly, the first issue we address is whether the Dane County officers' request for consent to search Weber's apartment was part of a custodial interrogation.

¶9 This brings us to the question addressed by the Wisconsin Supreme Court in ***Turner***. Turner was arrested, on a probation hold and as a suspect in an armed robbery and stabbing. ***Turner***, 136 Wis. 2d at 337, 401 N.W.2d at 829. While being taken to the police station, Turner told the arresting officers that he wanted to talk to his attorney, and he identified the attorney by name. When they arrived at the police station, Turner unsuccessfully attempted to contact his attorney by telephone. After learning that his attorney was unavailable, the arresting officer gave Turner a telephone book opened to the pages listing attorneys and gave him the opportunity to call another attorney. Turner declined and instead said he would talk to the police without his attorney present. ***Id.*** at 338, 401 N.W.2d at 830. Turner was then transported to Sheboygan County jail where he was held on a probation hold and was again given ***Miranda*** warnings orally, and in writing. Subsequently, he admitted his involvement in the armed robbery. He also gave consent to search his residence. ***Id.***

¶10 In concluding that the consent to search did not violate Turner's constitutional rights, the Wisconsin Supreme Court reasoned that the Fifth Amendment focuses on the privilege against coercive self-incrimination. ***Id.*** at 351, 401 N.W.2d at 835-36. However, it pointed out that consent to search is examined by applying Fourth Amendment principles and is based on an individual's privacy rights. ***Id.*** Under the Fourth Amendment, a consent to search

voluntarily given is sufficient to avoid violating a defendant's Fourth Amendment right to be free from unreasonable searches and seizures. ***State v. Wallace***, 2002 WI App 61, ¶17, 251 Wis. 2d 625, 642 N.W.2d 549. In addition, the court in ***Turner*** concluded that consenting to a search is not a testimonial, communicative statement[4] and that a request to search is not equivalent to an interrogation. ***Turner***, 136 Wis. 2d at 351, 401 N.W.2d at 836. As the court in ***Turner*** explained, requesting consent to search does not violate a defendant's Fifth Amendment right to remain silent. ***Id.*** Therefore, we analyze Weber's consent to search issue under the Fourth Amendment.

¶11 In a Fourth Amendment challenge of the type presented here, the State has the burden to prove, by clear and convincing evidence, that consent was voluntarily given. ***Wallace***, 251 Wis. 2d 625, ¶17. There are numerous factors to consider. As we explained in ***Wallace***, we review:

> "[W]hether any misrepresentation, deception or trickery was used to entice the defendant to give consent; whether the defendant was threatened or physically intimidated; the conditions at the time the request to search was made; the defendant's response to the agents' request; the defendant's general characteristics, including age, intelligence, education, physical and emotional condition, and prior experience with the police; and whether the agents informed the individual that consent to search could be withheld."

Id. (quoting ***State v. Bermudez***, 221 Wis. 2d 338, 349, 585 N.W.2d 628, 633 (Ct. App. 1998)). Here, the record is devoid of any evidence of misrepresentation or trickery by the Dane County officers. Instead, they explained who they were and

[4] A statement is "testimonial" when the communication, itself, "explicitly or implicitly" relates to a factual assertion or discloses information relative to the crime under investigation. ***Pennsylvania v. Muniz***, 496 U.S. 582, 594 (1990).

that they would limit their interview with Weber because they knew that he had asked for a lawyer to be present during any questioning on the Columbia County charges. Similarly, there is no evidence of any threats or intimidations or that Weber lacked the education, physical condition, emotional condition or any other characteristic that would prevent him from giving a voluntary answer to the officers' request to search his residence.

¶12 Instead, Weber's assertion that his consent was involuntary relies on law enforcement personnel having made two contacts with him after he exercised his rights under ***Miranda***. However, he does not explain how being asked his correct address and later being asked if officers could search at that address constituted coercion sufficient to overcome his will to refuse. We are unpersuaded that these two contacts, given the absence of other factors that could indicate a lack of voluntariness, are sufficient. We also note that it was at Weber's suggestion that the conversation about searching his residence first began. He volunteered to let Smith have the keys to his residence to search it, although Smith never asked to be permitted to do so. Therefore, we conclude that under the facts and circumstances of this case, Weber's consent was voluntarily given. Accordingly, neither the request for a consent to search nor the consent that was given to the Dane County officers violated Weber's constitutional rights.

Questioning During Booking.

¶13 Weber also argues that Smith's asking whether Weber had given his correct address during the booking process in Columbia County violated the protections afforded by ***Miranda*** and led to the knowledge of THC in his residence and his offer to consent to a search of his residence. He contends that Smith's violation created a poisonous tree from which Dane County officers

learned of the opportunity to question him. Therefore, as the fruit of a poisonous tree,[5] the evidence obtained in the search of his residence was unlawfully obtained and should have been suppressed, together with any incriminating statements he made to Smith. Accordingly, we next address the questioning that occurred during booking.

¶14 It is uncontested that Weber invoked his Fifth Amendment right to counsel after being given ***Miranda*** warnings and that Smith knew this when he asked him if he had given his correct address. The State contends that there exists an exception to ***Miranda's*** procedural protections for questions involved in the booking process. The State relies on ***Pennsylvania v. Muniz***, 496 U.S. 582 (1990). Weber contends that the exchange of information went far beyond the usual booking information and that Smith's question was asked in anticipation of filing obstruction charges against him. Therefore, Weber contends Smith's inquiry does not come within the booking questions exception.

¶15 The United States Supreme Court has explained that questions and answers used to secure the biographical data necessary to complete the booking process are not sheltered under the procedures required by ***Miranda***. ***Muniz***, 496 U.S. at 602. Therefore, a ***Miranda*** violation does not generally occur when booking questions are asked. However, not all questions asked during the booking

[5] We assume only for purposes of our discussion, but do not decide, that if a ***Miranda*** violation is determined to exist, a poisonous tree is established. The poisonous tree doctrine arose in Fourth Amendment jurisprudence. *See* ***Wong Sun v. United States***, 371 U.S. 471 (1963). It may have a more limited use in a Fifth Amendment context where ***Miranda*** protections have not been observed, but there has not been coerced, self-incriminating testimony in violation of the Fifth Amendment. *See* ***Oregon v. Elstad***, 470 U.S. 298 (1985); ***Michigan v. Tucker***, 417 U.S. 433 (1974); *but see* ***State v. Knapp***, 2003 WI 121, No. 00-2590 (addressing the exclusion of deriviative evidence when the violation of ***Miranda's*** protections was intention).

process are exempt from the scope of ***Miranda***. Police may not ask questions during booking that are reasonably likely to elicit incriminating admissions. ***Muniz***, 496 U.S. at 601.

¶16 The Wisconsin Supreme Court adopted a booking question exception in ***State v. Stevens***, 181 Wis. 2d 410, 434, 511 N.W.2d 591, 599 (1994). However, the supreme court specifically directed that booking questions must be asked during the actual booking process at the police station. ***Id.*** at 434-35 & n.10, 511 N.W.2d at 599 & n.10. Furthermore, we have held that police may not use routine booking questions as a guise for obtaining incriminating information. ***State v. Bryant***, 2001 WI App 41, ¶16, 241 Wis. 2d 554, 624 N.W.2d 865. The test of whether a question is entitled to the booking question exception from the ***Miranda*** protections is whether a police officer in the position of the questioner should have known that the question was reasonably likely to elicit an incriminating response. ***Id.***, ¶17.

¶17 Although ***Muniz*** provides an exception to the procedural protections established by ***Miranda*** for booking questions, it is important to note that the United States Supreme Court has explained that the Fifth Amendment privilege at issue here has an "incrimination element."[6] The incrimination element is important because the reasoning in ***Muniz*** relative to its limitation on questions that can be asked as booking questions is based on the incriminating nature of the

[6] *See* ***Doe v. United States***, 487 U.S. 201, 207 n.5 (1988) ("Because we ultimately find no testimonial significance in either the contents of the directive or Doe's execution of it, we need not, and do not, address the incrimination element of the privilege."); *see also* ***United States v. Balsys***, 524 U.S. 666, 683 (1998) (reviewing prior United States Supreme Court cases that have held that the Fifth Amendment is not violated by compelled testimony that could incriminate the speaker in a crime if immunity from prosecution by both federal and state governments is given).

questions it prohibited. ***Muniz***, 496 U.S. at 601. Therefore, if the booking questions are not incriminating, there is no need for ***Miranda's*** protections.

¶18 Here, the record shows that Smith asked only one question: whether the address Weber had given to the jailer was correct. That question was asked during the booking process while Weber was still sitting at the jailer's desk at the Columbia County jail. Smith questioned Weber when he had information that caused him to believe that Weber's answer could incriminate him in the crime of obstruction. However, Weber's answer was never used to prosecute him for that crime.[7] Therefore, we conclude Smith's question falls outside the description of those questions that are prohibited under ***Miranda*** and within the description of those questions permitted by ***Muniz***. Our conclusion in this regard is consistent with our decision in ***Bryant*** where we expressed a concern with answers given during booking that incriminate defendants in crimes. ***Bryant***, 241 Wis. 2d 554, ¶16. Accordingly, we conclude that because ***Miranda's*** protections were not breached, the circuit court properly refused to suppress Weber's statements made during the booking process.

[7] In some ways, this lack of prosecution is similar to what would have happened if Weber had been given immunity prior to answering Smith's question, *i.e.*, the incrimination element of the Fifth Amendment could not be violated. *See* ***Balsys***, 524 U.S. at 683.

CONCLUSION

¶19 Because we conclude that the statements made during the booking process and the evidence seized during the search were lawfully obtained, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.