COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2014AP342-CR

Cir. Ct. No. 2010CF000069

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHNNY JEROME JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 BRENNAN, J. Johnny Jerome Jones appeals from an amended judgment of conviction entered after he pled guilty to one count of homicide by negligent operation of a motor vehicle, one count of hit and run resulting in death, and one count of hit and run resulting in great bodily harm. He argues that he

unequivocally invoked his right to counsel during a custodial interrogation, and that therefore, the circuit court erred in denying his motion to suppress the confession he gave to police subsequent to his alleged invocation.[1] Because we conclude, upon reviewing the circuit court's findings, and listening to the audio recording of the police interrogation, that Jones did not unequivocally request counsel when he jokingly said, "So y'all can get a public pretender right now?," we affirm.

BACKGROUND

¶2 On January 8, 2010, the State filed a criminal complaint, charging Jones with one count of second-degree reckless homicide, one count of duty upon striking an occupied or attended vehicle resulting in death, and one count of duty upon striking an occupied or attended vehicle resulting in great bodily harm. The complaint arose from incidents occurring on December 31, 2009.

¶3 According to the complaint, Milwaukee police officers observed a Mercury Mountaineer that was missing a front license plate. The officers followed behind the Mountaineer, which was owned by Jones's wife, and activated the police car's emergency lights. The Mountaineer accelerated and proceeded through an intersection's stop light and struck another vehicle, resulting in the death of the passenger in the struck vehicle.

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[1] Although a guilty plea generally waives all nonjurisdictional defects and defenses, there is an exception which permits appellate review of orders denying motions challenging the admissibility of a defendant's statement. WIS. STAT. § 971.31(10) (2013-14); ***County of Racine v. Smith***, 122 Wis. 2d 431, 434-35, 362 N.W.2d 439 (Ct. App. 1984).

All references to the Wisconsin Statutes are to the 2013-14 version.

¶4 After the complaint was filed, Jones turned himself in to the police and told police that he was the Mountaineer's driver at the time of the accident. Milwaukee Police Detectives James Hensley and David Chavez questioned Jones about the December 31, 2009 accident. An audio recording of that interrogation was played at the motion to suppress. During the interrogation the following exchange took place:

> DETECTIVE: You see the thing is, Johnny, is no one can, no one can speak for you. No one else, no witnesses, no one that was there.
>
> JONES: I know.
>
> DETECTIVE: We can't, nothing like that.
>
> JONES: I just feel so damn horrible.
>
> DETECTIVE: Well and that's, and that's why it's important to get your side out.
>
> JONES: So y'all can get a public pretender right now?[2]
>
> [LAUGHTER]
>
> DETECTIVE: You said it right, pretender . . . they're called public defenders.
>
> JONES: Oh yeah.
>
> DETECTIVE: Um, we, obviously due to the time right now, we can't, um . . .[3]

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[2] The circuit court explicitly found that Jones said, "So y'all *going to* get a public pretender right now?," rather than, "So y'all *can* get a public pretender right now?" (Emphasis added.) On appeal, Jones argues, and the State agrees, that the audio recording reveals that Jones says, "So y'all *can* get a public pretender right now?" (Emphasis added.) Our analysis remains the same under either interpretation of the audio recording; as such, we use the version agreed upon by the parties on appeal.

[3] Detective Hensley testified at the suppression hearing that the interrogation began at 1:18 a.m.

> JONES: How, how much, how much time is it anyway, you face off of reckless homicide?
>
> DETECTIVE: Well it's, I believe it's between the max is 15 years, I believe. Now I'm not, don't quote me on that, but . . .

¶5 Jones filed a pretrial motion, seeking to suppress the statements he made to Milwaukee police detectives. At the motion to suppress hearing, Jones argued that his statement should be suppressed because, after he was read his ***Miranda*** rights,[4] he unequivocally invoked his right to counsel by stating, "y'all can get a public pretender right now?" Detective Hensley testified at the suppression hearing that he knew "public pretender" meant an appointed attorney and that Jones was referring to an attorney. Thereafter, Jones was asked if he recalled "telling the detectives that y'all can get me a public pretender right now," and Jones responded, "Yes. Because we made a joke. They made a joke right after that about it." Jones then testified that by saying "public pretender" he meant a lawyer.

¶6 After listening to the testimony and to the audio recording of the detectives interrogating Jones, the circuit court denied Jones's motion to suppress, concluding that Jones's request was not unequivocal. The circuit court found that Jones's reference to "a public pretender" was made "in sort of a joking manner," "with a question mark at the end," and that Jones and the two detectives laughed about the comment after it was made. The court stated: "Clearly, again to my ears, Mr. Jones and the detectives, all three of them were laughing at his comment about a public pretender. It was thrust and parry. It was not an unequivocal

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

request." The court further noted Jones's experience in the criminal justice system and with being interrogated.

¶7 Subsequently, Jones pled guilty to homicide by negligent operation of a motor vehicle, hit and run resulting in death, and hit and run resulting in great bodily harm. The circuit court sentenced Jones to ten years (five years of initial confinement and five years of extended supervision) for homicide by negligent operation of a motor vehicle, seven years (five years of initial confinement and two of years extended supervision) for hit and run resulting in death, and eight years (five years of initial confinement and three years of extended supervision) for hit and run resulting in great bodily harm, all to be served consecutively.

¶8 Jones appeals the circuit court's denial of his motion to suppress.

DISCUSSION

¶9 Jones's argument before this court is two-fold. First, he argues that the circuit court's factual findings following the suppression hearing are clearly erroneous; second, he contends that the record shows that he unequivocally invoked his right to counsel when he allegedly asked for a "public pretender." Because we conclude that the circuit court's findings of fact are not clearly erroneous and because those facts demonstrate that Jones's statement regarding a "public pretender" was not an unequivocal request for counsel, we affirm.

I. The circuit court's factual findings are not clearly erroneous because they are supported by the audio recording of Jones's police interrogation.

¶10 The circuit court found that during the police interrogation, Jones stated, "so y'all going to get a public pretender right now," in "sort of a joking manner," and then was "laughing at this comment" with the detectives. Jones

contends that an examination of the audio recording in this case does not support the circuit court's findings. We disagree.

¶11 The circuit court's findings on a suppression motion must be upheld unless they are clearly erroneous. WIS. STAT. § 805.17(2). A finding is clearly erroneous if it is unsupported by evidence in the record. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. Any conflicts in the evidence will be resolved in favor of the circuit court's ruling. ***State v. Flynn***, 92 Wis. 2d 427, 437, 285 N.W.2d 710 (1979).

¶12 We have reviewed the audio recording submitted into evidence and conclude that it supports the circuit court's findings that Jones's reference to a "public pretender" was made in "sort of a joking manner," and that Jones was "laughing at this comment" with the detectives. Jones believes that the audio recording reveals that his "tone was non-descriptive" and that "it is not possible to tell from the recording who laughed—Mr. Jones or the officers." We disagree. A reasonable interpretation of the audio recording is that Jones made the statement with a joking tone—his reference to a "public pretender," rather than a "public defender," reveals as much. And laughter from three different individuals—two detectives and Jones—can be reasonably inferred from the recording. In short, the circuit court's findings are not clearly erroneous.[5]

[5] Jones also argues that the circuit court's finding that Jones said, "So y'all *going to* get a public pretender right now?," was erroneous. (Emphasis added.) However, as we previously explained, Jones and the State agree on appeal that Jones said, "So y'all *can* get a public pretender right now?" *See* supra fn.1; (emphasis added). As such, we accept the latter statement as true and need not examine whether the circuit court erroneously exercised its discretion in finding otherwise.

II. Jones's joking statement, "So y'all can get a public pretender right now?," was not an unequivocal request for counsel.

¶13 Next, Jones argues that even if we conclude that the circuit court's findings of fact were not erroneous, the facts found by the circuit court do not support its conclusion that Jones's reference to a "public pretender" was not an unequivocal request for counsel. Whether the facts found by the circuit court warrant suppression of Jones's statement is a question of law that we review *de novo*. *See* ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404.

¶14 To invoke the Fifth Amendment right to counsel, a suspect is required to "'articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *See* ***State v. Jennings***, 2002 WI 44, ¶30, 252 Wis. 2d 228, 647 N.W.2d 142 (quoting ***Davis v. United States***, 512 U.S. 452, 459 (1994)). Such a request must be "unambiguous[ ]." ***Davis***, 512 U.S. at 459. A mere reference to an attorney is not sufficient to invoke the right. *See* ***Jennings***, 252 Wis. 2d 228, ¶31. For example, statements like, "'[m]aybe I should talk to a lawyer,' [are] not ... clear and unequivocal request[s] for counsel." ***Id.*** (quoting ***Davis***, 512 U.S. at 462). "'Unless [a] suspect *actually requests* an attorney, questioning may continue.'" ***Id.*** (quoting ***Davis***, 512 U.S. at 461; emphasis added).

¶15 Here, Jones did not unequivocally request counsel. The circuit court found that Jones's statement—"So y'all can get a public pretender right now"—was made "sort of with a question mark at the end of it, and he says it in a sort of a joking manner. To my ears, he and the two detectives were laughing at this comment. It was said in a tone that was, in my view, not particularly serious from

Mr. Jones." A joking reference to a "public pretender" is ambiguous by its very nature. The joking nature of Jones's statement—supported by the circuit court's finding that Jones's tone was "joking" and that Jones and the detectives laughed about the comment—as well as the content of Jones's statement—that is, his reference to a "public pretender," rather than a public defender—would not lead "'a reasonable police officer in the circumstances [to] understand the statement to be a request for an attorney.'" *See* ***Jennings***, 252 Wis. 2d 228, ¶30 (citation omitted). We agree with the circuit court that Jones was "joking around with the officers" and that the statement "was part of the thrust and parry" between the detectives and Jones.

¶16 Our conclusion that Jones did not unequivocally request counsel is further supported by the fact that after police told Jones that they could not obtain counsel for him at that time because of the time of day, Jones asked the detectives, "How, how much, how much time is it anyway, you face off of reckless homicide?" It seems unlikely that Jones would voluntarily continue his conversation with the detectives without prompting if he had been sincerely requesting counsel.

¶17 At best, the tone and content of Jones's statement, "So y'all can get a public pretender right now?," as well as Jones's immediate question to police following their explanation that a public defender could not be obtained at that time of day, would only have led a reasonable officer to believe that Jones "*might* be invoking the right to counsel." *See* ***Davis***, 512 U.S. at 459. But that is not enough to require the detectives to cease their questioning. *See* ***id.*** As such, we affirm.

By the Court.—Judgment affirmed.

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