

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 3, 2003

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. 02-2658-CR

Cir. Ct. No. 01-CF-537

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERTA L. MCCORMICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Roberta McCormick appeals an order denying her motion to suppress and a judgment, entered upon a jury's verdict, convicting her

of theft by employee, contrary to WIS. STAT. § 943.20(1)(b).¹ McCormick argues the trial court erred by denying the suppression motion because her statements to private investigators were involuntary. Alternatively, McCormick argues that because the private investigators are licensed, their conduct was tantamount to state action. Finally, McCormick contends that her statements were inadmissible because they were obtained in violation of WIS. STAT. § 943.50(3). We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In September 2001, McCormick was employed by Embers Restaurant in Eau Claire. Suspicious that employee theft was the source of waning profits, the restaurant's owner, Karl Hartkemeyer, hired a private investigative agency named the "Wisconsin Rangers." After conducting surveillance at the restaurant, the Rangers concluded that McCormick was stealing money. When the restaurant closed on the evening of September 6, two or three Rangers confronted McCormick as she walked to her car. They identified themselves, took McCormick by the arm and escorted her back into the restaurant for questioning. It is undisputed that the Rangers did not provide McCormick with any *Miranda*² warnings or their equivalent before questioning her.

¶3 The trial court found that McCormick was detained and questioned from approximately 9:30 p.m. to 1:00 a.m., during which time McCormick was denied the ability to use the telephone. McCormick was also forbidden from using

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

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

the restroom without being accompanied by a Ranger. Ultimately, McCormick admitted pocketing money from patron sales and wrote an inculpatory statement.

¶4 At 1 a.m., the Rangers contacted the Eau Claire Police Department and police officer Sean Lester was dispatched to the restaurant. The Rangers explained to Lester they had evidence that McCormick stole money from the restaurant. Lester subsequently read McCormick the *Miranda* warnings and placed her under arrest. McCormick then admitted the allegations to Lester and wrote out a second statement.

¶5 The State charged McCormick with one count of theft by employee. McCormick filed a pretrial motion to suppress statements she gave to both the Rangers and Lester. The trial court denied the motion and the statements were received into evidence at trial. McCormick was convicted upon a jury's verdict. This appeal follows.

ANALYSIS

¶6 McCormick argues the trial court erred by denying the suppression motion because her statements to the Rangers were involuntary. The United States Supreme Court has held that the constraints of the Fourth and Fifth Amendments do not apply to purely private activity. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (Fourth Amendment provides no protection against private searches); *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (even “outrageous behavior by a private party” does not violate the Fifth Amendment). McCormick nevertheless argues the Wisconsin Constitution should be interpreted to grant greater protection than the Federal Constitution. McCormick urges this court to adopt the exclusionary rule against private individuals. We decline to adopt such a rule.

¶7 Our supreme court has recognized that the exclusionary rule was created to deter law enforcement officers from violating an individual's constitutional rights. See *State v. Ward*, 2000 WI 3, ¶57, 231 Wis. 2d 723, 604 N.W.2d 517. This restraint was not intended to be applied against the activities of private individuals. See *State v. Bembenek*, 111 Wis. 2d 617, 631-32, 331 N.W.2d 616 (Ct. App. 1983). An inculpatory statement to a private citizen will be suppressed, however, if the citizen is acting as an agent for the police. *State v. Lee*, 122 Wis. 2d 266, 275, 362 N.W.2d (1985). Among the factors to be considered when determining whether a private citizen is acting as a police agent are the following:

(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; and (4) whether it was the citizen or the police who controlled the circumstances under which the citizen and the suspect met.

Id. at 276-77. (citations omitted).

¶8 Here, the trial court found that the Rangers had no contact with law enforcement until after they had obtained McCormick's statements. Although the trial court concluded that her statements to the Rangers were "the equivalent of coerced," the Rangers were not acting as agents for the police. Those statements were obtained independent of any police involvement. The trial court further concluded that once the police were contacted, McCormick's statement to the

police officer was freely and voluntarily given. Because there was no police misconduct, there is no constitutional basis to exclude McCormick's statements.³

¶9 McCormick nevertheless claims that because private investigators are regulated under Wisconsin law, the Rangers' conduct was tantamount to state action. We are not persuaded. It is not enough for McCormick to claim that the Rangers are state actors merely because they are licensed or otherwise regulated by the State. She must show that the Rangers were acting as agents for the State. As noted above, there was no agency relationship between the police and the Rangers. It was not the police, but the private investigators who initiated contact with McCormick, suggested the course of action to be taken, questioned McCormick about the alleged thefts and controlled the circumstances of that questioning. *See id.*

¶10 Finally, McCormick contends that her statements were inadmissible because they were obtained in violation of WIS. STAT. § 943.50(3).⁴

³ Admissibility of the statements is governed by the general rules of evidence. Their reliability is judged not by excluding them, but by admitting them into evidence and allowing the fact-finder to decide how much weight and credibility to attach to them.

⁴ WISCONSIN STAT. § 943.50(3) provides, in relevant part:

(continued)

McCormick's reliance on this statute is misplaced. By its plain language, § 943.50(3) applies to an investigation of one who is suspected of committing one of the violations enumerated under sub. (1m), which lists various forms of retail theft, i.e. shoplifting. The statute does not apply to one who is suspected of employee theft. Moreover, § 943.50(3) does not create a statutory exclusionary rule nor otherwise govern admissibility of evidence. Rather, it is an immunity statute that protects merchants from civil and criminal liability for acts it authorizes.

By the Court.—Judgment and order affirmed.

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

A merchant...or a merchant's security agent who has reasonable cause for believing that a person has violated *this section* in his or her presence may detain the person in a reasonable manner for a reasonable length of time to deliver the person to a peace officer, or to his or her parent or guardian in the case of a minor. The detained person must be promptly informed of the purpose for the detention and be permitted to make phone calls, but he or she shall not be interrogated or searched against his or her will before the arrival of a peace officer who may conduct a lawful interrogation of the accused person. The merchant...or merchant's security agent may release the detained person before the arrival of a peace officer or parent or guardian. Any merchant...or merchant's security agent who acts in good faith in any act authorized under this section is immune from civil or criminal liability for those acts.

(Emphasis added).

