COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP1587-CR
2009AP1588-CR

Cir. Ct. Nos. 2006CF947
2006CF2301

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIE B. COLE,

DEFENDANT-APPELLANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: JEFFREY A. CONEN and JEFFREY A. WAGNER, Judges. *Affirmed.*

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

¶1 PER CURIAM. In these consolidated appeals, Willie B. Cole appeals from judgments of conviction and from orders reinstating those judgments. We conditionally reversed the judgments in Cole's earlier appeal,

concluding that the circuit court applied the wrong burden of proof when resolving Cole's motion to suppress his custodial statement. *See* ***State v. Cole***, 2008 WI App 178, ¶2, 315 Wis. 2d 75, 762 N.W.2d 711. Following remittitur, the circuit court conducted an evidentiary hearing, again denied Cole's motion to suppress, and ordered reinstatement of the judgments of conviction.[1] We affirm.

BACKGROUND

¶2 In February 2006, police arrested Cole for battering his wife. Milwaukee Police Officer Angela Gonzalez met with Cole after his arrest. She prepared an interview report that states:

> [t]his report was written by P.O. Angela Gonzalez assigned to District Six, Late shift. On 2-11-06 at 6:00 a.m. I, P.O. A. Gonzalez read subject (COLE, WILLIE B B.M. 3-8-52) his legal rights and asked him if he wanted to make a statement regarding Battery D.V. incident 06-041-0133. Cole stated he did not wish to make any statements to the police at this time.

Cole and Gonzalez both signed this report.

¶3 Cole remained in custody following his arrest. On April 24, 2006, Milwaukee Police Officer Adam Riley met with Cole while investigating evidence that Cole had tried to prevent his wife from testifying against him. Riley advised

[1] Our opinion resolving Cole's first appeal suggests that this case involves one judgment of conviction. *See* ***State v. Cole***, 2008 WI App 178, ¶1, 315 Wis. 2d 75, 762 N.W.2d 711 (***Cole I***). Both ***Cole I*** and the instant matter involve two judgments of conviction. In this proceeding, Cole appeals in case No. 2009AP1587-CR from the judgment of conviction for substantial battery and the order reinstating that judgment entered in circuit court case No. 2006CF947. Cole appeals in case No. 2009AP1588-CR from the judgment of conviction for two counts of intimidating a witness and the order reinstating that judgment entered in circuit court case No. 2006CF2301. The Honorable Jeffrey A. Conen presided over the proceedings reviewed in ***Cole I***. The Honorable Jeffrey A. Wagner presided over the circuit court proceedings after remand.

Cole of his rights under the Fifth Amendment to the U.S. Constitution, pursuant to ***Miranda v. Arizona***, 384 U.S. 436 (1966). *See* ***Cole I***, 315 Wis. 2d 75, ¶6. Cole then spoke to Riley about the evidence of witness intimidation and about the battery offense.

¶4 Cole subsequently moved to suppress his statement to Riley. Cole contended that he invoked his right to counsel in his interview with Gonzalez and that law enforcement officers therefore could not question him later about any matter without an attorney present. At the suppression hearing, Riley testified on direct examination that Cole made statements after Riley provided ***Miranda*** warnings. On cross-examination, Riley agreed that he reviewed a police report before he spoke to Cole and "saw that [Cole] had requested a lawyer during his first arrest." The State then submitted Gonzalez's report without objection from Cole. Cole did not testify. The circuit court denied the suppression motion, concluding that Cole had not carried the burden of proving that he invoked his right to counsel when he spoke to Gonzalez. Cole then pled guilty to one count of substantial battery and two counts of intimidating a witness.

¶5 Cole appealed. He challenged, among other matters, the circuit court's order denying the motion to suppress his statement. In a published decision, we concluded that the State had both the burden of production and the burden of persuasion on the question of whether Cole invoked his right to counsel during the interview with Gonzalez. ***Cole I***, 315 Wis. 2d 75, ¶¶38-39. Therefore, we conditionally reversed the judgments of conviction and remanded the matter to the circuit court "with instructions to determine, applying the correct burden of proof, whether Cole ... invoked his Fifth Amendment/***Miranda*** right to counsel in the interview with Officer Gonzalez." ***Id.***, ¶43. We further directed the circuit court to reinstate the judgments of conviction if the circuit court determined that

Cole did not invoke his right to counsel during the interview with Gonzalez. *See* ***id.***, ¶44.

¶6 At the hearing after remittitur, Gonzalez testified that she met with Cole on February 11, 2006, that she gave him the warnings required by ***Miranda*** before attempting to question him, and that Cole declined to make a statement. She further testified that her report accurately reflected that Cole did not ask for an attorney and that if Cole had made such a request she would have noted it. Riley also testified and stated that he had no information before meeting with Cole on April 24, 2006, to suggest that Cole requested an attorney during the interview with Gonzalez. Riley explained that he was mistaken when he gave contrary testimony. Cole then testified and asserted that he did request an attorney during his interview with Gonzalez.

¶7 The circuit court concluded that the State met its burden of proof in all respects. The circuit court therefore reentered the judgments of conviction, and Cole appeals.

DISCUSSION

¶8 Before questioning a suspect in custody, law enforcement officers must inform the person of certain rights, including the right to have an attorney present during questioning and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda***, 384 U.S. at 478-79 (1966). "If a suspect requests counsel at any time during the interview, he or she is not subject to further questioning until a lawyer has been made available or the suspect himself or herself reinitiates conversation." ***Cole I***, 315 Wis. 2d 75, ¶25. Moreover, "[t]he Fifth Amendment/***Miranda*** right to counsel during custodial interrogations is not offense specific. 'Once a suspect invokes [this] right to counsel for interrogation

regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present.'" ***Cole I***, 315 Wis. 2d 75, ¶26, (citations omitted, emphasis and brackets in ***Cole I***). To be entitled to the protection of this rule, however, "the suspect must unambiguously request counsel." ***Davis v. United States***, 512 U.S. 452, 459 (1994).

¶9 When the State seeks to introduce a defendant's custodial statement into evidence, the State has the burden of proving by a preponderance of the evidence that the defendant received and understood the ***Miranda*** warnings, and knowingly and intelligently waived the rights protected by those warnings. ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. We determined in ***Cole I*** that the burden of proof is also on the State when, as here, a defendant "asserts he previously invoked his right to counsel as a basis for invalidating a later waiver."[2] ***Cole I***, 315 Wis. 2d 75, ¶38.

¶10 Cole now challenges the circuit court's conclusion after remand that the State satisfied its burden and proved that Cole did not invoke his right to counsel. When we review a ***Miranda*** challenge, we are bound by the circuit court's factual findings unless they are clearly erroneous. ***State v. Ross***, 203 Wis. 2d 66, 79, 552 N.W.2d 428 (Ct. App. 1996). "An implicit finding of fact is sufficient when the facts of record support the decision of the [circuit] court." ***State v. Echols***, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993). Further, "[w]hen the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19,

[2] Cole's sole basis for claiming that his statement to Riley should be suppressed is the contention that Cole invoked his right to counsel during his interview with Gonzalez. ***Cole I***, 315 Wis. 2d 75, ¶23.

257 Wis. 2d 421, 651 N.W.2d 345. We defer to both express and implicit credibility findings of the circuit court. ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998).

¶11 The circuit court could properly rely on Gonzalez's testimony to find that the State met its burden. Indeed, we noted in ***Cole I*** that Gonzalez's report alone could support a finding that Cole did not invoke his right to counsel: "[a] finding that Cole did not invoke his Fifth Amendment/***Miranda*** right to counsel, based on Officer Gonzalez[']s report, would not be clearly erroneous. It is reasonable to infer that Officer Gonzalez would have noted such a significant event if it had occurred." ***Cole I***, 315 Wis. 2d 75, ¶42 n.10.

¶12 Cole understandably emphasizes the testimony from Riley at the original suppression hearing that he reviewed a police report and "saw that [Cole] had requested a lawyer." Riley, however, explained in his testimony after remand that he "was simply mistaken" when he first testified about what he saw in Gonzalez's report.

¶13 "Sorting out the conflicts and determining what actually occurred is uniquely the province of the [circuit] court." ***State v. Owens***, 148 Wis. 2d 922, 930, 436 N.W.2d 869 (1989). Further, "the fact finder does not only resolve questions of credibility when two witnesses have conflicting testimony, but also resolves contradictions in a single witness's testimony." ***Id.*** The circuit court could reasonably find that Riley gave a persuasive reason to discount his original testimony. As we stated in ***Cole I***: "[i]t is reasonable to decide that, because [Gonzalez's] report does not make a reference to Cole invoking the right to counsel, Officer Riley must have been mistaken when he testified that he saw this in the police report." ***Cole I***, 315 Wis. 2d 75, ¶41.

¶14 Cole objects that the circuit court did not make express findings regarding the credibility of Gonzalez, Riley, and Cole. Absence of express credibility determinations does not prevent us from recognizing the circuit court's conclusions about credibility. To the contrary, we assume that the circuit court made implicit findings that support its decision. *See* ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552.

¶15 Here, the circuit court implicitly concluded that Riley credibly explained his testimony at the first hearing. We defer to that finding. *See* ***Jacobson***, 222 Wis. 2d at 390.

¶16 The circuit court also made an implicit finding that Gonzalez more credibly described the February 2006 custodial interview than did Cole. "Where it is clear under applicable law that the [circuit] 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." ***Echols***, 175 Wis. 2d at 673. In this case, Cole testified that Gonzalez did not give him ***Miranda*** warnings and that he asked for an attorney when he spoke to her. Gonzalez flatly refuted that testimony. The circuit court found that Gonzalez "informed [Cole] of his ***Miranda*** rights" and that Cole "did not invoke his right to counsel." The circuit court's finding reflects its conclusions that Gonzalez was credible and Cole was not. We accept those conclusions.

¶17 In sum, Gonzalez's testimony, corroborated by her interview report, amply supports the circuit court's finding that Cole did not invoke his right to counsel in the February 2006 custodial interview. Therefore, the circuit court did not err by reinstating the judgments of conviction. *See* ***Cole I***, 315 Wis. 2d 75, ¶44.

By the Court.—Judgments and orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).