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DISTRICT IV

October 24, 2024

To:

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Circuit Court Judge
Electronic Notice

Yvette Kienert
Clerk of Circuit Court
Waupaca County Courthouse
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Katena Roberts Turner
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You are hereby notified that the Court has entered the following opinion and order:

2024AP678-CR State of Wisconsin v. Jeremy D. Leitzke (L.C. # 2022CT23)

Before Nashold, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jeremy D. Leitzke appeals a judgment convicting him of operating a motor vehicle while intoxicated (OWI), second offense. Specifically, Leitzke challenges the circuit court order denying his suppression motion. Based on my review of the briefs and record, I conclude that this case is appropriate for summary disposition, and I summarily affirm. *See* WIS. STAT. RULE 809.21.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

The following facts are derived from the suppression-hearing testimony of Deputy Andrew Thorpe of the Waupaca County Sheriff's Office.[2] During the early morning hours of November 12, 2021, Thorpe received information through an anonymous report that Leitzke was driving while intoxicated to Wally World Tavern in Farmington, Wisconsin. Later that morning, Thorpe stopped a vehicle driven by Leitzke. While speaking with Leitzke, Thorpe noticed an odor of intoxicants coming from Leitzke and that Leitzke's eyes were bloodshot. Thorpe asked Leitzke how much alcohol he had consumed, and Leitzke responded that he had consumed one drink. After asking Leitzke where he was going and coming from, Thorpe administered field sobriety tests. Based on those tests, Thorpe concluded that Leitzke was impaired.

After administering field sobriety tests, Thorpe asked Leitzke how much he "really" had to drink, what kind of alcoholic beverage he had consumed, and whether the alcoholic beverage was a single shot or double shot. Leitzke's responses were consistent with his initial statement that he had consumed one drink. Thorpe requested that Leitzke take a preliminary breath test, and Leitzke declined. Thorpe informed Leitzke that he believed Leitzke was clearly intoxicated and placed him under arrest. After Thorpe read Leitzke the informing the accused form and Leitzke refused to consent to a blood test, Thorpe obtained a search warrant for the blood test. A blood sample was obtained at a hospital and Thorpe and Leitzke then returned to Thorpe's patrol vehicle, at which point Thorpe read Leitzke ***Miranda*** warnings.[3] Following ***Miranda*** warnings, Leitzke stated that he had consumed a "Captain and Coke," and when Thorpe asked whether

[2] The transcript indicates that there was a "squad video" of the interaction between Thorpe and Leitzke; however, no video is included in the appellate record.

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

Leitzke was under the influence of alcohol or drugs, Leitzke responded with something like "I guess alcohol."[4] According to the criminal complaint, the blood test showed that Leitzke's blood alcohol concentration was .158 g/100mL.

In his suppression motion, Leitzke argued that, under ***State v. Knapp***, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, Thorpe's questions about Leitzke's alcohol consumption, which were posed after field sobriety tests but prior to arrest and ***Miranda*** warnings, violated Leitzke's constitutional right against self-incrimination under article I, section 8 of the Wisconsin Constitution. As a result, Leitzke argued that the statements he made during this time period must be suppressed, and that the resulting physical evidence, including the blood test results, must likewise be suppressed under the fruit of the poisonous tree doctrine. *See* ***Wong Sun v. United States***, 371 U.S. 471 (1963). The circuit court denied Leitzke's motion, concluding that ***Knapp*** does not support Leitzke's position and that, in any event, the blood test did not result from the questioning at issue.

Leitzke pleaded guilty to OWI, second offense, and a judgment of conviction was entered. Leitzke appeals. *See* WIS. STAT. § 971.31(10) (permitting appellate review of an order

[4] The circuit court found that Leitzke's statements that he had consumed a Captain and Coke and that he "guess[ed] alcohol" were made after field sobriety tests but *prior to* Leitzke's arrest and ***Miranda*** warnings. However, this finding is clearly erroneous. *See* ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899 (we uphold a circuit court's factual findings unless they are clearly erroneous). As set forth above, Thorpe unequivocally testified that Leitzke made these statements *following* his arrest and ***Miranda*** warnings, while Leitzke was in the squad car with the officer after the hospital's blood draw. This testimony as to timing is also consistent with the criminal complaint and an excerpt from the police report that was admitted into evidence during the suppression hearing. Thus, to the extent Leitzke's argument on appeal relies on the court's erroneous finding that the "guess[ed] alcohol" statement was made before the arrest and ***Miranda*** warnings, such reliance is misplaced.

denying a motion to suppress evidence, notwithstanding the defendant's guilty or no-contest plea).

Relying on ***Knapp***, Leitzke argues that Thorpe violated his right against self-incrimination under article I, section 8, of the Wisconsin Constitution by questioning him about his alcohol consumption after Thorpe completed the field sobriety tests and prior to Leitzke's arrest and ***Miranda*** warnings. Leitzke argues that because Thorpe had already concluded that Leitzke was operating a motor vehicle while intoxicated and Thorpe intended to arrest Leitzke, further questioning was impermissible under ***Knapp***. In making this argument, Leitzke does not contend that he was in custody at the time of this questioning. In fact, Leitzke repeatedly acknowledges that he was not in formal custody, thereby conceding this point. Instead, Leitzke argues that Thorpe attempted to avoid constitutional requirements by not taking Leitzke into custody or providing ***Miranda*** warnings at that point and instead continuing to question him about his consumption of alcohol. Leitzke's argument is unavailing.

I first observe that, as to the application of the fruit of the poisonous tree doctrine, Leitzke fails to show any connection between the statements that he made during the time period at issue and Thorpe's decision to arrest him and obtain a blood test. All of the statements that Leitzke made during this time period were consistent with his initial statement that he had consumed one drink. Indeed, Thorpe specifically testified that there "was nothing additional of value" that Leitzke provided in these answers that made a difference in Thorpe's decision to arrest Leitzke because "[t]he answers were consistent [with] what [Leitzke] had previously told [Thorpe]." The only statement that arguably differed from Leitzke's initial statement was his response that he "guess[ed] alcohol" when Thorpe asked him whether he was under the influence of alcohol or drugs. However, as previously noted, this statement was made after Leitzke was arrested and

given ***Miranda*** warnings, not before. *See supra* note 4. Thus, because Leitzke has failed to show any connection between the pre-arrest, pre-***Miranda*** statements at issue and the subsequent arrest and blood draw, he provides no basis for applying the fruit of the poisonous tree doctrine to the blood test results.[5] *See* ***Knapp***, 285 Wis. 2d 86, ¶24 (fruit of the poisonous tree doctrine applies if evidence is obtained "'*by exploitation of* that [prior] illegality'"; broadly speaking, the doctrine is a "'device to prohibit the use of any secondary evidence which is the *product of* or which *owes its discovery to* illegal government activity.'" (emphasis added; quoted sources omitted)).

More fundamentally, the case on which Leitzke's argument depends, ***Knapp***, does not support Leitzke's contention that when a law enforcement officer believes that there are grounds to arrest a suspect and intends to make such an arrest, any further questioning without ***Miranda*** warnings violates the suspect's right against self-incrimination under the Wisconsin Constitution, even when the suspect is not in custody. Indeed, ***Knapp*** in no way undermines the well-established case law holding that custody is a prerequisite for ***Miranda*** protections. *See* ***State v. Bartelt***, 2018 WI 16, ¶30, 379 Wis. 2d 588, 906 N.W.2d 684 ("[T]he ***Miranda*** safeguards apply only to custodial interrogations under both constitutions…. [U]nless a defendant is in custody, he or she may not invoke the right to counsel under ***Miranda***." (internal quotation marks and

[5] Leitzke suggests that the answers he provided during the relevant time period may have resulted in Thorpe requesting a blood test for alcohol rather than for some other substance. However, assuming that no drug testing was conducted as Leitzke asserts, the record provides no indication that Thorpe had reason to request testing for any substance other than alcohol. At the time he arrested Leitzke and sought a warrant for a blood test, Thorpe knew the following: there had been an anonymous report that Leitzke was "driving while intoxicated" to a tavern; Leitzke had the odor of alcohol when speaking to Thorpe, Leitzke's eyes were bloodshot, Leitzke had admitted to consuming alcohol, and Leitzke had failed field sobriety tests.

quoted source omitted)); ***State v. Lonkoski***, 2013 WI 30, ¶23, 346 Wis. 2d 523, 828 N.W.2d 552 ("Custody is a necessary prerequisite to ***Miranda*** protections.").

Critically, in ***Knapp***, the State "conceded that the physical evidence was seized as a direct result of an intentional ***Miranda*** violation." ***Knapp***, 285 Wis. 2d 86, ¶20. In so conceding, the State necessarily conceded that the defendant was in custody when the ***Miranda*** violation occurred, *see* ***Bartelt***, 379 Wis. 2d 588, ¶30, which is consistent with the facts in that case. In ***Knapp***, the defendant, Knapp, had reportedly been seen the previous night with the victim of a murder shortly before she was killed. ***Knapp***, 285 Wis. 2d 86, ¶¶3, 5. An officer went to Knapp's apartment to arrest him based on a reported parole violation. ***Id.***, ¶¶6-7. When the officer arrived at Knapp's apartment, he saw Knapp through a window of Knapp's door and told Knapp to open the door because he had a warrant for Knapp's arrest. ***Id.***, ¶7. Knapp picked up the phone to call his attorney but eventually hung up the phone, stepped back, let the officer enter, and told the officer he was trying to call his attorney. ***Id.*** The officer told Knapp that he had to go to the police station but the officer never read Knapp ***Miranda*** warnings. ***Id.*** The officer testified at a suppression hearing that he had intentionally failed to provide Knapp ***Miranda*** warnings in order to "keep the lines of communication open" and that he was aware that Knapp had been attempting to contact counsel prior to questioning. ***Id.***, ¶14. While Knapp was putting on his shoes to be taken to the police station, the officer questioned him about the clothes he had been wearing the previous evening. ***Id.***, ¶8. Knapp pointed to a pile of clothing on the floor, which the officer seized before taking Knapp to the police station. ***Id.*** Blood was found on one of the items of clothing, and subsequent DNA testing established that the blood was the victim's. ***Id.***, ¶12.

On appeal, our supreme court concluded that the clothing-related evidence was inadmissible, stating that "[w]here physical evidence is obtained as a direct result of an intentional ***Miranda*** violation," the evidence must be suppressed under article I, section 8 of the Wisconsin Constitution as fruit of the poisonous tree. ***Id.***, ¶2.[6]

In support of his position that, under ***Knapp***, custody is not a prerequisite for a ***Miranda*** violation, Leitzke asserts that "the physical evidence suppressed in ***Knapp*** was seized **before** Knapp was in formal custody, *i.e.*, while he was changing his clothes in his own bedroom (hardly a custodial environment), and was discovered as a result of law enforcement questioning by a detective who had the *intention* to arrest Knapp *but had not yet done so*." (Emphases in original.) Thus, according to Leitzke, ***Knapp*** stands for the following principle:

> [A] law enforcement officer's intentions, prior to questioning a suspect, are dispositive of whether [a]rticle I, [section] 8 [of the Wisconsin Constitution] has been violated, especially when an officer has the intention to take a suspect into custody, but in an effort to take an "investigatory shortcut," foregoes *Mirandizing* the individual by delaying "formal custody" of placing the person in handcuffs in order to conduct an interrogation.

Leitzke's assertions are based on a misinterpretation of ***Knapp***. The officer in ***Knapp*** came to Knapp's apartment with a warrant for Knapp's arrest, informed Knapp of the warrant, and told Knapp he was taking him to the police station, but first allowed Knapp to put on his shoes. Leitzke points to nothing in ***Knapp*** that would indicate that Knapp was not under arrest or in custody at that point. Indeed, as noted, the State conceded that Knapp's clothing was seized as a

[6] In so concluding, the ***Knapp*** court looked to the Wisconsin Constitution to provide protection beyond that described by the United States Supreme Court, a plurality of which had recently concluded in ***United States v. Patane***, 542 U.S. 630 (2004), that the fruit of the poisonous tree doctrine did not extend to derivative evidence discovered as a result of a defendant's voluntary statements obtained without ***Miranda*** warnings. ***Knapp***, 285 Wis. 2d 86, ¶1 (citing ***Patane***, 542 U.S. 630).

direct result of an intentional ***Miranda*** violation, which necessarily includes the concession that Knapp was in custody at the time of the questioning that led to the clothing's seizure. ***Knapp*** provides no support for Leitzke's position that, contrary to precedent, an officer's mere *intention* to take someone into custody suffices to trigger ***Miranda*** protections and that custody itself is not required. As explained in ***State v. Streckenbach***, No. 2020AP345-CR, unpublished slip op. ¶20 (WI App Dec. 7, 2021):

> The ***Knapp*** court held that in one specific circumstance, article I, section 8 of the Wisconsin Constitution provided greater protection than the Fifth Amendment to the United States Constitution. However, the circumstance at issue in ***Knapp***—i.e., law enforcement obtaining physical evidence as a direct result of an intentional ***Miranda*** violation—is not present in this case. [The defendant] does not develop any argument explaining why we should interpret the Wisconsin Constitution as providing greater protection than the United States Constitution under the circumstances at issue here—namely, where an officer questioned a suspect during a valid traffic stop at a time when the suspect was not in custody for ***Miranda*** purposes. We therefore decline to do so.

In sum, because custody is required to invoke ***Miranda*** protections, and because Leitzke concedes that he was not in custody when Thorpe questioned him prior to his arrest, Leitzke has failed to show a violation of his right to be free from self-incrimination under article I, section 8, of the Wisconsin Constitution.

Accordingly,

IT IS ORDERED that the judgment of the circuit is summarily affirmed, pursuant to WIS. STAT. § 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals