

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-3181-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROY L. ROGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER and THOMAS P. DONEGAN Judges.¹ *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¹ The Honorable Jeffrey A. Wagner issued the March 28, 1994 judgment of conviction and the September 17, 1997 order denying the motion for postconviction relief. The Honorable Thomas P. Donegan issued the November 23, 1993 order waiving Rogers to adult court.

PER CURIAM. Roy L. Rogers, *pro se*, appeals from the judgment of conviction for first-degree intentional homicide, party to a crime, following his guilty plea, and from the trial court order denying his motion for postconviction relief, and from the order waiving jurisdiction from the juvenile to the adult court system. He argues: (1) his arrest was unlawful and counsel was ineffective for failing to investigate and challenge it; (2) the trial court erred in denying his motion to suppress his confession and, at the suppression hearing, counsel was ineffective for failing to call him to testify, and for failing to ask certain questions of the detective who did testify; and (3) the trial court erred in denying his motion to withdraw his guilty plea. We affirm.

I. BACKGROUND

According to the criminal complaint, which formed the factual basis for Rogers's guilty plea, on September 20, 1993, Rogers and two accomplices abducted Clance Venson, Jr., intending to rob him of his money and car. They tied his hands, taped his mouth, and forced him into the trunk of his car. After driving around for more than an hour, they stopped the car and opened the trunk, and either Rogers or one of his accomplices (the complaint included differing accounts) aimed a gun at Venson and fired. They reentered the car and, after driving around for a short time, they pulled into an alley where Rogers opened the trunk, aimed the gun at Venson's head and fired. Rogers and his accomplices then drove to a house where Rogers sold the gun. They then continued driving a short time more until they parked the car, used bleach in an attempt to rid the car of evidence, and then set the car on fire. Police recovered Mr. Venson's partially burned body from the trunk. An autopsy established that he bled to death as a result of a gunshot wound to the head.

Rogers was waived from the juvenile to the adult court system, where he was charged with first-degree intentional homicide and armed robbery, both as party to a crime. After the trial court denied his suppression motion, Rogers pled guilty to first-degree intentional homicide, party to a crime; the armed robbery charge was dismissed. He was sentenced to life imprisonment with parole eligibility in 2020. More than three years later, Rogers filed a motion for postconviction relief. The trial court denied his motion without a hearing.

II. DISCUSSION

A. Arrest

Rogers first argues that he was arrested without either a warrant or probable cause, and that no judicial determination of probable cause was made within forty-eight hours of his arrest, as required by *Riverside v. McLaughlin*, 500 U.S. 44 (1991); *see also State v. Koch*, 175 Wis.2d 684, 499 N.W.2d 152 (1993) (holding that the forty-eight hour rule for determining probable cause for warrantless arrest is applicable in Wisconsin). As the State points out, however, Rogers waived these arguments by pleading guilty. *See State v. Aniton*, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (Ct. App. 1994) (“A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea.”).²

² As the State also explains, section 971.31(10), STATS., establishes an exception allowing for appellate review of a trial court’s denial of a suppression motion. In this case, however, although Rogers pursued a suppression motion, he did not base it on any challenge to his arrest or the timely judicial determination of probable cause. Therefore, as the State correctly argues, “because the defendant did not raise these objections in a motion to suppress, the exception to the guilty plea waiver rule permitted under section 971.31(10) does not apply.”

B. Confession

Rogers next argues that the trial court erred in denying his motion to suppress the confession he gave police the night of his arrest, and the derivative evidence. He claims that he did not knowingly and voluntarily waive his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and that his confession was involuntary because, he says, he was coerced.

As our supreme court recently explained:

When the State seeks to admit into evidence an accused's custodial statement, both the United States and Wisconsin constitutional protections against compelled self-incrimination require that it make two showings. First, the State must prove that the accused was adequately informed of the *Miranda* rights, understood them, and knowingly and intelligently waived them. "[T]he waiver 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." Second, the State must prove that the accused's statement was given voluntarily.

State v. Santiago, 206 Wis.2d 3, 18-19, 556 N.W.2d 687, 692-93 (1996) (citations and footnote omitted). A trial court's factual findings from an evidentiary hearing on a confession suppression motion "will not be disturbed unless clearly erroneous." *Id.* at 17, 556 N.W.2d at 692. A trial court's "determinations of the sufficiency of the *Miranda* warnings and of whether the *Miranda* rights have been knowingly and intelligently waived" are reviewed *de novo*. *Id.* at 18, 556 N.W.2d at 692.

Milwaukee Police Detective John Wesley, one of two detectives who took Rogers's statement, was the only witness who testified at the suppression hearing. Rogers acknowledges that Detective Wesley advised him of his rights but points out that Detective Wesley conceded that he did not do so until

after interviewing him for seven minutes. Rogers also contends that he never waived his rights, and that he requested an attorney but was not provided with one for the interrogation.

The record confirms some of Rogers's contentions but offers no support for his conclusions. Detective Wesley testified that he "interviewed [Rogers] in regards to his family and where he came from" before reading Rogers his rights from a card issued by the Wisconsin Department of Justice. After receiving Rogers's acknowledgment of understanding his rights, Detective Wesley continued to read from the card: "[R]ealizing that you have these rights, are you now willing to answer questions or make a statement?" Detective Wesley testified that Rogers signed a statement confirming that he understood his rights. As the cross-examination exposed, however, that statement did not include a waiver of rights. Thus, on redirect, the prosecutor further questioned Detective Wesley about Rogers's waiver:

Q: Just to clear something up. You read him the back of that Miranda card, is that correct, the waiver?

A: I read the whole card like I had stated previously, sir.

Q: And Mr. Rogers specifically waived his rights and he also told you [he] understood his rights, is that correct?

A: That is correct.

Q: And when you wrote down on Exhibit Number 1³ that he stated he understood said rights, it's your statement that you meant he both understood and waived those rights, is that correct?

A: That's correct, sir.

³ The reference to the exhibit number reflects either a misstatement or typographical error. According to the record, exhibit 1 was the Department of Justice card containing the *Miranda* rights; exhibit 2 was the Milwaukee Police Department "show up" report containing Detective Wesley's summary of Rogers's statement.

Detective Wesley also testified that Rogers never invoked his right to remain silent, never asked for a lawyer, and never asked for a parent or guardian.⁴ The trial court found that Rogers knowingly and voluntarily waived his rights including his right to counsel. The court's findings are solidly grounded in the testimonial record; indeed, no evidence suggests anything to the contrary.

Rogers also argues that his confession was not voluntary. He maintains that he was only sixteen years old; that his parent or guardian was not notified of his arrest and, as a result, that he had no family or friends with him; that he did not have a lawyer with him; that he was chained to a wall for four hours before being questioned; that he was questioned for three hours; that he was "held incommunicado" during the questioning; and that Detective Wesley showed him a picture of the victim and told him that Rogers's accomplice had said that Rogers was responsible for the victim's death. We have reviewed the record.

⁴ Rogers claims noncompliance with the requirements of section 48.19(2), STATS., which provides:

When a child is taken into physical custody as provided in this section, the person taking the child into custody shall immediately attempt to notify the parent, guardian and legal custodian of the child by the most practical means. The person taking the child into custody shall continue such attempt until the parent, guardian and legal custodian of the child are notified, or the child is delivered to an intake worker under s. 48.20(3), whichever occurs first. If the child is delivered to the intake worker before the parent, guardian and legal custodian are notified, the intake worker, or another person at his or her direction, shall continue the attempt to notify until the parent, guardian and legal custodian of the child are notified.

The record includes a juvenile court custody request form reflecting that Rogers was taken into custody on September 21, 1993 at 1:15 P.M., and that his parents were notified on September 22, 1993 at 5:41 A.M. Neither the record nor Rogers, however, provides any information to explain why that delay occurred, or anything that would allow for our determination of whether there was compliance with section 48.19(2). Moreover, Rogers offers no authority to establish that noncompliance would affect the determination of whether his confession and derivative evidence would have been admissible.

Although it supports some of what Rogers asserts, it fails to fully confirm his contentions. Further, even if most or even all of Rogers's allegations were true, they would not establish that his confession was coerced.

“[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary.’” *State v. Clappes*, 136 Wis.2d 222, 241, 401 N.W.2d 759, 768 (1987) (quoting *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)) (internal quotation marks omitted). Whether a statement is voluntary depends on the totality of the circumstances, and generally requires a balancing of the personal characteristics and circumstances of the defendant against the police conduct that may have elicited the confession. See *id.* at 236, 401 N.W.2d at 766. A defendant's young age, however, is but one of many circumstances to be considered and does not alter the method of analysis. See *Shawn B.N. v. State*, 173 Wis.2d 343, 363-65, 497 N.W.2d 141, 148 (Ct. App. 1992) (confession of thirteen-year-old defendant voluntary, absent evidence of police coercion).

The record does not reveal how long Rogers was held in the interrogation room prior to questioning. Detective Wesley testified, however, that he removed Rogers's handcuff for the interview and that Rogers was allowed to walk around the room during the questioning. He testified that the interview lasted two hours and twenty-five minutes; that he provided Rogers with cigarettes at his request; that Rogers never asked for the presence of a parent or guardian;⁵ that Rogers said that he had been arrested before; and that Rogers was cooperative

⁵ The State offers no response to Rogers's accurate representation that Detective Wesley interviewed him for seven minutes before advising him of his rights. On redirect, however, Detective Wesley clarified that, during those first seven minutes, he asked Rogers about personal and family background, not about the homicide. Rogers provides no argument or authority to suggest that any such delay in reading his rights would affect the admissibility of his confession.

throughout the interview and appeared relieved to be admitting what he had done. Detective Wesley testified that Rogers was alert, understood exactly what was taking place during the interview, and never complained of lack of sleep or asked to take a break. Detective Wesley also testified that neither he nor his partner had their weapons with them during the interview, and that no promises or threats were made to Rogers in any way. Indeed, Rogers characterizes Detective Wesley's conduct as consisting of "gentle inducements" carried out "with the subtlety of a serpent."

The trial court concluded that Rogers's statements were voluntary. The evidence fully supports the trial court's conclusion; indeed, once again, no evidence suggests otherwise. Independently reviewing and applying the relevant constitutional standards to the uncontroverted testimonial record, we also conclude that Rogers's statements were voluntary.⁶

C. Assistance of Counsel

Rogers argues that counsel was ineffective for failing to investigate the circumstances of his arrest (and, as a result, that he was denied his right to challenge what he considered an improperly delayed probable cause determination). He also argues that counsel was ineffective for failing to inform him of his right to testify at the suppression hearing and for failing to call him to testify (and, as a result, that he was denied both his right to testify and his right to a defense).

⁶ Rogers also argues that he should be allowed to withdraw his guilty plea because his confession was coerced and, had his confession been suppressed, he would not have pled guilty. As the State points out, however, Rogers waived this claim by failing to raise it in the trial court and, obviously, even if he had not waived the claim, it is one that necessarily would fail given our rejection of his challenge to the trial court's denial of his suppression motion.

A defendant claiming ineffective assistance of counsel must prove that counsel's performance was deficient and that counsel's deficient performance produced prejudice. *See State v. Toliver*, 187 Wis.2d 346, 359, 523 N.W.2d 113, 118 (Ct. App. 1994). To prove prejudice following a guilty plea, a defendant must establish "a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *State v. Bentley*, 201 Wis.2d 303, 312, 548 N.W.2d 50, 54 (1996) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

A trial court has discretion to deny a postconviction motion without holding an evidentiary hearing if the motion fails to offer allegations which, if proven, would require relief, or fails to offer anything more than conclusory allegations, or offers allegations conclusively refuted by the record. *See Bentley*, 201 Wis.2d at 309-310, 548 N.W.2d at 53. Whether a postconviction motion's allegations would entitle a defendant to relief is an issue subject to our *de novo* review. *See id.*

Rogers's motion for postconviction relief alleged that a judicial determination of probable cause did not take place within forty-eight hours and that counsel "proved ineffective on this issue ... by not asserting any objection." Rogers maintains that had counsel pursued an investigation of the circumstances surrounding his arrest and initial police and court contacts, he would have been able to establish the trial court's lack of personal jurisdiction. Even assuming, however, that Rogers could have shown that his arrest was unlawful or that his court appearance was improperly delayed, he would not have established that the trial court lacked personal jurisdiction. An illegal arrest does not establish a jurisdictional defect, and a *Riverside* violation does not deprive a court of personal jurisdiction. *See State v. Smith*, 131 Wis.2d 220, 237-40, 388 N.W.2d 601, 609-

10 (1986). Thus, even assuming deficient performance, Rogers could not have established any prejudice arising from counsel's failure to investigate or challenge either the circumstances of his arrest or the timing of his court appearance. Given that counsel's challenges could not have resulted in the trial court's loss of personal jurisdiction, Rogers's motion offered nothing to establish that, but for counsel's failure to pursue these issues, he would not have pled guilty.

Rogers's motion for postconviction relief also claimed that counsel was ineffective for failing to call him to testify at the suppression hearing, and for failing to ask certain questions of Detective Wesley. To show prejudice, however, Rogers would have had to establish that, but for these alleged deficiencies, he would have prevailed at the suppression hearing and, further, that he would not have pled guilty. In his motion for postconviction relief, however, Rogers offered nothing to establish either proposition. Most significantly, he did not allege what his testimony would have been; he merely asserted that he wanted to testify "to inform the court of the major factors that surrounded his interrogation."

Interpreting Rogers's postconviction motion generously, however, the trial court assumed that the "major factors" to which Rogers referred were those listed elsewhere in the motion, relating to his challenge to the confession.⁷

⁷ In his motion for postconviction relief, Rogers listed the following factors:

- A. Defendant was a juvenile who just turned 16.
- B. It was defendant's first encounter with the interrogation process.
- C. Defendant sat chained to a wall for four hours prior to interrogation.
- D. During the four hour period of being chained to the wall defendant received nothing to eat.
- E. The detectives gave defendant a [C]oke and some cigarettes and began to ask defendant questions before reading him his [*Miranda*] rights[;] after a time they read defendant his rights and continued to question him.

(continued)

Still, as the trial court correctly observed, most of these factors, including those arguably favorable to Rogers, were elicited through Detective Wesley's testimony. Therefore, with the exception of Rogers's claim that he asked for an attorney during the interview, much of what might have been Rogers's testimony would have been cumulative evidence, merely corroborating Detective Wesley's testimony.

Rogers maintains that, because he did not testify, "the court wasn't truly able to make a determination based on the totality of the circumstances and had [he] been allowed to testify there is reasonable probability that his motion to suppress statements would've been granted." The trial court concluded, however, that even if Rogers had testified as his postconviction motion implied, "[h]is testimony would not have altered the outcome based on the totality of circumstances presented."

Given that the judge who reviewed Rogers's motion for postconviction relief was also the judge who heard his motion to suppress, and given that the judge had the opportunity to assess Detective Wesley's credibility, the postconviction court's conclusion that Rogers's testimony would not have altered the result constitutes the trial court's implicit determination that Detective Wesley was credible. And Detective Wesley's credible account of the interview, whether standing alone or standing together with Rogers's intended testimony,

F. Two detectives were present during interrogation.

G. Defendant's parents weren't present nor were they notified during interrogation.

H. Defendant asked for an attorney[;] they did not provide him with one.

I. The interrogation of the defendant lasted for three hours.

J. After four hours of waiting and three hours of interrogation, defendant's parents still were not notified.

K. Defendant at no time relinquished any of his rights.

supports the trial court's factual findings and legal conclusions. Thus, even if counsel was deficient for failing to call Rogers to testify, no prejudice resulted. Rogers's confession would not have been suppressed, and Rogers's motion to withdraw his guilty plea still would have been properly denied.⁸

By the Court.—Judgment and orders affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

⁸ Rogers also asserts that counsel was ineffective for failing to question Detective Wesley about “the Milwaukee Police Department’s policy on interrogating juveniles and if they were complied with.” He fails to explain, however, how this could have had any bearing on the trial court’s resolution of the suppression motion.

