COURT OF APPEALS DECISION DATED AND FILED

January 27, 2011

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. 2010AP1435-CR | **Cir. Ct. No. 2009CF214**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JAMES A. STEVENS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: CRAIG R. DAY, Judge. *Reversed and cause remanded for further proceedings*.

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. The State appeals from a circuit court order granting James A. Stevens' motion to suppress statements Stevens made to police in an apartment hallway and at a police station. The State contends that the circuit court erred in excluding the statements as involuntary, because the record

establishes that the police conduct in obtaining the statements was not coercive as a matter of law. We agree, and reverse.

Background

¶2 In the early morning hours of November 7, 2009, Platteville police observed Stevens involved in a fight outside a bar. The police issued Stevens a verbal warning for disorderly conduct and allowed him to leave. However, police then located a pill bottle with Stevens' name in the area Stevens had left, containing marijuana. Three police officers followed Stevens to an apartment complex and questioned him in the hallway regarding the contents of the pill bottle. After five to fifteen minutes of questioning, Stevens admitted the marijuana was his. Police arrested Stevens and brought him to the hospital for treatment of injuries he sustained in the fight outside the bar, and then to the police station, where Stevens was given ***Miranda***[1] warnings and then made further incriminating statements. The State charged Stevens with possession of a controlled substance.

¶3 Stevens moved to suppress the statements he made in the apartment hallway and at the police station. He argued that the police interrogation in the apartment hallway violated his rights under ***Miranda***; that his statements in the hallway were involuntary under ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965); and that his subsequent statements at the police station were subject to exclusion as "fruit of the poisonous tree" under ***Wong Sun v. United States***, 371 U.S. 471, 484-86 (1963). After a motion hearing, the circuit

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

court found that Stevens was not under arrest for purposes of ***Miranda*** when he was questioned in the apartment hallway. However, the court also found that, balancing Stevens' personal characteristics against the tactics employed by the police, Stevens' statements were involuntary. The court granted Stevens' motion to suppress his statements in the apartment hallway and at the police station. The State appeals.

Discussion

¶4 A confession is involuntary if it was obtained by police coercion. ***State v. Berggren***, 2009 WI App 82, ¶30, 320 Wis. 2d 209, 769 N.W.2d 110. Thus, "police coercion is a necessary prerequisite to finding that a defendant's statement was involuntarily made." ***State v. Ward***, 2009 WI 60, ¶33, 318 Wis. 2d 301, 767 N.W.2d 236. If police have employed coercive tactics in obtaining a confession, "[w]e consider the totality of the circumstances [to determine] whether a confession was voluntary, and in doing so, we balance the personal characteristics of the defendant against the pressures imposed upon him by police in order to induce him to respond to the questioning." ***Berggren***, 320 Wis. 2d 209, ¶30 (citation omitted). Whether police have employed coercive tactics is a threshold question, however, and we do not reach the balancing test absent coercive police conduct. *See* ***id.***

¶5 "In order for police conduct to be coercive, the pressures brought to bear on the defendant by representatives of the State must exceed the defendant's ability to resist." ***Ward***, 318 Wis. 2d 301, ¶37 (citation omitted). The conduct "must be shown to be the type of conduct that prevents a defendant's statements from being the product of a free and unconstrained will, reflecting deliberateness

of choice, as opposed to the result of a conspicuously unequal confrontation." ***Id.***, ¶40 (citation omitted).

¶6 Whether police conduct was coercive is a question of law, which we review de novo. *See* ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). However, we will not disturb the circuit court's findings of historical fact unless those findings are clearly erroneous. *See* ***State v. Bridges***, 2009 WI App 66, ¶9, 319 Wis. 2d 217, 767 N.W.2d 593.

¶7 The State contends that the police did not employ coercive tactics to obtain a confession from Stevens, while Stevens contends that the police conduct was coercive. The parties point to the following evidence from the motion hearings to support their positions: Knoernschild, along with two other police officers, questioned Stevens in the apartment hallway regarding the contents of the pill bottle. Stevens initially denied any knowledge of the contents. Knoernschild testified that Stevens appeared to be in pain from an injury to his shoulder from the fight outside the bar, and that Knoernschild smelled intoxicants on Stevens, although Stevens did not appear intoxicated. One of the officers told Stevens that it would be in his best interest to start telling the truth, and Knoernschild said to Stevens, "Be honest with me, man." Knoernschild testified that the officers questioned Stevens for about five minutes, and Stevens then said that the pill bottle contained marijuana and that it was his. The officers then arrested Stevens, and took him to the hospital, where he was treated for his shoulder injury. At the police department, police read Stevens his ***Miranda*** rights, and he gave further incriminating statements.

¶8 Stevens testified that when the police questioned him in the apartment hallway, he felt like they were harassing him, had trapped him, and

wouldn't let him go. He said that his back was against the wall and there was an officer on either side and in front of him, each about a foot and one-half away from him. He testified that the questioning occurred for about fifteen minutes before he confessed. He also testified that if he had not consumed alcohol or been injured that evening, or if he had been informed he had a right to talk to a lawyer, he would not have confessed.

¶9 After hearing Knoernschild's and Stevens' testimony, as well as an audiotape recording of most of the interaction between the officers and Stevens in the apartment complex, the circuit court made the following findings of fact: the length of the interrogation was minimal, probably between five and ten minutes, fifteen at the most; the interrogation took place in a small space, with three officers blocking Stevens, although the officers took no physical steps to prevent Stevens from leaving; the officers did not place any physical pressure on Stevens; the officers used deceptive practices by telling Stevens it was in his best interest to tell the truth, when actually it was in his best interest to remain silent; the officers used aggressive tones and commanded Stevens to speak rather than posing questions to him;[2] and the police never informed Stevens of his right to counsel or his right to remain silent.

¶10 We conclude that the facts established at the motion hearings and found by the circuit court do not constitute coercive practices by the police. First,

[2] The State invites us to listen to the audiotape recording and reach our own findings of fact as to the tone of the police questioning. *See* ***Cohn v. Town of Randall***, 2001 WI App 176, ¶7, 247 Wis. 2d 118, 633 N.W.2d 674. Upon our review of the audiotape, we conclude that the circuit court's findings that the police officers' tones were "aggressive" and "commanding" based on the contents of the recording are not clearly erroneous, and we therefore do not disturb them. *See* ***State v. Bridges***, 2009 WI App 66, ¶9, 319 Wis. 2d 217, 767 N.W.2d 593.

the only specific statements by the police that Stevens identifies as coercive are the statements that it was in Stevens' best interest to tell the truth, and instructing Stevens to be honest and explain the situation.[3] However, we have explained that "[a]n officer telling a defendant that his cooperation would be to his benefit is not coercive conduct, at least so long as leniency is not promised." ***Berggren***, 320 Wis. 2d 209, ¶31 (citation omitted). We have also held that a police officer's use of a loud and confrontational tone does not equate to coercive tactics. *See* ***State v. Markwardt***, 2007 WI App 242, ¶¶41-42, 306 Wis. 2d 420, 742 N.W.2d 546. Moreover, these facts together with the additional facts in the record—that three police officers questioned Stevens for five to fifteen minutes, surrounding him and blocking his way, after Stevens had consumed intoxicants and had been injured in a fight—do not amount to coercive conduct. *See* ***Ward***, 318 Wis. 2d 301, ¶¶37, 40 (coercive conduct is type of conduct that overcomes a defendant's ability to resist and to make statements of own free will).

¶11 Stevens argues, however, that even if the police conduct was not inherently coercive, it was coercive based on Stevens' physical and mental limitations. *See* ***State v. Hoppe***, 2003 WI 43, ¶46, 261 Wis. 2d 294, 661 N.W.2d

[3] The circuit court found that the officers told Stevens he had to provide an explanation for how the marijuana got in the pill bottle with his name on it, contrary to the fact that Stevens had a right to remain silent. While the record reveals that the police said to Stevens, "Explain to me, okay, how this pill bottle gets there with your name on it with this bag inside of it," we disagree that this statement amounts to a communication that Stevens was *required* to provide an explanation. Additionally, we note that the circuit court referenced the absence of ***Miranda*** warnings in the apartment hallway. While the absence of ***Miranda*** warnings would be an appropriate factor if we reached the balancing test to determine whether Stevens' statements were voluntary, failure to give ***Miranda*** warnings in a noncustodial setting does not amount to coercion. *See* ***State v. Hoppe***, 2003 WI 43, ¶56, 261 Wis. 2d 294, 661 N.W.2d 407 ("[T]he circuit court was correct to consider the absence of [***Miranda***] warnings in its voluntariness analysis."). This is the case even when, as here, police also state that it is in the defendant's best interest to provide an explanation.

407 ("[P]ressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures."). He contends that because he had been drinking, was injured, and there was an indication that he had consumed marijuana, he was under impaired mental and physical conditions, rendering him uncommonly susceptible and the police conduct therefore coercive. We disagree. While the record indicates that Stevens had been drinking, there are no facts indicating that he was intoxicated. Additionally, while Knoernschild stated he received reports at the bar that Stevens had been kicked out of the bar for smoking marijuana, there are no facts indicating that Stevens was under the influence of marijuana while the police questioned him at the apartment complex. Finally, the record indicates that Stevens' shoulder was injured in the fight outside the bar, but does not indicate he was in pain to the level that would render him more susceptible to police influence. Consistent with the testimony at the motion hearing, the circuit court found only that Stevens was in "some pain," and stated that the facts surrounding Stevens' shoulder injury did not contribute to its analysis. Thus, in their entirety, these facts do not render the police conduct coercive. Additionally, none of the other facts as to Stevens' physical or mental state—such as his age or education level—rendered Stevens particular susceptible to police influence.

¶12 Because the police conduct in this case was not coercive, we do not reach the balancing test between Stevens' personal characteristics and the pressures imposed by police to determine whether Stevens' statements were voluntary. *See* ***Berggren***, 320 Wis. 2d 209, ¶30. Rather, the lack of coercion by police defeats Stevens' argument that his confession was involuntary. *See* ***State v. Ward***, 318 Wis. 2d 301, ¶33. Accordingly, we conclude that there is no basis to

suppress the statements by Stevens in the apartment complex; correspondingly, there is no basis to suppress the statements by Stevens at the police station as "fruit of the poisonous tree." *See* ***Wong Sun***, 371 U.S. at 484-86. We reverse and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

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