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July 11, 2018

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

2016AP332-CR State of Wisconsin v. Timmy Lansing Johnson, Jr.
(L.C. # 2014CF126)

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

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).

Timmy Johnson appeals an amended judgment convicting him of kidnapping, armed robbery by use of force, and first-degree reckless homicide. After reviewing the record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm for the reasons discussed below.

The sole issue on appeal is whether the circuit court should have suppressed statements that Johnson made to police in the hospital following a high speed chase that ended in a rollover crash. Johnson's suppression motion alleged that he agreed to speak with the police after they had read him his ***Miranda***[2] rights, but that his decision was involuntary because he was suffering from the mental illness of depression at the time of the interrogation.

The circuit court held an evidentiary hearing at which audio and visual recordings and a transcript of the interrogation were entered into evidence. Two police officers who had been present during portions of the interrogation testified, but Johnson did not. The circuit court made factual findings that the police questioning (which was split into two sessions in between which photographs were taken and forensic evidence was collected from Johnson's person pursuant to a warrant) lasted not "much more than an hour;" that the police did not allow Johnson to speak with his mother until after the second session; that Johnson never asked for a lawyer; that the police expressed some skepticism over whether Johnson was being forthright with them and gave some indications that it would be to Johnson's benefit to cooperate, but refused Johnson's request to be put in a hospital rather than jail if he answered their questions; that Johnson was advised of his constitutional rights and knew that the interview was being recorded; that the police did not physically abuse Johnson in any way; that the police confronted Johnson with the

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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

evidence against him, including repeatedly asking him to explain how he came to be driving the victim's cab with the victim in the trunk, and made appeals to Johnson's conscience; that Johnson was suffering from depression and was making suicidal statements; that although Johnson was emotional, Johnson did not appear to be "totally distraught, totally incoherent with the exception of the very beginning of the interview where he couldn't even remember his middle name"—in response to which the officers told Johnson to "[q]uit playing games;" that police called a suicide intervention team for Johnson following the second session; and that Johnson engaged with officers and responded appropriately to their questions. The court concluded that the police had not engaged in improper or coercive conduct and that Johnson's statement was voluntary. The court then denied Johnson's suppression motion.

When reviewing a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Hindsley***, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48. However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. ***Id.***

Before introducing a statement made by a defendant during custodial interrogation, the State must establish by the preponderance of the evidence both that the statement was made with a knowing and intelligent understanding of the constitutional rights being waived and that the statement was given voluntarily. ***Hindsley***, 237 Wis. 2d 358, ¶21; *see also* ***Miranda***, 384 U.S. 436 (generally discussing "knowing and intelligent" standard for waiver of constitutional rights). Absent countervailing evidence, a defendant's custodial statement may be admitted upon a prima facie showing that the defendant was informed of his or her rights, that the defendant indicated that he or she understood them and was willing to make a statement, that the statement sought to

be introduced was in fact made by the defendant, and that the statement was not the result of duress, threats, coercion or promises. ***State v. Lee***, 175 Wis. 2d 348, 360, 499 N.W.2d 250 (Ct. App. 1993). If the court is presented with countervailing evidence, it must proceed to a balancing test under the totality of the circumstances. ***Id.*** at 361.

In order to be knowing and intelligent, a waiver of ***Miranda*** rights "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." ***Hindsley***, 237 Wis. 2d 358, ¶30 (quoted source omitted). It is sufficient if the defendant is cognizant during a custodial interrogation of "the State's intention to use [the defendant's] statements to secure a conviction" and of the defendant's own ability to "stand mute and request a lawyer." ***Lee***, 175 Wis. 2d at 364-65 (quoted source omitted).

A statement is considered voluntary when it is "the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Jerrell C.J.***, 2005 WI 105, ¶18, 283 Wis. 2d 145, 699 N.W.2d 110 (quoted source omitted). While some form of coercion or improper conduct is a prerequisite for a finding of involuntariness, police conduct need not be egregious or outrageous to be coercive if the defendant's condition renders him or her uncommonly susceptible to police pressures. ***Id.***, ¶19. Thus, the court must balance the personal characteristics of the defendant (such as age, intelligence, physical and emotional condition, and prior law enforcement contacts) against the tactics used by law enforcement (such as the length of questioning, delay in arraignment, conditions under which the statement took place, and threats or inducements) to determine whether a particular statement was voluntary under the totality of the circumstances. ***Id.***, ¶20.

On this appeal, Johnson first complains that the circuit court did not make an explicit finding that Johnson's waiver of his ***Miranda*** rights was knowingly and intelligently made. We note, however, that Johnson did not assert either in his suppression motion or at the suppression hearing that he had misunderstood any of the information about his constitutional rights that the police had provided to him. Because the State met its prima facie burden of showing that Johnson's ***Miranda*** waiver was knowingly and intelligently made by producing audio and video recordings and a transcript of the interrogation showing that the police informed Johnson of his rights and that Johnson stated that he understood them, and because Johnson produced no countervailing evidence to show that the information he had been provided was inaccurate or that he misunderstood some aspect of it, the circuit court was not called upon to resolve any factual dispute on that issue. In that context, we are satisfied that the court's ultimate conclusion that Johnson had not been "denied *any* of his constitutional rights" (emphasis added) necessarily included an implicit determination that Johnson's waiver of his ***Miranda*** rights had been knowingly and intelligently made. *See generally* ***Miranda***, 384 U.S. at 442 (holding protects "rights that are enshrined in our Constitution"). We reach the same conclusion based upon the recordings and transcript of the custodial interrogation and Johnson's failure to identify at the postconviction hearing any misunderstanding that he had about his ***Miranda*** rights or the consequences of waiving them.

We turn next to Johnson's primary claim that his custodial statement was involuntary due to his "compromised physical and mental condition." We begin our analysis with a determination that the facts found by the circuit court were supported by the testimony of the police officers as well as the recordings of the interrogation, and were not clearly erroneous. To the extent that Johnson is now claiming that the circuit court should have made additional factual

findings regarding his physical condition or other factors such as his age and education level, we reiterate that the court's findings were responsive to the arguments that were made before it. We will not fault the circuit court for failing to make findings that it was not specifically asked to make, and we will not make new factual findings of our own on appeal.

Balancing the circuit court's findings regarding the personal characteristics of the defendant against the tactics used by law enforcement, we conclude that Johnson's statement was voluntary under the totality of the circumstances.

The factors weighing towards the statement being involuntary are that Johnson was isolated by not being allowed to speak with his mother; that Johnson was suffering from depression and was making suicidal statements, leading police to call a suicide intervention team immediately after the interrogation; and that Johnson was emotional and crying at points during the interrogation.

Those factors were outweighed by the factors weighing towards the statement being voluntary—namely: that the entire interrogation lasted only about two hours including the break, with little more than an hour of actual questioning time; that the police refused Johnson's request to be put in a hospital rather than jail if he answered their questions and did not make false promises to him; that the police did not threaten or physically abuse Johnson in any way, but rather informed him about the evidence against him, made suggestions that could minimize Johnson's culpability for his actions, and made appeals to his conscience; that Johnson engaged with officers, responded appropriately to their questions, and asked his own questions; and that Johnson did not appear distraught or incoherent after the first few minutes of the interview.

In sum, there was absolutely nothing improper about the police tactics used. Nor were those tactics rendered coercive by Johnson's mental state, given that Johnson made statements and asked questions throughout the interrogation demonstrating his sophistication and familiarity with the criminal justice system and his ability to resist questioning if he had chosen to do so.

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals