COURT OF APPEALS
DECISION
DATED AND FILED

May 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1283-CR **Cir. Ct. No. 2012CM836**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THADDEUS M. LIETZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

¶1 MANGERSON, J.[1] Thaddeus Lietz, pro se, appeals a judgment of conviction for disorderly conduct and obstructing an officer, both as a repeater.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

He also appeals an order denying his motion for postconviction relief. On appeal, Lietz argues the circuit court erred by denying his suppression motion and by imposing an illegal sentence. We affirm.

BACKGROUND

¶2 According to the criminal complaint, on June 27, 2012, Troy Giles arrived at his house in Waukesha County and found Lietz standing near Giles' garage, looking at him. Lietz then jumped a railing and ran into the woods. Giles had his wife call police, and Giles found Lietz in the woods and held him there until police arrived. Lietz told Giles and Waukesha County sheriff's deputies that he was in the area looking for work and had become separated from his friends. A Waukesha County sheriff's deputy issued Lietz a forfeiture citation for trespass to land.

¶3 The next day, Giles and his wife contacted Appleton police on the suspicion that Lietz, who the Gileses discovered lived in Appleton, had been inside their vehicle and ridden undetected and without their permission from Appleton to Waukesha County. Giles' wife told Appleton police detective John Schira that the previous day she had driven to Appleton, made two stops, and returned home. She indicated that after she exited her vehicle, she went inside to put some things away, and heard a vehicle door slam, which she attributed to the wind. Her husband arrived home a short while later, which is when he observed Lietz and chased him into the woods.

¶4 Schira and another detective traveled to Waukesha County to meet with the Gileses. Ultimately, Schira contacted fellow Appleton police detective Dan Tauber, and asked him to speak with Lietz regarding this incident.

¶5 At the suppression hearing, Tauber testified that, in response to Schira's request, Tauber went to Lietz's apartment, arriving at approximately 7:00 p.m. Tauber testified he knew Lietz from when Lietz participated in the Appleton Police Young Citizens Academy. Tauber asked Lietz if he could speak with him about an incident in Waukesha County, and Lietz invited Tauber inside. Because Lietz's roommate was present in the front room, Tauber asked Lietz if they could go somewhere to talk in private. In response, Lietz took Tauber into a back bedroom, Lietz shut the door, and they both sat down.

¶6 Tauber told Lietz there was a "report that a male subject matching [Lietz's] description had been down in the Delafield area. The party that owned the vehicle from Delafield believed that [Lietz] had possibly been in their vehicle and had arrived from Appleton to that location in their vehicle without their permission." Lietz told Tauber that "he had not been in that vehicle; and he had been down there for a job situation, had been taken down there by a different subject."

¶7 Tauber then spoke with Lietz about telling the truth. At that point, Lietz told Tauber "he had gotten into that vehicle without permission in the Appleton area. He drove as a passenger, that no one realized he was in that vehicle and had gotten out of that vehicle in Delafield, Wisconsin." Lietz also made a written statement.

¶8 Tauber also asked Lietz about what he was wearing when he traveled to Delafield. Lietz produced the clothes he had been wearing. When Tauber asked Lietz if he could take possession of them, Lietz agreed without hesitation.

¶9 At the end of their conversation, another officer arrived at Lietz's apartment and told Tauber that Lietz's extended supervision agent had placed a hold on him. Tauber relayed that information to Lietz, and then took him into custody. On cross-examination, Tauber stated he did not check whether Lietz's agent had placed a hold on him before meeting with Lietz. Tauber also testified he did not give Lietz ***Miranda***[2] warnings before speaking with him.

¶10 Lietz testified he did not feel intimidated by Tauber and he remembered Tauber from the Young Citizens Academy. Lietz believed his rules of supervision required him to answer Tauber's questions and to give Tauber his clothes. Rule 34 provides: "You shall report to and fully cooperate with face-to-face contact with Appleton Police Dept. or other local law enforcement officials as directed by your agent." Lietz conceded his agent did not direct him to speak to Tauber, but Lietz testified that his agent told him he had to cooperate with law enforcement. On cross-examination, Lietz admitted he had lied to officers in Waukesha County the day before Tauber questioned him.

¶11 Lietz argued he was "in custody" for ***Miranda*** purposes when Tauber questioned him and, as a result, Tauber needed, but failed, to advise him of his ***Miranda*** rights before questioning. He also argued his statements were involuntary because he was on extended supervision and his rules of supervision required him to fully cooperate with the Appleton Police Department.

¶12 The circuit court concluded Lietz had no reasonable belief that he was in custody for purposes of ***Miranda***. The court found Tauber went to Lietz's

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

house, and then Lietz invited Tauber inside, invited him into the back bedroom, and shut the bedroom door. The court also found no threats or promises were made, the length of the interview was reasonable, and Lietz simply had a discussion with Tauber, who he remembered from his participation in the Young Citizens Academy. As to voluntariness, the court found Lietz's belief that he had to always cooperate with officers incredible, noting that Lietz conceded he had lied to Waukesha County law enforcement the day before speaking to Tauber. The court also noted that Lietz's rules of supervision only required him to cooperate with law enforcement as directed by his agent, and Lietz's agent did not direct Lietz to cooperate with Tauber.

¶13 Ultimately, Lietz pleaded no contest to the charges with the repeater enhancers. In exchange for his no contest pleas, the State agreed to dismiss and read-in an obstructing charge from Waukesha County. The court accepted Lietz's pleas and found him guilty. On the disorderly conduct as a repeater count, the court sentenced Lietz to eighteen months' imprisonment, consisting of twelve months of initial confinement and six months of extended supervision, consecutive to any other sentence. On the obstructing as a repeater count, the court withheld sentence and placed Lietz on probation for two years.

¶14 Lietz brought a pro se postconviction motion. He argued his rules of supervision required him to cooperate and speak with Tauber, and he objected to the prosecutor's remarks at sentencing. Lietz also argued his Sixth Amendment right to counsel was violated because he had been "charged" in Waukesha County regarding this incident the day before Tauber questioned him, and, therefore, Tauber needed, but failed, to obtain the waiver of his right to counsel. The court denied Lietz's motion without a hearing. He appeals.

DISCUSSION

I. Denial of suppression motion

¶15 Lietz argues the circuit court erred by denying his suppression motion. We review a circuit court's decision on a suppression motion under a two-part standard of review: we review findings of fact under the clearly erroneous standard, and we independently review the application of law to those facts. *See* ***State v. Hughes***, 2000 WI 24, ¶15, 233 Wis. 2d 280, 607 N.W.2d 621.

¶16 Lietz first contends the court erred by denying his suppression motion because his Sixth Amendment right to counsel was violated. Specifically, Lietz argues that, the day before Tauber questioned him, Lietz was "charged by [the] Waukesha County Sheriff['s] Department" regarding this incident. Accordingly, Lietz argues Tauber needed, but failed, to obtain Lietz's waiver of his right to counsel before questioning.

¶17 It is well established that "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the *criminal* proceedings." ***Montejo v. Louisiana***, 556 U.S. 778, 786 (2009) (emphasis added). "Interrogation by the State is such a stage." ***Id.*** The Sixth Amendment right to counsel may be waived by a defendant during an interrogation, and ***Miranda*** warnings, although derived from the Fifth Amendment, are usually deemed sufficient to accomplish this waiver. ***Id.***

¶18 Here, before reaching the merits of Lietz's argument, we observe Lietz never argued his Sixth Amendment right to counsel was violated at the suppression hearing. Therefore, by pleading no contest to the charges, Lietz

forfeited his right to make this objection on appeal. *See* ***State v. Kazee***, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995) (A valid no contest plea constitutes a waiver of nonjurisdictional defects and defenses including claims of violations of constitutional rights prior to the plea.); *but see* WIS. STAT. § 971.31(10) (order denying a motion to suppress may be reviewed on appeal notwithstanding the fact that final judgment was entered upon the defendant's plea).

¶19 In any event, even on the merits, we conclude Lietz's Sixth Amendment right to counsel was not violated based on Tauber's questioning. "The Sixth Amendment right to counsel attaches upon formal commencement of prosecution, here in Wisconsin, upon filing of the criminal complaint or issuance of a warrant." ***State v. Harris***, 199 Wis. 2d 227, 235 n.3, 544 N.W.2d 545 (1996). Lietz was issued a forfeiture citation the day before Tauber questioned him—he was not charged in a criminal prosecution. Accordingly, Lietz's Sixth Amendment right to counsel had not attached at the time Tauber questioned him.

¶20 Lietz next argues Tauber was going to arrest him pursuant to the extended supervision hold at the time of questioning and, as a result, his statements are inadmissible pursuant to ***State v. Carrizales***, 191 Wis. 2d 85, 528 N.W.2d 29 (Ct. App. 1995). Lietz's reliance on ***Carrizales*** is misplaced. In that case, Carrizales pleaded no contest to second-degree sexual assault and was ordered to attend counseling as a condition of his probation. ***Id.*** at 89. On appeal, he argued his Fifth Amendment right against self-incrimination was violated because his sex offender treatment program required that he admit to committing the sexual assault. ***Id.*** We concluded Carrizales's right against self-incrimination was not violated because his admission of guilt would not incriminate him in a future criminal proceeding. ***Id.***

¶21 It appears that Lietz may be relying on ***Carrizales*** to argue that his Fifth Amendment right against self-incrimination was violated because he was compelled to answer Tauber's questions or face revocation of his extended supervision. To the extent this is Lietz's argument, we reject it. Nothing in the record shows that Lietz was faced with the choice of answering Tauber's questions or being revoked. Further, the mere fact that, at the end of Tauber and Lietz's conversation, another officer arrived and told Tauber that Lietz's extended supervision agent had placed a hold on Lietz, does not mean that Lietz was compelled to answer the questions.

¶22 Lietz next argues he "never received complete proper warnings prior to Sergeant Tauber's interrogation." However, "***Miranda*** warnings need only be administered to individuals who are subjected to a custodial interrogation." ***State v. Armstrong***, 223 Wis. 2d 331, 344-45, 588 N.W.2d 606 (1999). A person is "in custody" for ***Miranda*** purposes if "under the totality of the circumstances 'a reasonable person would not feel free to terminate the interview and leave the scene.'" ***State v. Lonkoski***, 2013 WI 30, ¶6, 346 Wis. 2d 523, 828 N.W.2d 552.

¶23 When considering whether Lietz was "in custody" for ***Miranda*** purposes, the circuit court found that Lietz invited Tauber into his apartment, that Lietz invited Tauber into the back bedroom, and that Lietz shut the door. The court also found that Tauber did not threaten or make promises to Lietz, that the interview did not last for an unreasonable length of time, and that Lietz simply had a discussion with Tauber, who Lietz knew from the Young Citizens Academy. We conclude that under these circumstances Lietz was not in custody for purposes of ***Miranda*** and, as a result, Tauber was not required to give Lietz the ***Miranda*** warnings.

¶24 Lietz next argues Tauber violated his Fourth Amendment right against unlawful seizure. Lietz acknowledges that he voluntarily gave Tauber his clothing; however, he argues that, because Tauber violated his Sixth Amendment right, the clothing obtained by permission should be suppressed.

¶25 This claim is derivative of Lietz's previous argument. Because we concluded Lietz's Sixth Amendment right to counsel was not violated based on Tauber's questioning, the clothing cannot be suppressed on that basis. Further, because Lietz concedes he voluntarily gave his clothing to Tauber, there is no independent Fourth Amendment violation.

¶26 Lietz next argues, within the argument section relating to his suppression motion, that he was denied a "postconviction motion hearing in which evidence could have been brought forward to show the defendant was intoxicated due to the fact he was at a park country concert." This argument is undeveloped, and we will not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments). Further, there is no reference to any concert intoxication evidence in Lietz's postconviction motion.

¶27 Lietz also argues "there is no DNA or other physical evidence … to support the accusations or conviction of disorderly conduct." DNA or physical evidence is not required to prove the crime of disorderly conduct. *See* WIS. STAT. § 947.01. The State explained at the plea hearing that "in regards to the disorderly conduct, it would be the act of getting into the victim's vehicle." As shown above, Tauber testified that Lietz admitted to him that he got inside the vehicle unbeknownst to the driver.

II. Illegal sentence

¶28 Finally, Lietz "contests the sentence structure on the grounds that it is an illegal sentence[.]" He argues the court is "not authorized to impose any portion of a penalty enhancer as extended supervision." In support, Lietz relies on ***State v. Volk***, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24. In that case, we concluded WIS. STAT. § 973.01(2)(c) provided that penalty enhancers could apply only to the confinement portion of a bifurcated sentence. ***Id.***, ¶2.

¶29 However, our analysis in ***Volk*** focused on felony sentence bifurcation, *see* ***id.***, ¶27, and that case was decided before WIS. STAT. § 973.01 was amended to include misdemeanor crimes as well as felonies, *see* ***State v. Lasanske***, 2014 WI App 26, ¶8, 353 Wis. 2d 280, 844 N.W.2d 417. In ***Lasanske***, we recognized that "sentencing for enhanced misdemeanors is a different procedure than sentencing for enhanced felonies."

> The first step for felonies, to determine and bifurcate the original sentence without considering the enhancer, is impossible for misdemeanors because it is the enhancer that transforms the misdemeanor jail sentence into a term of imprisonment in the state prisons, which then must be bifurcated per § 973.01 ….
>
> Determining the bifurcated structure of a misdemeanor begins under WIS. STAT. § 973.01(2)(a) with the applicable maximum term of imprisonment for the misdemeanor, plus additional imprisonment authorized by any applicable penalty enhancement statute. The confinement portion "may not exceed 75% of the total length of the bifurcated sentence." Sec. 973.01(2)(b)10. The extended supervision portion "may not be less than 25% of the length of the term of confinement in prison imposed under par. (b)." Sec. 973.01(d). We know that we must add the enhancer at the outset and not under para. (c) as with felonies because para. (c) refers to "confinement in prison," and misdemeanors do not become punishable by prison until after the enhancer is added. We say again, absent the inclusion of the penalty enhancer at the outset under para. (a), there is no bifurcated sentence from which to arrive at a maximum term of

> confinement in prison under subd. (b)10. Thus, subd. (2)(c)1. is inapplicable to misdemeanor cases: any attempt to apply para. (2)(c) to a misdemeanor bifurcated sentence would be to apply the penalty enhancer twice.

Id., ¶¶8-9.

¶30 Here, Lietz was eligible for up to two years of imprisonment on the disorderly conduct count. *See* WIS. STAT. §§ 947.01, 939.51(3)(b), 939.62(1)(a). His sentence had to be bifurcated, with no more than 75% of the total length of the bifurcated sentence as confinement and no less than 25% of the length of the term of confinement as extended supervision. WIS. STAT. § 973.01(2)(b)(10), (2)(d). His sentence of twelve months' initial confinement and six months' extended supervision complies with § 973.01, and is therefore not an illegal sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.