COURT OF APPEALS
DECISION
DATED AND FILED

September 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3223-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY BENES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JOSEPH E. WIMMER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

BROWN, P.J. Jeffrey Benes claims that the prosecutor in his jury trial improperly asked a testifying detective about Benes's having maintained his right to remain silent and also improperly commented on Benes's invocation of silence during closing arguments. Benes acknowledges that he did not object to the prosecutor's actions during trial. Still, he asks us to ignore

waiver and address the merits, contending that if the supreme court could ignore waiver to address a similar Fifth Amendment issue in ***State v. Fencl***, 109 Wis.2d 224, 325 N.W.2d 703 (1982), this court should too. Because the ***Fencl*** case does not say whether Fencl's counsel timely objected, because waiver was never at issue in that case, and because that case decided issues that were *publici juris* while the issues in this case are not, ***Fencl*** is no support for ignoring the waiver doctrine. After consideration, we apply waiver and affirm.

The two issues that Benes would like us to reach concern the prosecutor's questioning of a city of Waukesha police detective. Benes had been robbed at knife point in full view of police officers. The perpetrators were chased and caught; marijuana was found nearby, which the perpetrators admitted had been on their person. But the perpetrators later told police that they had robbed Benes of the marijuana and that Benes was a seller of the contraband. The officers then confronted Benes with this information. The prosecutor proceeded to get Benes's response to the confrontation in front of the jury. The following colloquy between the prosecutor and the detective occurred:

> Q … Did you tell him that you specifically wanted to talk to him about Klug and Williams' statements that they were trying to rob Mr. Benes of marijuana?
>
> A Yes, we advised him we needed to speak with him, get his half of the story here.
>
> Q What did Mr. Benes say to you when you did that?
>
> A He repeated his name and social security number and his address.
>
> Q How many times did he do that?
>
> A I would say at least four or five times.

> Q So, you asked him a series of questions and every time he would say his name, his social security number and his address?
>
> A Yes, he would.

Benes did not object to any of these questions. He did not take the stand in his own behalf. Instead, his counsel effectively brought out on cross-examination the many discrepancies in the perpetrators' testimony. His theory of defense was that all anybody really knew for sure was that marijuana was found near where the perpetrators were captured. The rest was basically a question of credibility. The perpetrators claimed they robbed Benes of the marijuana, that Benes had possession of it before the robbery and that Benes had intended to sell the marijuana to them before he was robbed. But in closing arguments, Benes's attorney suggested that the evidence could equally support the idea that the marijuana actually belonged to the perpetrators, that Benes was buying from them and that Benes was only robbed of the money that he was going to use to pay for the marijuana. Counsel suggested that the perpetrators were not credible and recited for the jury many of the inconsistencies in their testimony. Counsel also pointed out that the perpetrators admitted having lied to the police prior to testifying.

To counteract the argument of Benes's counsel, the prosecutor admitted that the perpetrators had lied to police regarding the robbery. But the prosecutor claimed that both perpetrators were now telling the truth on the stand. The prosecutor then compared their conduct with that of Benes. In pertinent part, the prosecutor told the jury, without objection, the following:

> Who is telling the truth? Who is making excuses? What do these guys say? … Mr. Williams says, yeah, I gave that statement…. Not everything I said was the truth, but the majority of it was. We robbed him. We went there with

> knives. We were going to take his dope from him. What did [Benes] say? My name is Jeffrey Benes. I live at such and such address. My social security number is X-Y-Z. There are all kinds of ways to lie. How do you figure out what the truth is? You look at the facts. You look at the evidence.

By a motion for postconviction relief and now on appeal, Benes claims that the prosecution violated his due process right to a fair trial and his Fifth Amendment right against self-incrimination by referring at trial to his prearrest silence. He contends that by answering the detective's question with a response akin to the "name, rank and serial number" response authorized by the articles of the Geneva Convention for prisoners of war,[1] he was unambiguously exercising his right to remain silent.

The State argues waiver as one of its responses. Benes replies that this court should look to ***Fencl*** for guidance on this issue. He notes that, in that case, questioning took place before ***Miranda***[2] warnings were read to the defendant, just as occurred here. He further notes that in ***Fencl***, the defendant did not respond to the police questioning and that the State nonetheless introduced evidence of this nonresponse. Benes claims that in ***Fencl***, "[d]efense counsel did not raise a timely objection to the evidence at trial." Nevertheless, argues Benes, the ***Fencl*** court reached the merits and concluded that the State's reference to Fencl's prearrest, pre-***Miranda*** silence was constitutional error.

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[1] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 17, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Every prisoner of war, when questioned on the subject, is bound to give only his surname, first name and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information.")

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

We have several responses. First, there is no support in the text of ***Fencl*** for the statement that Fencl's trial counsel failed to object. It is neither reported nor discussed. Second, waiver does not appear to have been at issue in that case. Third, we are certain that the supreme court took the case to decide an issue that would mark an important trend in Wisconsin criminal jurisprudence. At stake in that case was how the court was going to view the State's use of prearrest, pre-***Miranda*** silence and the use of postarrest, pre-***Miranda*** silence. Both issues were recurring ones at the time; and this court certified the ***Fencl*** case to the supreme court because of those issues—a certification which the supreme court accepted. Fourth, the supreme court affirmed the conviction on harmless error grounds. This shows that the court was intent on making law; it did not take the case because it lacked confidence in the result. In sum, the issues in that case were postured so as to announce a major statement in the criminal law.

Now, the law is settled with regard to a prearrest, pre-***Miranda*** invocation of silence. The State may not refer to it. This case seeks to apply a particular fact situation to that settled law. The fact intensive question is whether a defendant's statement giving his or her name, address and social security number is an unambiguous assertion of his or her right to remain silent. So, the issue here is *not* in the same posture as ***Fencl***. While a decision on the merits in this case might be publishable, it would be only because it applies an established rule of law to a fact situation different from that in a published decision, not because it enunciates a new rule of law and decides an issue of substantial and continuing public interest. We further note that while the issues in this case are constitutional in scope, the waiver rule applies not only to objections to the admission or rejection of evidence, but also to the alleged violations of constitutional rights. *See* ***Maclin v. State***, 92 Wis.2d 323, 328-29, 284 N.W.2d 661, 664 (1979).

We recognize that the question here is not so much whether Benes has waived his rights but whether he should be relieved of such a waiver. *See* ***Brisk v. State***, 44 Wis.2d 584, 588, 172 N.W.2d 199, 201 (1969). We do not think so in this case. There might have been good reason for counsel not to object to the allegedly offending questions. We point out that just prior to the questions and answers quoted above, the detective was queried about the earlier questions asked of Benes. According to the detective, Benes was asked whether he was aware that the perpetrators had bags of marijuana on them and Benes replied that he was not so aware. Benes was also asked if the police were going to find his fingerprints on the plastic bags. He told the detective that the police would not. These were exculpatory answers and counsel may have therefore wanted all the prearrest interview information in front of the jury without interruption. We do not know, really, what was on counsel's mind. But the whole point is that the issue never came up; so there is a factual void such that we feel uncomfortable relieving Benes from waiver.

By the Court.—Judgment and order affirmed.

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