COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0761-CR **Cir. Ct. No. 01CF000128**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ANDREW L. PHILLIPS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Forest County: ROBERT A. KENNEDY, JR., Judge. *Reversed and remanded for further proceedings.*

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

¶1 PER CURIAM. The State appeals an order granting Andrew Phillips' motion to suppress statements made to police officers. The State contends the circuit court erred by concluding the admissibility of Phillips' voluntary statements depended on the State's ability to establish that the

statements were incriminating. The State also argues the circuit court erred by concluding that Phillips' statement that he "could face reckless endangerment charges but not attempted homicide charges" was inadmissible as a privileged offer to settle. We agree with both contentions and reverse the order suppressing evidence.

BACKGROUND

¶2 Phillips was taken into custody on suspicion that he was involved in firing rifle shots toward a house, toward people standing outside the house and toward a car parked alongside the road. After being read his ***Miranda***[1] rights, Phillips indicated that he did not want to speak to the officer. As the officer began to leave, however, Phillips asked a question about the potential charges. In response, the officer indicated that although he was not the primary investigating officer, he believed the charges might include reckless endangerment. The officer further indicated that although the district attorney had the "final say," the charges could include attempted homicide. Phillips responded: "I wasn't trying to kill anybody," and added that he "could face reckless endangerment charges but not attempted homicide charges." Phillips then asked the officer how many charges he could be facing. The officer reiterated that the district attorney maintained charging discretion, but indicated that the charges could depend, in part, on whether anyone was in the car parked outside the house. Phillips then responded "there wasn't anybody in the car."

¶3 Phillips subsequently filed a motion to suppress these statements. With respect to his statements "I wasn't trying to kill anybody" and "there wasn't

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

anybody in the car," the court concluded that these statements were voluntary. The court concluded, however, that because the State could not establish that the statements were incriminating, they were inadmissible. With respect to Phillips' statement that he "could face reckless endangerment charges but not attempted homicide charges," the court concluded that this statement was inadmissible as a privileged offer to settle. This appeal follows.

ANALYSIS

¶4 The State contends the circuit court erred by concluding that admissibility of Phillips' voluntary statements depended on the State's ability to establish that the statements were incriminating. Specifically, the State argues that the circuit court misapplied WIS. STAT. § 908.01(4),[2] confusing the requirements for "admission of a prior statement of a witness" with the requirements for "admission by party opponent." We agree.

¶5 The application of the evidentiary rules to the undisputed facts is a question of law this court analyzes independently. ***Sholten Pattern Works v. Roadway Exp.***, 152 Wis. 2d 253, 257, 448 N.W.2d 670 (Ct. App. 1989). WISCONSIN STAT. § 908.01(4) provides:

> (4) **Statements which are not hearsay.** A statement is not hearsay if:
>
> (a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> 1. Inconsistent with the declarant's testimony, or
>
> 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
>
> 3. One of identification of a person made soon after perceiving the person; or
>
> (b) Admission by a party opponent. The statement is offered against a party and is:
>
> 1. The party's own statement, in either the party's individual or a representative capacity, or
>
> 2. A statement of which the party has manifested the party's adoption or belief in its truth, or
>
> 3. A statement by a person authorized by the party to make a statement concerning the subject, or
>
> 4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship, or
>
> 5. A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

¶6 The State argues that Phillips' own statements, offered by the State against Phillips, are not inadmissible hearsay. We agree. WISCONSIN STAT. § 908.01(4)(b) does not require the State to establish that Phillips' admissions are against his interest or otherwise incriminating. *See* ***State v. Benoit***, 83 Wis. 2d 389, 265 N.W.2d 298 (1978) (out-of-court statements by a party under § 908.01(4)(b) are admissible against him or her at trial regardless whether they are against interest). We therefore reverse that part of the order suppressing these statements.

¶7 The State also argues the circuit court erred by concluding that Phillips' statement that he "could face reckless endangerment charges but not attempted homicide charges" was inadmissible as a privileged offer to settle. Again, we agree with the State's analysis. Because "Settlement Offers" under the civil procedure provisions of WIS. STAT. § 807.01[3] are inapplicable to the present

[3] WISCONSIN STAT. § 807.01 provides:

> **SETTLEMENT OFFERS**. (1) After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with cost. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.
>
> (2) After issue is joined but at leaset 20 days before trial, the defendant may serve upon the plaintiff a written offer that if the defendant fails in the defense the damages be assessed at a specified sum. If the plaintiff accepts the offer and serves notice thereof in writing before trial and within 10 days after receipt of the offer and prevails upon the trial, either party may file proof of service of the offer and acceptance and the damages will be assessed accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed the damages offered, neither party shall recover costs.

(continued)

facts, it is possible the circuit court might have been referring to an "Offer to Plead Guilty" under WIS. STAT. § 904.10, which provides:

> Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible.

¶8 The statute, by its plain language, applies only to offers to plead guilty made to the court or the district attorney. There is no evidence that the district attorney was part of the exchange between Phillips and the officer.

> (3) After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.
>
> (4) If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss.814.04(4) and 815.05(8).
>
> (5) Subsections (1) to (4) apply to offers which may be made by any party to any other party who demands a judgment or setoff against the offering party.

Because neither WIS. STAT. § 904.10 nor WIS. STAT. § 807.01 applies to offers of compromise made to law enforcement officers, the circuit court erroneously exercised its discretion by suppressing Phillips' statement as a privileged offer to settle.

By the Court.—Order reversed and the matter is remanded to the trial court for further proceedings.

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