Appeal No. 2011AP2916-CR **Cir. Ct. No. 2011CF205**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ANDREW M. EDLER,

DEFENDANT-RESPONDENT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

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

Pursuant to WIS. STAT. RULE 809.61,[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination. We respectfully request that the supreme court be the body to decide the following issues:

Issue I

In ***Maryland v. Shatzer***, ___U.S. ___, 130 S. Ct. 1213 (2010), the United States Supreme Court held that, even if a defendant has invoked his or her right to counsel, law enforcement may give the ***Miranda***[2] warnings again so long

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

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

as the defendant has been released from custody for at least fourteen days. ***Shatzer***, 130 S. Ct. at 1222-24. The question is whether Wisconsin should follow ***Shatzer*** or rely on the Wisconsin Constitution as the Wisconsin Supreme Court has done with Fifth Amendment issues on other occasions.

Issue II

When the defendant asked, in the squad car on the way to the second interrogation, "can I have my attorney present for this?" did he unambiguously invoke his right to counsel? No similar case has been published in Wisconsin and other jurisdictions are split with regard to substantially similar statements.

Issue III

If the statement is declared to be ambiguous, then we ask that the supreme court resolve a third issue. Does it make a difference whether the ambiguous statement was made before ***Miranda*** warnings were given as opposed to afterwards? Again, there is no Wisconsin law on this issue and other jurisdictions are split as to whether it makes a difference.

Factual Background

In early 2011, the defendant, Andrew Edler, was seventeen years old and one of the newest firefighters in the Waldo Fire Department. In January and March 2011, two small arson fires occurred in the area, and Edler fell under suspicion because he arrived so quickly at the scene of those two fires. While interrogating Edler about an unrelated burglary case, Detective Gerald Urban began asking Edler about the arsons and his possible involvement. Shortly after the subject of the arsons came up, Edler said, "From this point on, I'd like a lawyer here." Urban immediately ceased questioning. Edler was booked and

jailed pending appearance on criminal charges in the burglary case.[3] Soon after his initial appearance in that case on April 1, 2011, Edler was released on bond, and a public defender was appointed as his lawyer on April 4, 2011.

Later in April, an acquaintance of Edler agreed to Urban's request to secretly record a conversation with Edler about the arsons. That conversation was recorded on April 18, 2011. Two days later, Edler was arrested on the arson charges at his family home. Edler's father asked what Edler was being accused of, and Urban told him about the arson charges, emphasizing that Edler's cooperation in the investigation was important. As Edler sat in the squad car, Edler's father admonished him to cooperate with the investigators and tell the truth.

On the ride to the station, Urban sat beside Edler in the back seat of the squad and advised him continually that he should take his father's advice, cooperate, tell the truth, and "help himself out." At some point during the ride, Edler asked Urban, "can my attorney be present for this?" and Urban answered, "yes he can."

Upon arrival at the sheriff's department, Edler was placed in an interview room to wait for questioning. He was crying and having some difficulty breathing as Urban entered and began telling him about the strong case the sheriff's department had developed against him. Urban emphasized that the evidence already was sufficient for convictions.

[3] Edler initiated contact with Urban the next day, while still in custody, but only wanted to know when he might be released; as to additional information about the arsons, Edler said, "I honestly don't have anything to say about that."

Urban then began to read Edler the ***Miranda*** warnings. When he read "you have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning," Edler asked, "if the lawyer … if I request a lawyer does that mean you still have to bring me into custody and I have to go sit in the jail?" Urban explained that the presence of a lawyer would have no effect on the fact that Edler was now in custody. Urban then reread all of the ***Miranda*** rights from the beginning. At the end, when Urban asked, "realizing that you have these rights, are you now willing to answer questions?" Edler answered affirmatively. In the subsequent interrogation, Edler admitted involvement in the arsons.

Circuit Court Decision and Summary of Parties' Arguments on Appeal

During proceedings on the arson charges, Edler's attorney moved to suppress evidence of Edler's statements during the April 20 interrogation, on the grounds that Urban's questioning violated Edler's Fifth Amendment right to counsel.[4] The court granted Edler's motion, holding that Edler's question in the squad car, "Can my attorney be present for this?" was an unequivocal invocation of his right to counsel. Under ***Edwards***, the court held, once that clear request was made, it was to be "scrupulously honored," and police should not have attempted to get Edler to discuss the arsons unless Edler himself initiated the communication.

[4] At the circuit court level, Edler also argued that his Sixth Amendment right to counsel was violated, both on April 20, and earlier on April 18, when at police request Edler's acquaintance recorded Edler making incriminating statements about the arsons. The circuit court rejected those arguments and found no Sixth Amendment violation. Edler did not appeal that decision, nor does his brief on appeal assert the Sixth Amendment as an alternative ground supporting the court's decision below.

The State appealed, arguing that Edler's question "was a question about his rights and not an assertion of them." The State argues that the surrounding circumstances (which the circuit court held made the question clear and unambiguous) made the request unclear:

> Both parties, Edler and Urban, knew that Edler had an attorney on the charged burglary matter. Hence, it made perfect sense that Edler reference this lawyer when being transported for questioning about the arson. However, asking if his lawyer could attend an interrogation is a different matter than requesting that his lawyer be present.

Edler offers three arguments in response. First, Edler renews his circuit court argument that his Fifth Amendment right to counsel, unequivocally invoked during the March 30, 2011 interrogation, remained in force on April 20, 2011.[5] Second, he argues that even if the nineteen-day break in custody gave officers leave to reapproach Edler, the circuit court correctly recognized that Edler's question in the squad car, "can my attorney be present for this?" was an unequivocal invocation of his Fifth Amendment right to counsel. Finally, Edler argues, even if that question were ambiguous, the officers should have asked for clarification, because they had yet to read Edler his ***Miranda*** warnings.

Discussion

Issue #1: Does the Wisconsin Constitution Provide More Protection than ***Shatzer***?

[5] In addition to his arguments under the Wisconsin Constitution, Edler attempts to distinguish ***Shatzer***, urging that police conduct after his release on bond prevented the twenty-one-day period from being an effective "break in custody." The circuit court's decision did not directly discuss that argument, nor the argument that Edler's March 30 invocation of his right to counsel was still effective on April 20.

The United States Supreme Court held in ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981), that once a defendant invokes the right to counsel, any purported waiver of that right (even after ***Miranda*** warnings) is presumptively invalid unless the defendant re-initiated the contact with police. A question heretofore unanswered, however, was whether law enforcement is allowed to re-approach the suspect for interrogation after releasing him from custody. As we indicated above, such re-approach was approved of in ***Maryland v. Shatzer***. ***Shatzer*** held that a two-week break in custody "ends the presumption of involuntariness" created by an invocation of the right to counsel. ***Shatzer***, 130 S. Ct. at 1217, 1222-24.

Relying on ***Shatzer***, the State asserts that police were free to re-approach Edler on April 20 because more than fourteen days had passed since his invocation on March 30. Edler urges the opposite, that ***Shatzer*** is not consistent with article I, section 8 of the Wisconsin Constitution, and cites ***State v. Knapp***, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, where the Wisconsin Supreme Court held that under article I, section 8, physical evidence obtained as a result of an intentional violation of ***Miranda*** rights is inadmissible at trial, contrary to the United States Supreme Court's determination that such evidence could be admitted consistent with the United States Constitution. ***Knapp***, 285 Wis. 2d 86, ¶83; *see also* ***State v. Felix***, 2012 WI 36, ¶36, 339 Wis. 2d 670, 811 N.W.2d 775 ("We have more often interpreted the Wisconsin Constitution differently than the federal constitution in regard to Article I, Sections 7 and 8 than in regard to Article I, Section 11.").

The Wisconsin Supreme Court has emphasized that "the rights intended to be protected by [WIS. CONST. art. I, § 8] 'are so sacred, and the pressure so great toward their relaxation in case[s] where suspicion of guilt is

strong and evidence obscure, that it is the duty of the courts to liberally construe the prohibition in favor of private rights.'" ***Knapp***, 285 Wis. 2d 86, ¶63 (citations omitted). In ***Knapp***, the court observed that permitting admission of evidence obtained via intentional violation of article I, section 8 would warp police incentives, making violation of the suspect's rights a more effective investigative method than honoring the protections against self-incrimination. ***Id.***, ¶78.

The State in contrast points to ***State v. Jennings***, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142, in which the Wisconsin Supreme Court held that WIS. CONST. art. I, § 8 was coextensive with the Fifth Amendment for purposes of the issue in that case. Specifically, the ***Jennings*** court decided to follow ***Davis v. United States***, 512 U.S. 452 (1994), and by so doing, held that after an effective waiver of rights, police have no duty to clarify a suspect's ambiguous reference to counsel. ***Jennings***, 252 Wis. 2d 228, ¶36. The State then cites cases from other jurisdictions which have followed the reasoning in ***Shatzer***. *See, e.g.*, ***United States v. Schwensow***, 151 F.3d 650 (7th Cir. 1998); ***Clark v. State***, 781 A.2d 913 (Md. App. 2001); ***In re Bonnie H.***, 65 Cal. Rptr. 2d 513 (Cal. App. 1997); ***People v. Trujillo***, 773 P.2d 1086 (Colo. 1989).

In summary, in view of the fact that the Wisconsin Constitution has not always been treated as co-extensive with the Fifth Amendment, we ask the supreme court to decide whether the Wisconsin Constitution provides more robust protection of the privilege against self-incrimination than does the United States Constitution in this instance.

Issue #2: Did Edler Invoke the Right to Counsel Unequivocally?

The next issue is whether "can my attorney be present for this?" was a clear request for counsel. The circuit court reasoned as follows:

> As I mentioned before, [Edler] did ask if his attorney could be present, and Detective Urban said yes. The State argues that this is not clear and unequivocal. However, given the context I believe that it was clear and unequivocal. Mr. Edler did, in fact, have an attorney in the burglary case. He didn't have one in the arson, but he did have one in the burglary. And he had talked to Detective Urban about three weeks earlier, and during the interview he requested the opportunity to seek counsel. So I think given that context it is clear and unequivocal.

Neither the parties nor this court are aware of any precedent determining whether the specific question Edler uttered was ambiguous. In the absence of controlling precedent, the parties cite analogous decisions for their persuasive value. The State cites ***Commonwealth of Virginia v. Redmond***, 568 S.E.2d 695 (Va. 2002), upholding a circuit court's determination that the questions, "Can I speak to my lawyer? I can't even talk to [a] lawyer before I make any kinds of comments or anything?" were equivocal in the context in which they were uttered (i.e., during back-and-forth between the police and the suspect regarding whether he wanted to talk without an attorney present). ***Id.*** at 700.[6] Edler in contrast likens his case to ***United States v. Lee***, 413 F.3d 622 (7th Cir. 2005), where the Seventh Circuit determined that "Can I have a lawyer?" was an unequivocal request for an attorney, after comparing it with the following unambiguous statements from other cases: "I think I should call my lawyer"; "I have to get me a good lawyer, man. Can I make a phone call?"; "Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I

[6] The State also urges us to consider the defendant's later statement, in the interview room while being read the ***Miranda*** warnings, "[If I] request a lawyer, does that mean you still have to bring me into custody and I have to go sit in the jail?", as evidence that his earlier question in the squad car was equivocal. We hesitate to do so, given that ***Redmond*** itself rejected a very similar argument: "an accused's subsequent statements are not relevant to the question whether he invoked his right to counsel. A statement either asserts or fails to assert [this right]." ***Commonwealth of Virginia v. Redmond***, 568 S.E.2d 695, 698 (Va. 2002).

should talk to a lawyer. Are you looking at me as a suspect?" ***Lee***, 413 F.3d at 626.

Edler also quotes the Rhode Island Supreme Court's observation that the phrasing "can I get" is in ordinary conversation a common way to frame a request, which led the court to hold that "Can I get a lawyer?" was a clear request for an attorney to be present during questioning. ***State v. Dumas***, 750 A.2d 420, 424-25 (R.I. 2000). Finally, Edler notes that a statement framed rather similarly to his, "Can I have a lawyer present when I do that?" was deemed unequivocal by the Georgia Supreme Court. ***Taylor v. State***, 553 S.E.2d 598, 602 (Ga. 2001).

We certify this issue for determination by the Wisconsin Supreme Court to clarify the law and guide the lower courts and law enforcement.

*Issue #3: Does it Matter Whether Edler's Question was Prewaiver or Postwaiver Waiver of His **Miranda** Rights?*

It is well-established that after a defendant has knowingly and voluntarily waived his ***Miranda*** rights, the Constitution does not require police to clarify whether a later unclear statement means that he has changed his mind and now wants an attorney present. *E.g.*, ***Jennings***, 252 Wis. 2d 228, ¶42. But federal and state authorities are in conflict as to whether the same analysis applies before the defendant has waived his rights. *Compare, e.g.*, ***Sessoms v. Runnels***, 691 F.3d 1054 (9th Cir. 2012) *and* ***United States v. Plugh***, 648 F.3d 118 (2d Cir. 2011).

We have reviewed the most recent pertinent decision of the United States Supreme Court, ***Berghuis v. Thompkins***, ___ U.S. ___, 130 S. Ct. 2250 (2010), which held that silence alone is ambiguous and insufficient to invoke the right to counsel, ***id.*** at 2260. ***Berghuis***, however, offers little help for the question

presented here because a key underpinning of its holding was the fact that the defendant had been read and understood the ***Miranda*** warnings at the outset of questioning. ***Berghuis***, 130 S. Ct. at 2262. In contrast, Edler's question, "Can my attorney be present for this?" was asked in the squad car, before he was read the rights.

The majority and dissent opinions in ***Sessoms*** present the competing arguments on this issue. The majority's position is consistent with Edler's:

> In light of these instructions from the Supreme Court, it is clear that ***Berghuis*** does not alter ***Davis****'s* requirement that an unambiguous invocation can apply only after a suspect has been informed of his ***Miranda*** rights. Not only are the Supreme Court cases on this point pellucid, their rationale makes eminent sense. A person not aware of his rights cannot be expected to clearly invoke them. Once, however, a suspect has been read his ***Miranda*** rights, it is reasonable to ascribe to him knowledge of those rights. If at some later point during the custodial interrogation he decides that he wants an attorney, he should be held to a higher standard of clarity to invoke that right. That is precisely what ***Davis*** concluded. Thus, if a suspect invokes his rights before the ***Miranda*** warnings are given, the invocation must be analyzed under the rule of ***Miranda*** and ***Edwards***, not that of ***Davis***…. Sessoms requested an attorney before receiving a clear and complete statement of his rights and, therefore, knowledge of his rights cannot be ascribed to him.

Sessoms, 691 F.3d at 1062. The dissent urges just the opposite:

> The ***Berghuis*** Court, without qualification, held: "If an accused makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her ***Miranda*** rights." 130 S. Ct. at 2259-60 (quoting ***Davis***, 512 U.S. at 461-62). The Court reiterated the practical considerations underlying the rule:

> There is good reason to require an accused who wants to invoke his or her [***Miranda*** rights] to do so unambiguously. A requirement of an unambiguous invocation of ***Miranda*** rights results in an objective inquiry that avoid[s] difficulties of proof and ... provide[s] guidance to officers on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity.
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> ….
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> And because the policy considerations emphasized by the Supreme Court in ***Davis*** and ***Berghuis*** apply equally before and after the ***Miranda*** rights have been read, it was not unreasonable for the state court to require an unambiguous request for counsel in this case.

Sessoms, 691 F.3d at 1066

This issue has split state and federal courts nationwide. If the court holds that it is ambiguous whether Edler invoked his right to counsel, we ask the court to resolve the question for Wisconsin: must police clarify a suspect's statement about obtaining counsel before interrogation, if that statement is made prewarning and prewaiver of the ***Miranda*** rights?

Conclusion

In conclusion, our analysis of the facts and law of this case shows that the legal standards governing the questions presented are important,

undecided issues of federal and state constitutional law. We respectfully request that the Wisconsin Supreme Court grant certification of these issues.