COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1375-CR **Cir. Ct. No. 2006CF3412**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEVILLE J. ANDERSON,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: M. JOSEPH DONALD and REBECCA F. DALLET, Judges. *Affirmed.*

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

¶1 PER CURIAM. Deville J. Anderson, *pro se*, appeals judgments of conviction, entered upon his guilty plea, on one count of first-degree reckless homicide by use of a dangerous weapon as a party to a crime. Anderson contends that the circuit court erred when it refused to suppress a custodial statement he

gave to police. Anderson also argues the court's erroneous denial of his motion resulted in the sentencing court relying on inaccurate information. We reject Anderson's arguments and affirm the judgments.

BACKGROUND

¶2 Freddie Smith gave a statement to police implicating himself and Anderson in the June 26, 2006 shooting death of Robert Taylor. Anderson turned himself into police on June 30, 2006, after his mother told him that police had been looking for him. While in custody, Anderson confessed his role in Taylor's death to Detectives Paul Formolo and James Hensley.

¶3 Anderson was originally charged with one count of first-degree intentional homicide, while armed, as party to a crime. He moved to suppress the custodial statement. The motion alleged that he had not been adequately advised of his constitutional rights, he did not understand those rights, officers misled him during questioning, and the post-interview statement was not accurate as prepared.

¶4 When Anderson testified at the motion hearing, he said that he asked for an attorney but was denied, that the detectives made him stand for an extended period of time in a room with no chairs, and that one of his interviewers hit him in the head repeatedly with a phone book. Detective Formolo and a detective who interviewed Anderson on a subsequent day both testified at the hearing, with significantly divergent accounts from Anderson.

¶5 The circuit court, noting that it "seriously question[ed] the credibility of Mr. Anderson," denied the motion.[1] Anderson then pled guilty, but sought to

[1] The suppression motion was denied by the Honorable William W. Brash, III.

withdraw the plea prior to sentencing. After a hearing, the State indicated it did not oppose the motion, and the court granted the plea withdrawal.

¶6 Anderson subsequently agreed to plead guilty to one count of first-degree reckless homicide, while armed, as party to a crime. He was sentenced to thirty years' initial confinement and twenty years' extended supervision.[2] He filed a postconviction motion to modify his sentence. The court reduced his initial confinement time by one year.[3] Anderson appeals.

DISCUSSION

I. The suppression motion.

A. The right to remain silent.

¶7 Anderson first argues that the circuit court erred in denying the motion to suppress because he invoked his right to remain silent, but police did not scrupulously honor that right by terminating the interview.[4]

¶8 Detectives began interviewing Anderson at about 2:30 a.m. For the first several hours, Anderson denied any involvement in Taylor's death. Midway

[2] The Honorable M. Joseph Donald accepted Anderson's plea, adjudicated him guilty, and imposed sentence.

[3] The motion to modify sentence was assigned to the Honorable Rebecca F. Dallet, who entered an amended judgment of conviction reducing Anderson's initial confinement time by one year. Anderson's appeal follows the entry of Judge Dallet's judgment, but he makes no specific argument regarding her decision. His appeal instead focuses on denial of the suppression motion and the original sentencing proceedings.

[4] Anderson does not identify where trial counsel made this argument. However, the State does not seek to invoke any waiver doctrine against Anderson. Thus, although it appears that this argument is being raised for the first time on appeal, *see* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997), we nevertheless address the merits of the issue.

through the interview, Anderson claimed to have an alibi witness. Formolo and Hensley brought the witness in for questioning and interviewed him themselves. The witness could not confirm Anderson's alibi, and instead said that Anderson had asked him to provide an alibi if questioned by police.

¶9 The detectives returned to Anderson to discuss the witness's lack of corroboration. About an hour after the detectives returned to the interview, Anderson stopped his denials. When the detectives asked Anderson whether he wanted to continue the interview or stop, Anderson replied he "just want[ed] to get it over with." Anderson ultimately admitted his role in Taylor's death. He now contends that his statement that he "just want[ed] to get it over with" was an invocation of his right to remain silent.

¶10 An accused who wants to invoke the right to remain silent must do so unambiguously. *See* ***Berghuis v. Thompkins***, 130 S.Ct. 2250, 2260 (2010); *see also* ***State v. Ross***, 203 Wis. 2d 66, 75-76, 552 N.W.2d 428 (Ct. App. 1996). A suspect "must articulate his or her desire to remain silent or cut off questioning sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent." ***State v. Markwardt***, 2007 WI App 242, ¶28, 306 Wis. 2d 420, 742 N.W.2d 546 (internal quotation marks and quoted sources omitted). Whether the right to remain silent has been sufficiently invoked is a question of constitutional fact reviewed under a two-part standard. ***Id.***, ¶30.

¶11 Anderson contends that "the courts should understand that there was a direct question. … The police ask[ed] Anderson specifically, whether or not he

wanted the interview to be over. Anderson responded by saying 'I just want to get it over with.'"[5] Anderson asserts this question and answer could only be viewed to mean "I just want to get the interview over with" and that his response is "an unambiguous request."

¶12 There is no question that Anderson wanted to end the interview. However, the ambiguity is in how he wished to end it. Anderson is implicitly arguing that he wanted the detectives to end their questioning. However, a reasonable police officer, who has just informed a long-denying suspect that his alibi has been rejected by the alleged witness, could interpret the statement to mean that the suspect has realized continued denial will be futile and wishes to "get the interview over with" by providing a statement. "[T]here is no invocation of the right to remain silent if *any* reasonable competing inference can be drawn." ***Id.***, ¶36. Officers are not required to stop questioning if there is ambiguity in an attempted invocation of the right to remain silent. *See* ***Ross***, 203 Wis. 2d at 78. Thus, the statement to Formolo was not obtained in violation of Anderson's right to remain silent, so no basis for suppression exists on this ground.

B. Involuntariness and Police Coercion.

¶13 Next, Anderson claims that his confession was involuntary because detectives "applied improper police tactics" by interviewing him for twelve hours, that the police coerced him to sign the statement while he was falling asleep, and that the circuit court ignored the law.[6] Coercive police conduct is a necessary

[5] Anderson's brief is written entirely in capital letters. For ease of reading, we have changed the case when quoting him.

[6] Again, Anderson does not demonstrate where these arguments were raised in the circuit court.

prerequisite to a finding of involuntariness. ***State v. Hoppe***, 2003 WI 43, ¶37, 261 Wis. 2d 294, 661 N.W.2d 407. In addition, Anderson complains that "the trial court ignored the law and misstated the facts when making a decision. Apparenntly [sic] the trial court thought that if a person is nodding off or visually tired he can still make a rational decision."

¶14 First, there is no bright-line rule that establishes interviews of a certain length as inherently coercive.[7] *See* ***Markwardt***, 306 Wis. 2d 420, ¶45. Second, Anderson fails to specify *how* detectives coerced him to sign the statement at the end of the interview. He merely indicates that he was tired, but Formolo agreed that all parties were tired by the end of the interview and that Anderson was yawning. However, Formolo also testified that Anderson was able to follow along as the detective read the statement, signing and making corrections throughout. Third, Anderson does not identify the misstatements of law or fact he believes the court committed or elaborate on his complaint. Accordingly, Anderson's conclusory claim of involuntariness fails on its own and, in any event, we discern no involuntariness from this record. No basis for suppression of the custodial statement exists on this ground, either.

II. Inaccurate sentencing information.

¶15 Finally, Anderson also claims that the court relied on inaccurate sentencing information because it believed he lied at the suppression hearing. Anderson believes that once we reverse the suppression ruling, we will vindicate

[7] We note that the interview lasted nine and one-half hours, not twelve. It began at about 2:30 a.m. and ended about 1 p.m., with a one-hour break while detectives interviewed the alibi witness.

his testimony, thereby proving the sentencing court relied on inaccurate information at sentencing. Because we affirm the denial of the suppression motion, Anderson's argument necessarily fails.

¶16 However, we note that the circuit court's statement at the suppression hearing, that it "seriously question[ed] the credibility of Mr. Anderson," is a factor that the sentencing court was entitled to consider because it is a facet of Anderson's character. In addition, Anderson himself told the sentencing court during allocution that "as far as that [suppression] hearing, hey, it was – It was a lot of foolish stuff that I said. I don't want to make no more excuses, but that wasn't me. It wasn't me. And I'm sorry for that too. I wasted a lot of time." Accordingly, we conclude the sentencing court did not rely on inaccurate information.

By the Court.—Judgments affirmed.

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