

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP85-CR

Cir. Ct. No. 2008CF3815

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

OMARR T. MOORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Omarr T. Moore appeals from a judgment of conviction, entered upon his *Alford* plea, on one count of armed robbery as party

to a crime and one count of hostage-taking.¹ He also appeals from an order denying his postconviction motion, which sought reconsideration of a motion to suppress incriminating statements Moore gave to police. Moore contends that the circuit court erred in denying the suppression motion because the State failed to meet its evidentiary burden upon re-hearing. Based on the circuit court's factual findings, we affirm the judgment and order.

BACKGROUND

¶2 On July 3, 2008, the assistant manager of an auto parts store left work and went home. As he put his seven-month-old daughter into the car, two masked men approached with handguns. They ordered the manager to sit in the front passenger seat, and they drove his car back to the store. Once there, the men told the manager to give his daughter to the driver, then ordered him into the store to retrieve money from the store safe. On July 14, 2008, an employee at a salvage yard was approached by two masked men, one of whom had a shotgun. They came into the office trailer and demanded money. One struggled with the employee before striking him with the butt of the shotgun, while the other took money from the office. The employee made note of the license plate on the men's van. On July 23, 2008, two men approached a woman as she got into her car outside her home. They pointed guns at her, ordered her out of the car, and drove off with her vehicle.

¶3 Police spoke with Moore, and he admitted participating in the auto parts store robbery and the carjacking, but denied participating in the salvage yard

¹ See *North Carolina v. Alford*, 400 U.S.25 (1970).

robbery. His co-actors were located and interviewed, with all the subjects implicating each other. Moore was charged with three counts of armed robbery as party to a crime and one count of hostage-taking.

¶4 Moore moved to suppress his statement to police, claiming it had been involuntary. Among other things, Moore claimed that there was a short, approximately ten-minute discussion prior to the recorded interview. In this unrecorded portion, Moore says, he was not provided with the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), and he requested an attorney, but that request was ignored.

¶5 The circuit court held a *Miranda/Goodchild* hearing regarding Moore's statement.² The interviewing officer, Detective Rodolfo Gomez, and Moore both testified. Gomez said that during the preliminary, unrecorded conversation, Moore did not request a lawyer, nor did Moore tell Gomez that he was in any discomfort or request any medication. After the preliminary discussion, Gomez began recording, advised Moore of his *Miranda* rights, obtained a waiver of those rights, and took Moore's statement.

¶6 Moore testified that he requested an attorney before being read his rights. When he was asked why he did not renew that request when Gomez read him his rights, Moore offered two reasons. First, he explained that he had asked for pain medication for a laceration in his mouth, and Gomez supposedly replied

² See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), and *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 262, 133 N.W.2d 753, 762 (1965). A *Miranda* hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement, see *State v. Woods*, 117 Wis. 2d 701, 714–715, 345 N.W.2d 457, 464–465 (1984), and a *Goodchild* hearing determines the voluntariness of such a statement, see *Goodchild*, 27 Wis. 2d at 264–265, 133 N.W.2d at 763–764.

that “if you give me a statement, I’ll see if I can get those meds.”³ Second, Moore explained that he had already asked for any attorney, but was rebuffed. Moore went on to claim that during the unrecorded discussion, Gomez threatened him physically and with federal prosecution.

¶7 The circuit court adjourned the hearing to listen to a recording of the interview. Ultimately, it denied the suppression motion. It rejected Moore’s contention that he had requested an attorney during the unrecorded portion of the interview. It determined that the unrecorded portion was merely to establish rapport and included no questions about the crimes being investigated. It found, based on the recording, that there was no indication that Moore was in pain during the interview. His speech was not impaired, his responses were prompt, he made no complaints about pain, and he did not request medication. The circuit court also disbelieved Moore’s claim that Gomez had threatened him.

¶8 Moore then agreed to resolve his case by entry of an *Alford* plea to one count of armed robbery and one count of hostage taking.⁴ The other two armed robbery charges were dismissed and read in. The circuit court accepted Moore’s plea and sentenced him to eight years’ initial confinement and six years’ extended supervision on both counts, concurrent to each other but consecutive to any other sentence.

³ The nature of Moore’s injury is unclear; his brief refers to a laceration but the circuit court decision refers to an abscessed tooth. It is not disputed, however, that Moore had some oral injury. In addition, the medication referred to was something that Moore had in his possession when he was taken into custody.

⁴ An *Alford* plea is a plea wherein a defendant pleads guilty but maintains his or her innocence. See *State v. Garcia*, 192 Wis. 2d 845, 851 n.1, 532 N.W.2d 111, 113 n.1 (1995).

¶9 Moore's appellate counsel originally filed a no-merit appeal, but, upon receiving a better-quality recording of the interview, voluntarily dismissed it to return to the circuit court. In the new recording, Moore can clearly be heard requesting his pain medication. In February 2013, Moore filed a postconviction motion, asking the circuit court to reconsider the suppression ruling in light of the improved recording. The circuit court granted a new suppression hearing.

¶10 At the hearing, the State did not recall Gomez, who had in the interim been charged with misconduct in public office for attacking a suspect during a recorded interrogation. Moore did not testify again, either. As a result, the circuit court reconsidered the parties' original testimony in light of the new recording. It upheld its earlier denial of suppression, for reasons we will detail herein. Moore appeals, challenging only the circuit court's decision denying the postconviction motion.

STANDARD OF REVIEW

¶11 The burden at a *Miranda/Goodchild* hearing is on the State. *See State v. Jiles*, 2003 WI 66, ¶26, 262 Wis. 2d 457, 474, 663 N.W.2d 798, 807. The State must show, by a preponderance of the evidence, that the defendant received and understood his *Miranda* warnings before knowingly and intelligently waiving his protected rights, and that the defendant's statements were given voluntarily. *See Jiles*, 2003 WI 66, ¶26, 262 Wis. 2d at 474–475, 663 N.W.2d at 807. It is undisputed that Moore was informed of, then waived, his *Miranda* rights at the start of the recorded interview. The primary questions are whether Moore had attempted to invoke the right to counsel before the recording, and whether the subsequent statement was voluntary.

¶12 A circuit court’s decision on a motion to suppress evidence presents a mixed question of fact and law. *See State v. Casarez*, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 668, 762 N.W.2d 385, 388. We do not reverse the circuit court’s factual findings unless clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See id.*, 2008 WI App 166, ¶9, 314 Wis. 2d at 668, 762 N.W.2d at 388–389.

¶13 We consider a defendant’s statements voluntary “if they are 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. Hoppe*, 2003 WI 43, ¶36, 261 Wis. 2d 294, 309, 661 N.W.2d 407, 414. “Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness.” *Id.*, 2003 WI 43, ¶37, 261 Wis. 2d at 309, 661 N.W.2d at 414. “We apply a totality of the circumstances standard to determine whether a defendant’s statements are voluntary.” *Id.*, 2003 WI 43, ¶38, 261 Wis. 2d at 310, 661 N.W.2d at 414.

DISCUSSION

¶14 The circuit court, in its written order denying reconsideration of the suppression motion, summarized Moore’s arguments as three claims: “that before he confessed he requested a lawyer, but his request was ignored[;] ... that his confession was not voluntary because at the time he was suffering from an abscessed tooth[; a]nd ... that he was coerced into confessing by tactics employed by the detective who interrogated him.” The circuit court acknowledged that its initial rejection of the suppression motion was based on a finding that Moore had

not asked for any pain medication, and that the new recording and transcript thereof had persuaded the circuit court that the earlier finding had been erroneous.

¶15 Because no new evidence was presented at the postconviction motion hearing, though, “[t]he parties made it clear ... that the task left to [the circuit court] at this point was to re-weigh the evidence ... taking into consideration” that Moore did ask for his medication, that Gomez misstated the facts when he testified otherwise, and, perhaps, “the recent revelations about Detective Gomez’s unprofessional conduct” with a different person. Ultimately, the circuit court “remain[ed] satisfied that the preponderance of the evidence shows that Mr. Moore’s confession was voluntary and that he was not denied an alleged request to have a lawyer present.” Consideration of the three new factors did not “shake [the circuit court’s] confidence in the other evidence that demonstrates the voluntariness of Mr. Moore’s statements and casts doubt on this claim that he requested a lawyer before the interrogation began.”

A. The Request for Counsel

¶16 On appeal, Moore argues that the circuit court “erred by not holding the State to its burden of proof and ordering suppression[.]” He asserts that the circuit court had “been made aware of multiple reasons to doubt the credibility of Detective Gomez as to what was said and done prior to him deciding to activate the audio recording device in the interrogation room” and, as a result, “[t]here is an insufficient level of credible testimony presented by the State in this case to conclude that Moore’s Fifth Amendment rights were not violated[.]” The insurmountable barrier against which Moore finds himself, though, is that the circuit court’s legal conclusions are premised on factual findings to which this court defers.

¶17 With respect to Moore’s claim that he requested a lawyer before the recorded interrogation, the circuit court noted that it originally rejected the claim because “the recording shows that Mr. Moore was given a ‘wide open opportunity’ to ask for a lawyer [after Gomez read his *Miranda* rights] and he did not.” While the circuit court considered Moore’s claim that he had given up asking because Gomez had disrespected or was dismissive of the unrecorded request, it found that Gomez’s tone during the recorded interview was “not dismissive or disrespectful” but, to the contrary, congenial—“so congenial that it would be hard to believe he could be as disrespectful as Mr. Moore suggests and then, once the recording began, turn so abruptly congenial.”

¶18 The circuit court then explained that upon reconsideration and review of the transcript and recording, it was concluding that Moore had not been intimidated into withholding a request for a lawyer. The circuit court noted that, at the end of the interview, Moore declined to sign the written statement Gomez had prepared because he wanted to review it with a lawyer first. This refusal, and Moore’s reasoning for it, gave the circuit court “additional confidence in [the] conclusion that Mr. Moore did not ask for a lawyer before his interrogation was recorded.”

¶19 The circuit court further explained that the new factors did not persuade it otherwise. While the new revelations related to Gomez’s credibility, the circuit court explained that its finding about whether Moore asked for a lawyer was based on *Moore’s* credibility, not Gomez’s, “and on inferences [drawn] from the tone and content of the recorded portion of the interrogation.”

B. Involuntariness Due to Pain

¶20 With respect to Moore’s claim that his confession was involuntary because of his oral pain, the circuit court, as we have seen, acknowledged that Moore “did, in fact, request his pain medication[, which] corroborates his claim that he was feeling pain from his abscessed tooth.” The circuit court noted, however, that “whether he was in pain is a different question from whether the pain disabled his ability to resist police pressure.”

¶21 The circuit court listened to the interview again, in light of the three new factors, “but was not persuaded to reach any different conclusion than I reached previously.” It observed that Moore did not complain about pain during the interrogation, which lasted for more than an hour. It explained that Moore’s speech was “not affected the way speech is affected when a person has a serious toothache.” It noted that Moore “did not have difficulty responding to questions promptly, articulately, coherently or in detail.” Significantly, given our standard of review, the circuit court also found “no reason to alter my finding that he sounded the same during the interrogation as he did on the stand in my courtroom.” Thus, the circuit court concluded that what it heard previously and what it heard on the improved recording “were the voluntary statements of a person with sufficient poise and presence of mind to decide for himself whether to confess.”

C. Involuntariness Due to Threats

¶22 Finally, Moore claimed that Gomez had coerced him into confessing by threatening him physically and by threatening federal prosecution. The circuit court noted that its original conclusion was made, in part, because it found Gomez more credible than Moore, and the new revelations cast doubt on Gomez’s

credibility. Indeed, the circuit court noted that “if the case came down to Detective Gomez’s word against Mr. Moore’s, the State would be unable to meet its burden in demonstrating the admissibility of Mr. Moore’s confession.” Nevertheless, the circuit court came “to the same conclusion [it] reached previously, and for two of the same reasons.”

¶23 First, the circuit court determined that it was apparent that whatever Gomez was doing “during the prelude to the interrogation was the ‘pretty standard police tactic’ of building rapport with the suspect, ... not intimidating him.” It also determined that “the congenial tone of the recorded conversation as it begins makes me doubt that Detective Gomez had just spent 10-15 minutes verbally assaulting, intimidating or otherwise abusing Mr. Moore.” Second, the circuit court also observed that “Gomez had no qualms about getting confrontational ... [and] if he was inclined to use the tactics ... such as threatening federal prosecution, the mere fact that the interrogation was being recorded would not have stopped him.” The new revelations about Gomez did not suggest otherwise. Thus, even discounting Gomez’s credibility, the circuit court concluded that other objective evidence on record indicated that Gomez had not threatened Moore into confessing.⁵

¶24 Deferring to the circuit court’s factual determinations, particularly those based on credibility and things that happened live in the courtroom, we agree with the circuit court’s legal conclusions that Moore was properly advised of his

⁵ We would note that if, in fact, Gomez threatened Moore into confession, it would seem more likely that Moore would have confessed to all three robberies. Instead, he confessed only to two of the three, maintaining his innocence as to the third.

rights and validly waived them before giving a voluntary statement. Accordingly, the circuit court properly denied the postconviction motion.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

