COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2855-CR **Cir. Ct. No. 2013CF4836**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIBERTO VALADEZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

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

¶1 BRADLEY, J. Eriberto Valadez appeals from a judgment entered after a jury found him guilty of possession with intent to deliver cocaine as a party

to a crime, contrary to WIS. STAT. §§ 961.41(1m)(cm)2., 939.05 (2013-14).[1] Valadez claims: (1) the trial court should have granted his motion to suppress statements he made before police told him his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966); (2) his constitutional rights were violated when the trial court denied his motion to disclose the identity of the State's confidential informant; and (3) the trial court imposed a harsher sentence because he elected to have a trial. We affirm.

BACKGROUND

¶2 In January 2013, police executed a no-knock search warrant at 1608 S. Union Street in Milwaukee. Valadez and his brother, Miguel Valadez, lived there. Valadez's four-year-old son also was there some of the time and Valadez's mother, Sulema Vazquez, sometimes stayed in the home. The search warrant was for firearms, but a confidential informant had also told police that cocaine dealing was taking place from the home. Both Valadez and his brother Miguel had outstanding arrest warrants on the date of the search.

¶3 When police arrived, they noticed Miguel leaving the home and he was arrested. An eleven-member tactical team used a battering ram to enter the house. They found Valadez and his son inside and placed plastic handcuffs on Valadez while they cleared the house for safety, which took approximately ten minutes. After the house was cleared, a nine-member search team entered. Police Officer Michael Slomczewski found Valadez sitting on the couch in the living room. He read the search warrant to Valadez and removed the plastic handcuffs.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

While the other officers were searching the residence, Slomczewski sat and talked with Valadez in the dining room as Valadez's son played nearby. Slomczewski testified at the suppression hearing that Valadez was not under arrest and he was making "basically small-talk," by asking Valadez "[h]ow long he lived at the house, what his rent was, which bedroom is his, where he worked." Slomczewski did not know there was any cocaine in the house at the time of this conversation. Valadez told Slomczewski he paid $450 rent, and which bedroom was his.

¶4 In the southwest bedroom that Valadez and his mother identified as Valadez's, the search team found 6.62 grams of cocaine hidden in a tennis shoe, $450 in a child's shoe, Valadez's Wisconsin photo identification card, several WE Energy bills for the house with two $100 bills in them, and photos of Valadez.

¶5 At the conclusion of the search, police arrested Valadez and took him to the station for questioning. He was read his ***Miranda*** rights. Valadez denied knowing anything about the cocaine, but when Slomczewski asked if he was willing to cooperate, Valadez said: "'this is the life that I chose to live, Slomczewski, I have to deal with the consequences.'" When Slomczewski asked Valadez if he wanted to go to prison and not see his son, Valadez "very nonchalantly, kind of kicked back in his chair without a care in the world" "smiled at me and [said] 'does it look like I care.'"

¶6 The State charged Valadez with possession of cocaine with intent to sell as a party to a crime and he pled not guilty. The trial court denied his motion to disclose the State's confidential informant after conducting an *in camera* review. The trial court ruled that because the informant implicated Valadez in the cocaine sales, the confidential informant's testimony would not be helpful to Valadez, making it inappropriate to disclose the informant's identity.

¶7 The trial court also denied Valadez's motion to suppress, ruling that under the facts of this case and ***State v. Goetz***, 2001 WI App 294, 249 Wis. 2d 380, 638 N.W.2d 386, a reasonable person in Valadez's position would not think he was under arrest because the plastic handcuffs were removed. The trial court found Valadez was not in custody during the conversation with Slomczewski, who did not know at the time of the conversation that cocaine had been discovered in Valadez's bedroom. As a result, the trial court found ***Miranda*** rights did not need to be given and the statements Valadez gave to Slomczewski did not require suppression.

¶8 After a trial, the jury found Valadez guilty and the trial court sentenced him to three years' initial confinement followed by two years' extended supervision. At sentencing, while considering Valadez's character, the trial court discussed whether Valadez had genuinely accepted responsibility for his crime:

> And I'm not quite sure what to do with this one, on this factor. Because you say you are remorseful. You say you accept responsibility. But we have a situation here where you went to trial and motion alleging that these weren't your crimes.
>
> Today you tell us they are your crimes. I don't know if you're really accepting responsibility or if you believe that's what the court would like to hear.
>
> You've also submitted a letter from a family member that tells me that you're innocent which, again, leads me to believe that you haven't fully accepted the crime, that you and your family are still not accepting. So that bothers me.
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> ….
>
> *I never -- I certainly never penalize anyone for choosing to take their case to trial*; but the problem, of course, is that when you do take a case to trial and in a drug case is you've done just the opposite of what we hope to have; and that is, you accepting responsibility. You've done just the

> opposite. You sort[] of dodged responsibility, and that concerns me.
>
> Also I remember some of the testimony in the case where you were telling the officer that this was the life that you chose to live and that it wasn't such a big deal. What was the big deal if you have to go to prison for a couple of years?
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> ….
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> As a result of all of this, a result of you're [*sic*] not accepting responsibility, I'm not even sure if you really accept responsibility today, and the sort of statements that you had made to the officers almost minimizing the significance of incarceration, I just don't believe that this is a case where probation would be appropriate.

(Emphasis added.) Valadez appeals.

DISCUSSION

A. *Suppression of pre-Mirandized statements*.

¶9 Valadez claims the trial court erred when it denied his motion seeking to suppress the statements he made to Slomczewski when they were talking at the dining room table as police searched the house. The statement he would like suppressed is his admission that the southwest bedroom was his. A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We will uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.***; WIS. STAT. § 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). We review the trial court's application of constitutional principles *de novo*. ***Casarez***, 314 Wis. 2d 661, ¶9.

¶10 The issue here is whether Valadez was "in custody" for ***Miranda*** purposes when Slomczewski spoke with him in the dining room. "Whether a

person is in custody for ***Miranda*** purposes is a question of law this court reviews independently." ***Goetz***, 249 Wis. 2d 380, ¶8. "A person is in custody for purposes of ***Miranda*** if the person is either formally arrested or has suffered a restraint on freedom of movement of the degree associated with a formal arrest." ***Goetz***, 249 Wis. 2d 380, ¶11. This objective standard is whether, under the totality of the circumstances, a reasonable person "would have considered himself or herself to be in custody." ***Id.***; *see also* ***Stansbury v. California***, 511 U.S. 318, 323 (1994) (the subjective views of the officer or the person being questioned do not govern). Further, when a person is detained during the execution of a search warrant, that person is "not in custody for purposes of ***Miranda***." ***Goetz***, 249 Wis. 2d 380, ¶12.

¶11 Here, the trial court found that Valadez was not in custody. After Slomczewski read Valadez the search warrant, he removed the plastic cuffs and said "[H]ey, let's go in the dining room and talk." The two sat at the dining room table and exchanged small-talk while the other officers were searching the home. As noted, Slomczewski asked questions about whether Valadez lived at the house, how much he paid in rent and which bedroom was his. The conversation lasted only a few minutes. Slomczewski was not aware during the conversation of any drugs or contraband located in the home. The trial court concluded that under these facts and the ***Goetz*** case, Valadez was not in custody and therefore there was no ***Miranda*** violation.

¶12 In ***Goetz***, we reached the same conclusion with similar facts. The police executed a search warrant at Goetz's home looking for marijuana. ***Id.***, 249 Wis. 2d 330, ¶2. Goetz was told to sit at the kitchen table and an officer asked Goetz several questions, including whether there was any marijuana in the house. ***Id.***, ¶4. Goetz was told she was not under arrest, but if she did not cooperate, she would be arrested. ***Id.***, ¶3. Goetz told police there may be some marijuana in the

bedroom. ***Id.***, ¶4. After the police found marijuana in the home, Goetz was handcuffed, but the handcuffs were removed when her children were coming home. ***Id.***, ¶5. Goetz was not immediately arrested, but later charged with possession with intent to deliver and keeping a drug house. ***Id.***, ¶6. We denied Goetz's motion to suppress the statements she made at the kitchen table because Goetz's freedom of movement was not restrained to the degree associated with a formal arrest. ***Id.***, ¶17.

¶13 The trial court ruled that the ***Goetz*** case controlled here. We agree. Slomczewski removed Valadez's plastic cuffs and made small talk with him while sitting at the dining room table. Although Slomczewski did not specifically tell Valadez that he was not under arrest, a reasonable person would get that message when the cuffs were removed. Further, Slomczewski never asked Valadez any questions about cocaine or drugs in the house; rather, he limited them to background questions. Valadez argues the question about which bedroom was his was incriminating because that is where police found the cocaine. However, Slomczewski was unaware of any drugs in the home at the time he spoke with Valadez. Accordingly, under the *objective* standard, a reasonable person in Valadez's position would not have considered himself to be in custody at the time Slomczewski had this conversation. Because Valadez was not in custody, ***Miranda*** warnings were not required and therefore, the trial court properly denied Valadez's motion to suppress his statements.

B. *Disclosure of Confidential Informant.*

¶14 Next, Valadez claims the trial court erred when it denied his motion to disclose the identity of the State's confidential informant. Valadez wanted the informant's name because he thought the informant would be able to testify in a

way that would establish Valadez's innocence by showing that the cocaine belonged to his brother Miguel. The trial court reviewed the State's information *in camera* and determined that disclosing the information would not be helpful to Valadez because the informant implicated both Valadez and Miguel in the cocaine sales.

¶15 In reviewing the trial court's decision to deny disclosure of an informer's identity, we apply the deferential standard of review and will uphold the trial court's decision as long as it did not erroneously exercise its discretion. *See* ***State v. Outlaw***, 108 Wis. 2d 112, 128-29, 321 N.W.2d 145 (1982).

¶16 WISCONSIN STAT. § 905.10 governs the informant's confidentiality privilege and does not require disclosure of the name of a State's informant in all circumstances. *See* ***State v. Vanmanivong***, 2003 WI 41, ¶30, 261 Wis. 2d 202, 661 N.W.2d 76. The statute permits disclosure under certain exceptions. *See* § 905.10(3). If a defendant believes the statutory exception under § 905.10(3) applies, the trial court follows a two-step process to determine whether it should order disclosure. ***State v. Nellessen***, 2014 WI 84, ¶¶30-32, 360 Wis. 2d 493, 849 N.W.2d 654. A defendant must first show the exception applies because "there is a reasonable possibility that the informer may be able to provide testimony necessary to the defendant's theory of defense." ***Id.***, ¶36; § 905.10(3)(b).[2] The

[2] WISCONSIN STAT. § 905.10(3)(b) provides:

> *Testimony on merits*. If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination of the issue of guilt or innocence in a criminal case or of a material issue on the merits in a civil case to which the federal government or a state or subdivision thereof is a party, and the federal government or a state or subdivision thereof invokes the privilege, the judge shall give the federal government or a state

(continued)

showing must be based on a "reasonable possibility, grounded in the facts and circumstances of the case." ***Nellessen***, 360 Wis. 2d 493, ¶2. Next, if the defendant satisfies the initial burden, the trial court conducts an *in camera* review of the State's submissions and should order disclosure, "[i]f, and only if, the court determines that an informer's testimony is necessary to the defense in that it could create a reasonable doubt of the defendant's guilt in the jurors' minds." ***Vanmanivong***, 261 Wis. 2d 202, ¶32.

¶17 Here, the trial court followed the correct procedure under that statute, considered the pertinent facts, and reached a reasonable conclusion. It found Valadez satisfied his initial burden and accordingly conducted an *in camera* review. After reviewing the information on the informant, the trial court found that the statutory exception did not apply because the informant implicated both Valadez and his brother in the cocaine sales. Thus, the informant would not help

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> or subdivision thereof an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits but the judge may direct that testimony be taken if the judge finds that the matter cannot be resolved satisfactorily upon affidavit. If the judge finds that there is a reasonable probability that the informer can give the testimony, and the federal government or a state or subdivision thereof elects not to disclose the informer's identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate, and the judge may do so on the judge's own motion. In civil cases, the judge may make an order that justice requires. Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the federal government, state or subdivision thereof. All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera at which no counsel or party shall be permitted to be present.

Valadez prove he was innocent; rather, the informant would provide inculpatory testimony against Valadez. The trial court's decision to deny Valadez's motion to disclose the informant's identity was reasonable and we affirm the trial court's decision.

C. *Sentencing.*

¶18 Finally, Valadez complains the trial court erroneously exercised its discretion in sentencing by imposing a harsher sentence because Valadez went to trial. He makes this assertion based on remarks the trial court made at sentencing referenced in the Background section of this opinion. We reject Valadez's claim.

¶19 In reviewing sentencing issues, we are limited to determining whether the trial court erroneously exercised its discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Here, citing only ***United States v. Jackson***, 390 U.S. 570 (1968), Valadez argues the trial court erroneously imposed a harsher sentence as a punishment because he took the case to trial. In ***Jackson***, the Supreme Court found imposition of a "trial penalty" unconstitutional. ***Id.*** at 581-82. ***Jackson***, which addressed the constitutionality of the Federal Kidnapping Act's provision that required imposition of the death penalty if the defendant exercised his right to a jury trial, ***id.*** at 581, does not control.

¶20 We are not dealing with a statute that punishes Valadez for exercising his constitutional right to a jury trial, and the sentencing transcript here demonstrates that the trial court did not impose the maximum penalty because Valadez went to trial. Rather, the sentencing transcript shows the trial court properly considered the required three primary factors—the seriousness of the crime, the defendant's character and the need to protect the public. *See* ***McCleary v. State***, 49 Wis. 2d 263, 274, 182 N.W.2d 512 (1971). The trial court found the

nature of Valadez's crime to be aggravated because drug trafficking has serious adverse consequences in the community, and the cocaine in the house exposed his four-year-old child to potential drug-related violence. The trial court was concerned about the impact the drugs had on the community and the violence drugs bring. It also discussed Valadez's character and rehabilitative needs, including his extensive drug crimes as a juvenile, lack of a high school education, and his antisocial or socially undesirable behavior pattern. The trial court addressed secondary factors including Valadez's age, education, employment background, his remorse and whether he accepted responsibility. *See* ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984).

¶21 The trial court addressed Valadez's remorse and acceptance of responsibility as a part of his character because of his inconsistent positions. At trial Valadez's theory was the cocaine belonged to his brother and that he was innocent. At sentencing, Valadez read a statement accepting responsibility but at the same time submitted a letter from a family member professing Valadez's innocence. Accepting responsibility, remorse and cooperation are legitimate sentencing factors that a trial court may consider as a part of the sentence. ***Gallion***, 270 Wis. 2d 535, ¶43 n.11. Further, the trial court specifically remarked that it never penalizes a defendant for taking a case to trial. The sentencing transcript shows the trial court properly exercised its sentencing discretion and the remarks that Valadez challenges did not result in a "trial penalty"; rather, the comments addressed the trial court's concern about the genuineness of Valadez's remorse and acceptance of responsibility. The trial court did not erroneously exercise its sentencing discretion. The five-year sentence imposed where Valadez faced a maximum sentence of fifteen years was reasonable based on the trial

court's consideration of the aggravated nature of the crime, the numerous factors relating to character and the need to protect the public.[3]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[3] The State points out that Valadez failed to raise the sentencing issue in the trial court and therefore he has forfeited the right to raise it here. *See* ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997); ***State v. Chambers***, 173 Wis. 2d 237, 261, 496 N.W.2d 191 (Ct. App. 1992). We elected to address the issue on the merits.