

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 17, 2010

A. John Voelker
Acting 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. 2009AP2057-CR

Cir. Ct. No. 2008CF761

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DAVID W. STEVENS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:

ROBERT G. MAWDSLEY, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. In this appeal, the State of Wisconsin argues that the circuit court erroneously suppressed David Stevens' inculpatory statements to police. We agree with the State that Stevens waived his Fifth Amendment right to

counsel¹ during a custodial interrogation. Therefore, we reverse the circuit court's order suppressing Stevens' statements, and we remand to the circuit court.

¶2 Stevens was charged with first-degree sexual assault of a child. The charge arose out of sexual contact with a nine-year-old girl in an apartment complex swimming pool. The girl alleged that Stevens had grabbed her by the waist and rubbed his hands along her body. Stevens, a registered sex offender, was arrested at the apartment complex. At the time of his arrest, Stevens admitted touching the girl in an attempt to play with her, but he stopped when he realized it was wrong. Stevens admitted that he was aroused by the girl and had sexually gratifying thoughts when he saw the girl in the pool.

¶3 Stevens was interviewed twice while in custody. During the first interview, Detective Haines gave Stevens his *Miranda*² rights, and Stevens waived those rights. Stevens then admitted that he had physical contact with the girl in the pool and that he acted on impulses he had toward her. Stevens touched the girl outside her swim suit, wrapped his hands around her waist, and maneuvered himself so that his private parts touched her. Stevens then stated that he wanted to speak to his lawyer, and the detective terminated the interview at 10:35 a.m.

¹ *State v. Coerper*, 199 Wis. 2d 216, 222, 544 N.W.2d 423 (1996) (Fifth Amendment grants right to counsel during custodial interrogation).

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

¶4 Detective Haines escorted Stevens back to his cell, a twenty or thirty second walk. Before the detective left Stevens, Stevens announced that he had changed his mind and wanted to continue speaking with the detective. The detective declined to speak with Stevens because he had invoked his right to counsel. Stevens stated that he wanted to waive his right to counsel. The detective agreed to speak with him when the detective returned from a scheduled interview of the victim. Stevens told the detective, “make sure you come back, make sure you come back because I want to talk to you.” Detective Haines testified at the suppression hearing that he did not say or do anything to prompt Stevens to speak with him again after Stevens invoked his right to counsel to terminate the first interview.

¶5 At noon on the same day, Stevens’ mother called Assistant State Public Defender Jenny Yuan to advise that Stevens was in custody on suspicion of a sexual assault. Attorney Yuan, who represented Stevens in other cases, visited the police department at 1:00 p.m. and asked to see Stevens. Another detective, William Graham, Jr., declined her request because Stevens had been advised of his rights and had not asked to see an attorney. Detective Graham did not recall telling Detective Haines that a lawyer had asked to speak with Stevens. Attorney Yuan did not make contact with Stevens before he waived his right to counsel and inculpated himself during the second interview.

¶6 Detective Haines consulted with Detective Graham about the Stevens case after he returned from interviewing the victim and before he undertook the second interview of Stevens. However, he did not recall being told that Attorney Yuan had appeared at the station at 1:00 p.m. to see Stevens.

¶7 At 3:00 p.m. on the same day, Detective Haines commenced the second interview with Stevens. At that time, the detective confirmed that Stevens had a change of heart and had approached the detective about speaking again. Stevens expressed his desire to speak with the detective, the detective again gave Stevens his *Miranda* rights, and Stevens waived his right to counsel. The detective did not take any steps to learn if Stevens had counsel before conducting the second interview. During the second interview, Stevens admitted that he had intentional contact with the girl in the pool, his groin area had contact with her body, and he had a slight erection.

¶8 Stevens moved to suppress the statements from the second interview. As grounds, Stevens argued that he invoked his right to counsel during the first interview, the police did not tell Stevens that his counsel had appeared at the station, Detective Graham did not tell Detective Haines that a lawyer had asked to see Stevens, and Detective Haines did not listen to a voicemail left by Attorney Yuan before interviewing Stevens for a second time. Stevens argued that the police failed to scrupulously honor his previously invoked right to counsel and his subsequent waiver of the right to counsel before the second interview was

invalid. Therefore, the statements given in the second interview had to be suppressed.

¶9 The State countered that Detective Haines properly terminated the first interview when Stevens invoked his right to counsel. On his way back to his cell, Stevens stated that he wanted to speak with the detective. Thereafter, Stevens' mother, not Stevens himself, made contact with Attorney Yuan. The State argued that the detective scrupulously honored Stevens' invocation of his right to counsel until Stevens initiated the contact that led to the second interview and a waiver of his right to counsel.

¶10 The circuit court agreed with Stevens. The court found that Detective Haines properly ceased the first interview when Stevens invoked his right to counsel. As he was returning to his cell, Stevens stated that he wanted to speak to the detective, but the detective had to leave, and Stevens encouraged the detective to come back soon. Thereafter, Attorney Yuan appeared at the station and spoke with Lt. Detective Graham, who denied her access to her client. The court found credible Detective Graham's testimony that if he had known from Detective Haines that Stevens had requested counsel, he would have granted Attorney Yuan access to Stevens.

¶11 The circuit court relied upon *State v. Middleton*, 135 Wis. 2d 297, 399 N.W.2d 917 (Ct. App. 1986).³ The court found that Stevens’ waiver of the right to counsel during the second interview was made without being told that his attorney had come to see him. The court concluded that the State did not prove by a preponderance of the evidence that Stevens would have waived the right to counsel. Therefore, Stevens did not knowingly waive his right to counsel before the second interview because he did not know that counsel had appeared at the station to see him. Therefore, the circuit court suppressed the statements made at the second interview. The State appeals.

¶12 When a suspect invokes his or her *Miranda* right to counsel, interrogation must cease. *State v. Hambly*, 2008 WI 10, ¶13, 307 Wis. 2d 98, 745 N.W.2d 48, citing *Edwards v. Arizona*, 451 U.S. 477 (1981). However, if the suspect initiates contact with law enforcement after invoking the right to counsel, interrogation may resume. *Hambly*, 307 Wis. 2d 98, ¶69. We consider whether the suspect, after invoking the right to counsel, initiated further dialogue in a way that “evinced a willingness and a desire for a generalized discussion.” *Id.*, ¶89. The State had the burden to show that Stevens initiated further communication

³ Our forthcoming analysis spends no time on *State v. Middleton*, 135 Wis. 2d 297, 399 N.W.2d 917 (Ct. App. 1986), because that case was overruled in *State v. Anson*, 2005 WI 96, ¶13, 282 Wis. 2d 629, 698 N.W.2d 776. Our supreme court made clear in *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶56, 326 Wis. 2d 729, 786 N.W.2d 78, that a overruled decision of this court has no precedential value whatsoever. Therefore, *Middleton* is out of the mix.

with the police. *Id.*, ¶69. We will uphold the circuit court's findings of historical fact unless they are clearly erroneous. *Id.*, ¶49.

¶13 The State met its burden to show that Stevens initiated the subsequent contact with the police. The circuit court's findings about Stevens' conduct are not clearly erroneous: Stevens approached Detective Haines to say that he wanted to speak and, during the second interview, Stevens affirmed that he wanted to speak to the detective and waive his right to counsel.

¶14 We turn to whether Stevens voluntarily, knowingly and intelligently waived his *Miranda* right to counsel during the second interview he initiated. *See Hambly*, 307 Wis. 2d 98, ¶91. Whether a proper waiver occurred is a question of law we decide independently. *State v. Ward*, 2009 WI 60, ¶17, 318 Wis. 2d 301, 767 N.W.2d 236. The State has the burden to show a proper waiver of the right to counsel. *Hambly*, 307 Wis. 2d 98, ¶70.

¶15 We consider whether some conduct by the police rendered Stevens' waiver of the right to counsel involuntary. The circuit court found that the police withheld from Stevens the fact that his attorney came to see him. While the circuit court placed great stock in this finding, we do not. The law does not require the police to inform a suspect that an attorney dispatched by someone else came to the station in the absence of the suspect's personal invocation of the right to counsel. *See Ward*, 318 Wis. 2d 301, ¶¶34-36. A suspect's lack of knowledge that an

attorney appeared at the station has “no bearing on the [suspect’s] capacity to comprehend and knowingly relinquish a constitutional right.” *Id.*, ¶34 (citation omitted).

¶16 It is undisputed in this record that at the time Attorney Yuan appeared at the station, Stevens had already told Detective Haines that he wanted to speak with him when the detective returned to the station later that day. In other words, Stevens had already initiated police contact after previously invoking his right to counsel. There are no facts in this record indicating that Stevens asked anyone to contact Attorney Yuan on his behalf.⁴ The presence of Attorney Yuan at the police station was attributable to the efforts of Stevens’ mother, not Stevens. Even if Stevens had asked his mother to contact Attorney Yuan, Stevens did not disclose to Detective Haines that he made this request. It was within Stevens’ power to make such a disclosure. There is no indication in any of the testimony that any pressure was brought to bear on Stevens to waive his previously invoked right to counsel, and Stevens does not argue that he was coerced or pressured.

¶17 The police employed no unlawful tactics in their interactions with Stevens that caused him to waive his right to counsel and make inculpatory

⁴ Earlier in this appeal, we remanded to the circuit court to take additional evidence, if warranted, on the question of whether Stevens directed his mother to contact Attorney Yuan. The circuit court declined to take such evidence, and neither party argues on appeal that such refusal was error. Therefore, we address this issue no further.

statements. There is no indication in the record and Stevens does not claim that he did not understand the *Miranda* warnings when he received them. The State met its burden to show that Stevens voluntarily, knowingly and intelligently waived his *Miranda* right to counsel.

¶18 Because Stevens initiated contact with the police and knowingly, intelligently and voluntarily waived his Fifth Amendment right to counsel, the circuit court erred in suppressing his subsequent inculpatory statements. The circuit court's suppression order is reversed and the cause is remanded.

By the Court.—Order reversed and cause remanded.

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

