COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1670-CR **Cir. Ct. No. 2012CF656**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

L.C. HOGAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM and STEPHANIE ROTHSTEIN, Judges. *Affirmed.*

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

¶1 PER CURIAM. L.C. Hogan was convicted of second-degree reckless homicide while armed.[1] He argues that he received ineffective assistance

[1] The Honorable Ellen R. Brostrom entered the judgment of conviction. The Honorable Stephanie Rothstein entered the order denying the motion for postconviction relief.

of trial counsel because his lawyer failed to argue that his confession should have been suppressed on the grounds that the police continued to question him after he invoked his right to silence.[2] We affirm.

¶2 "Both the United States and the Wisconsin Constitutions protect persons from state compelled self-incrimination." ***State v. Cummings***, 2014 WI 88, ¶46, 357 Wis. 2d 1, 850 N.W.2d 915 (quotation marks and citation omitted). When a suspect in custody has been given ***Miranda***[3] warnings and waived them, he or she retains the "right to cut off questioning" by invoking the right to remain silent. ***Cummings***, 357 Wis. 2d 1, ¶47 (quotation marks and citation omitted). However, the "suspect must unequivocally invoke the right to remain silent in order to cut off questioning." ***Id.***, ¶48 (quotation marks and citations omitted). "Once a suspect has invoked the right to remain silent all police questioning must cease—unless the suspect later validly waives that right and initiates further communication with the police." ***Id.***, ¶52 (quotation marks and citation omitted).

¶3 Whether a suspect has unequivocally invoked the right to silence turns on the defendant's statements "[i]n the full context of [the] interrogation." ***Id.***, ¶61. "If a suspect's statement is susceptible to 'reasonable competing inferences' as to its meaning, then the 'suspect did not sufficiently invoke the right to remain silent.'" ***Id.***, ¶51 (citing ***State v. Markwardt***, 2007 WI App 242, ¶36, 306 Wis. 2d 420, 742 N.W.2d 546). Moreover, "[i]f a suspect makes such an ambiguous or equivocal statement, police are not required to end the interrogation

[2] Hogan's trial lawyer filed a suppression motion, but argued that the confession should be suppressed because the police pressured Hogan into making the confession, an argument the circuit court rejected.

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

… or ask questions to clarify whether the accused wants to invoke his or her ***Miranda*** rights." ***Cummings***, 357 Wis. 2d 1, ¶51 (citations and quotation omitted). "[A] defendant may selectively waive his ***Miranda*** rights, deciding to respond to some questions but not others." ***Cummings***, 357 Wis. 2d 1, ¶67 (quotation marks and citations omitted). "Such selective refusals to answer specific questions, however, do not assert an overall right to remain silent." ***Id.*** (quotation marks and citation omitted).

¶4 Hogan contends that he invoked his right to silence when he told Detectives Billy Ball and Mark Peterson, who were interviewing him, that "the interview [is] over man" after they refused his request for a cigarette. The transcript of the interview shows the following exchange:

> HOGAN: Interview over man. You all, you all won't give me no cigarettes and shit you all just saying is making like I killed my nigger, can this, this interview be over man. I was want to sitting here and talk to you all and shit but you all ain't, you all ain't, you all think I'm still lying to you.
>
> BALL: (inaudible 28:43) interview is over.
>
> PETERSON: Let me get you some paperwork.
>
> BALL: All right.
>
> HOGAN: What's that, for your DNA? That's why I took it up like that while I was drinking it. It never even touched my lips. I gave you all DNA.
>
> BALL: Exactly. So why are we going to play around with the can? Dude, you, you getting a little crazy now.
>
> PETERSON: (inaudible 29:05)
>
> HOGAN: Hey man, come here man, can you bring me one last cigarette man before I go?

The detectives continue bantering with Hogan and give him a cigarette. Detective Ball then asks Hogan, "Now it's okay for us to continue to talk to you?" Hogan responds, "Yeah."

¶5 When Hogan said, "Interview over man" and "can this, this interview be over man" he did not unequivocally invoke his right to silence when his statements are considered in the context of the full interrogation. We agree with the State's analysis:

> Even if Hogan had not uttered another word, that statement is subject to competing interpretations. It could mean that Hogan did not want to continue the interview. It also could mean that although he wanted to talk to the detectives, he did not want to continue the interview because they would not give him a cigarette and accused him of lying, and that he would continue to talk if they gave him a cigarette and refrained from accusing him of lying. *See* ***Markwardt***, 306 Wis. 2d 420, ¶36 ("an equally reasonable understanding of [Markwardt's] comments could be that she was merely fencing with [the detective] as he kept repeatedly catching her in either lies that are at least differing versions of the events"). Even if the latter interpretation is less compelling, the fact that the statement is open to more than one reasonable interpretation means that it is not an unequivocal assertion of the right to silence. *See* ***Cummings***, 2014 WI 88, ¶55; ***Markwardt***, 306 Wis. 2d 420, ¶36.
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> But even if the only reasonable interpretation of Hogan's statement was that he did not want to talk to the detectives, the words that followed immediately afterwards indicated that Hogan wanted to keep talking to them. After Hogan made the "interview over" statement, Detective Ball removed the soda can that was on the table in front of Hogan. Hogan then said, "What's that, for your DNA? That's why I took it up like that while I was drinking it. It never even touched my lips. I gave you all DNA."
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> With those words, Hogan demonstrated his desire to talk about at least one aspect of his case, DNA evidence. Because he did that, he did not unequivocally assert his right to remain silent. *See* ***Cummings***, 2014 WI 88, ¶67 ("[A] defendant may selectively waive his ***Miranda*** rights, deciding to respond to some questions but not others. Such

> selective refusals to answer specific questions, however, do not assert an overall right to remain silent.") (citations and quotation marks omitted).
>
> At the end of the portion of the transcript quoted above, Detective Ball asked Hogan if it was "okay for us to continue to talk to you"; Hogan answered, "yeah." That was not, as Hogan claims, an impermissible reinterrogation after he had unequivocally invoked his right to silence, but simply good police practice in response to an equivocal request to remain silent. *See* ***State v. Ross***, 203 Wis. 2d 66, 78, 552 N.W.2d 428, 433 (Ct. App. 1996) ("[G]iven an equivocal or ambiguous request to remain silent, the police need not ask the suspect clarifying questions on that request. While such a procedure will often be good police practice, the Constitution does not require the police to always ask such clarifying questions.") (citation and quotation marks omitted).

Because Hogan did not unequivocally invoke his right to silence, his trial lawyer did not provide him with constitutionally ineffective assistance of counsel by failing to raise this argument in the suppression motion. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996) (failing to raise a meritless argument does not constitute ineffective representation).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).