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**DISTRICT II**

August 6, 2014

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Waukesha County Courthouse  
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You are hereby notified that the Court has entered the following opinion and order:

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2013AP945-CR

State of Wisconsin v. Shane J. Chivers (L.C. #2011CF711)

Before Brown, C.J., Neubauer, P.J. and Reilly, J.

Shane Chivers appeals from a judgment of conviction entered after a jury found him guilty of three counts of first-degree sexual assault of a child. Chivers challenges the trial court rulings (1) denying his motion to suppress statements, (2) admitting the recording of his custodial interrogation, and (3) denying Chivers's request to admit the victim's medical records at trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> Because we

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conclude that Chivers's custodial statements were unlawfully obtained in violation of his Fifth Amendment *Miranda*<sup>2</sup> right to counsel, we reverse the judgment and remand for a new trial.<sup>3</sup>

The following facts are taken from the suppression hearing. On the evening of July 18, 2011, Jefferson county sheriff's deputies contacted Chivers at his residence and asked him to meet them outside to sign some papers. Immediately after Chivers signed the paperwork, two Watertown police officers appeared and placed him in handcuffs. When Chivers asked for an explanation, the Watertown officers said they were arresting him at Waukesha county's request and that Chivers should seek additional information from Waukesha. At the Watertown police station, Chivers was provided with a temporary restraining order accusing him of sexually assaulting a child. According to Chivers, he told the officers he wanted an attorney. Using his cell phone, Chivers called his girlfriend and told her to quickly contact an attorney. She informed him that police were still at the residence. He then called his grandmother and asked her to obtain a lawyer. Chivers's grandmother testified that she told him it was too late at night to find an attorney and that he would have to wait until the morning when she could get ahold of the state public defender's office. She testified that Chivers told her he needed an attorney and the police would not help him obtain counsel. Chivers testified that the Watertown police took custody of his phone.

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<sup>2</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> Based on our holding that the statements must be suppressed and that Chivers is therefore entitled to a new trial, we need not address Chivers's two additional claims. The contested recording contains the custodial statements we now order suppressed. The medical records issue concerns a fact-specific discovery ruling which is potentially rendered moot by our order for a new trial.

Waukesha officers arrived to transport Chivers and, on the way to the squad, Chivers asked why he was under arrest. Officers told him they did not know and that he would have to speak with Detective Haines. Chivers testified that while in the squad car, he repeatedly asked for an attorney. He told the officers that he was unable to get a lawyer at the Watertown station and informed them that he wanted a lawyer and a phone call once they reached Waukesha. Chivers testified that he was taken to the Waukesha county booking room and asked officers if he needed a lawyer, but no one would respond. Saul Ramos, who was in a holding cell when Chivers arrived, testified that as Chivers was brought into the station and while he was in the booking area, he overheard Chivers asking whether he was going to be released or if he needed an attorney. Ramos testified that he did not recall the conversation verbatim but that it was “absolutely” a discussion about whether Chivers needed an attorney. Ramos testified that officers responded to Chivers by telling him they were going to be asking him a few questions. Chivers was placed in a holding cell overnight. He testified that the next morning he asked to make a phone call but was told to wait for Haines. At around 9:30 a.m., Haines retrieved Chivers and brought him to an interrogation room. It is undisputed that once inside Haines read Chivers his *Miranda* rights and Chivers made incriminating statements.

Haines testified that prior to Chivers’s arrest, he had investigated the case, commissioned and observed a forensic interview of the alleged victim, and believed he had probable cause to arrest Chivers. Though Haines agreed that Chivers could have been arrested immediately before his interrogation, Haines stated that he directed officers to arrest Chivers on the evening of July 18, 2011, and hold him overnight so that he could interview him the next morning. No other officers from either Watertown or Waukesha testified at the hearing.

After hearing the evidence, the trial court stated that the case did not turn on whether Chivers made requests for an attorney to other officers. The court determined that any request made to the Watertown police did not trigger Chivers's right to counsel because Watertown was merely charged with transporting him from his residence to the police department.<sup>4</sup> The court declined to suppress Chivers's custodial statements:

I'm satisfied that the defendant understood that at the time when Detective Haines started and read him his *Miranda* rights, that that was the point in time to invoke.

I make no findings as to whether or not the defendant actually made a request of the Watertown police officers for an attorney, because the court finds it's unnecessary to do so at this point in time because I'm satisfied that he was properly *Mirandized* by Detective Haines. I'm satisfied that he waived those rights, and I'm satisfied he gave a voluntary statement. Thus, the court will not suppress the statement.

On appeal Chivers maintains that his custodial statements to Haines should be suppressed because he asked both Watertown and Waukesha officers for an attorney, thus triggering his Fifth Amendment *Miranda* right to counsel.<sup>5</sup> We agree. Once a suspect is placed in custody and expresses his desire to deal with the police only through counsel, he is not subject to further interrogation until counsel has been made available or unless the suspect himself initiates further communication with the police. *State v. Collins*, 122 Wis. 2d 320, 328, 363 N.W.2d 229 (Ct. App. 1984) (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)). The *Edwards* rule is a

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<sup>4</sup> The trial court did not make a finding as to whether Chivers asked Waukesha officers for an attorney. Regardless, Chivers's testimony in this regard is un rebutted.

<sup>5</sup> Whether Chivers "effectively invoked his Fifth Amendment *Miranda* right to counsel" is a question of constitutional fact. *State v. Hambly*, 2008 WI 10, ¶16, 307 Wis. 2d 98, 745 N.W.2d 48. We will uphold the trial court's factual findings unless they are clearly erroneously. We independently determine the application of constitutional principles to those facts. *Id.*

“bright-line rule to safeguard pre-existing rights.” *Collins*, 122 Wis. 2d at 328 (citation omitted). In *Collins*, the defendant told arresting officers that he wished to speak with an attorney. Collins tried but was unable to reach his lawyer. *Id.* at 323. Collins was turned over to other officers for interrogation, read his *Miranda* rights, and proceeded to give an incriminating statement. Collins never asked the interrogating officers for an attorney. *Collins*, 122 Wis. 2d at 324. The Wisconsin Supreme Court held that because Collins had invoked his right to counsel upon his arrest, the subsequent interrogation was unlawful despite the officers’ reading of *Miranda* and regardless of whether the interrogating officers were actually aware that Collins had previously asked for an attorney. *Collins*, 122 Wis. 2d at 328-29.<sup>6</sup> In the present case, Chivers testified that he asserted his right to counsel to two different sets of police officers prior to the interrogation by Haines. Chivers’s testimony was unrebutted by the State. As in *Collins*, Chivers’s request for an attorney, made after he was in custody but before he was advised of his *Miranda* rights, was sufficient to trigger the protection of the *Edwards* rule.

The parties debate whether the subsequent case of *State v. Hambly*, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48, commands a different result. In *Hambly*, the Wisconsin Supreme Court reaffirmed that a suspect in custody could anticipatorily invoke his right to counsel, but noted that some courts have included a temporal component recognizing that effective invocation occurs only when custodial interrogation is imminent or impending. *Id.*, ¶¶24-29. In the end, the court declined to adopt a temporal limit and found that Hambly effectively invoked “his Fifth

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<sup>6</sup> There is apparently no good faith exception to the *Edwards* rule. *State v. Collins*, 122 Wis. 2d 320, 329, 363 N.W.2d 229 (1984).

Amendment *Miranda* right to counsel under both the ‘anytime in custody’ standard<sup>7</sup> and the ‘imminent or impending interrogation’ temporal standard.” *Hambly*, 307 Wis. 2d 98, ¶43. Here, too, Chivers effectively invoked his Fifth Amendment *Miranda* right to counsel under either standard. At the times when, according to Chivers’s un rebutted testimony, he requested a lawyer, a reasonable person in his position would have believed that interrogation was imminent or impending. See *Hambly*, 307 Wis. 2d 98, ¶28. Chivers was in the custody of various officers, all of whom deflected or refused to respond to his questions. The Watertown officers referred him to Waukesha, and the Waukesha officers told him he needed to wait for Haines. He was placed in a holding cell where officers continued to avoid his questions, maintaining their deference to Haines. The most reasonable inference is that an interrogation by law enforcement, probably Haines, was both imminent and impending. Because he satisfied this temporal standard, Chivers’s request for an attorney also constituted an effective invocation under the “anytime in custody” standard. See *id.*, ¶33. Chivers’s custodial statements made during the interrogation by Haines must be suppressed.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily reversed and the cause is remanded with directions pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>7</sup> The anytime in custody standard provides that “once a suspect is in custody and makes an unequivocal request to speak with a lawyer, he or she has effectively invoked the Fifth Amendment right to counsel for the purpose of responding to police questioning.” *Hambly*, 307 Wis. 2d 98, ¶120 (Roggensack, J., concurring); see also *id.*, ¶32 (majority opinion).