

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 3, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**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.

**No. 99-1887-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**DARREN JOHNSON-HAYES,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Racine County:  
DENNIS J. FLYNN, Judge. *Reversed and cause remanded.*

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

¶1 PER CURIAM. The State has appealed from a trial court order suppressing statements made by Darren Johnson-Hayes during a custodial interrogation. We reverse the trial court's order and remand the matter for further proceedings.

¶2 The sole issue on appeal is whether the trial court erred in determining that statements made by Johnson-Hayes after he vomited were involuntary. Our review of the trial court's decision requires us to apply constitutional principles to the facts as found by the trial court. *See State v. Clappes*, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). Consequently, the question of whether the statement was voluntary is an issue we review de novo. *See State v. Franklin*, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App.), *review denied*, \_\_\_ Wis. 2d \_\_\_, 602 N.W.2d 761 (Wis. July 23, 1999) (No. 98-2421-CR). However, the trial court's findings of historical fact will not be disturbed unless they are clearly erroneous. *See id.*

¶3 To be involuntary, a statement must be obtained by coercive police activity. *See State v. Owen*, 202 Wis. 2d 620, 641-42, 551 N.W.2d 50 (Ct. App. 1996). The totality of the circumstances must be considered in resolving the question of voluntariness. *See Franklin*, 228 Wis. 2d at 413. The defendant's personal characteristics, such as his or her age, education, intelligence, physical and emotional condition, and prior experience with the police, are weighed against the coercive police conduct. *See id.* In determining whether police conduct was coercive, relevant factors include the length of the interrogation, the general conditions under which the questioning took place, whether excessive physical or psychological pressure was brought to bear on the accused, whether the police used inducements or threats to compel a response, and whether the defendant was properly informed of his or her right to counsel and to remain silent. *See id.* However, if the defendant fails to establish that the police used actual coercion or improper pressure to obtain a statement, the inquiry ends and involuntariness cannot be found. *See State v. Williams*, 220 Wis. 2d 458, 464, 583 N.W.2d 845

(Ct. App.), *review denied*, 221 Wis. 2d 654, 588 N.W.2d 632 (Wis. Oct. 14, 1998) (No. 97-1276-CR); *Owen*, 202 Wis. 2d at 642.

¶4 James Zuehlke and Todd Terry, the two officers who conducted the interrogation of Johnson-Hayes, testified at the suppression hearing. Their testimony was undisputed. They indicated that Johnson-Hayes was taken into custody in mid-afternoon on March 10, 1999, for questioning concerning cocaine possession charges. Johnson-Hayes was questioned at the police station. The officers' testimony indicated that Johnson-Hayes was informed of his *Miranda* rights and waived them in writing. Questioning began at 3:05 p.m. and lasted between thirty minutes and an hour. Testimony indicated that the officers' normal practice was to ask a suspect if he or she was comfortable, needed water or wanted to use the restroom.

¶5 Zuehlke testified that Johnson-Hayes was calm at first and denied any connection to a baggie of cocaine found by the police. Zuehlke indicated that Johnson-Hayes became nervous when asked whether they might find his fingerprints on the baggie of cocaine. Zuehlke testified that shortly after this exchange, Johnson-Hayes vomited once in the wastebasket in the interview room. Zuehlke testified that Johnson-Hayes did not seem to require medical attention and seemed merely nervous. He testified that they asked him whether he was all right or whether he needed anything. Zuehlke testified that Johnson-Hayes replied that he was "fine."

¶6 Terry also testified concerning the vomiting incident. He testified that when Johnson-Hayes vomited, he asked him repeatedly if he was all right and whether he wanted to go to the hospital. Terry characterized the vomiting as the vomiting up of phlegm into the wastebasket, followed by continual spitting. He

stated, “It wasn’t like an ongoing vomiting session.” He testified that Johnson-Hayes was in physical distress for approximately thirty seconds.

¶7 The officers testified that after Johnson-Hayes vomited, he admitted that the cocaine was his. Subsequently, he requested an attorney and the interview ceased. Johnson-Hayes did not testify at the suppression hearing.

¶8 The trial court did not find that the officers were incredible. Moreover, after listening to the prosecutor’s summarization of their testimony, it stated that “the information stated by the district attorney I accept as being reflective of the record that was created.” However, based upon the record, it concluded that any statements made by Johnson-Hayes after he vomited were involuntary. The trial court concluded that when Johnson-Hayes threw up, it was a signal that he was in distress. It further concluded that the officers were required to stop the questioning for a short period to allow him to clean up or regain his composure.<sup>1</sup>

¶9 In effect, the trial court determined that as a matter of law, based on the undisputed facts, Johnson-Hayes’s statements were involuntary. The law does not support such a conclusion.

¶10 The law is well established that proof of physical pain does not affect the admissibility of statements made in response to police questioning absent proof that the defendant was irrational, unable to understand the questions or his or her responses, or otherwise incapacitated or reluctant to give a voluntary

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<sup>1</sup> Although the trial court stated that the officers “appeared to this judge to minimize the citizen’s state of distress,” it did not reject or find incredible their description of the events. Instead, it inferred from Johnson-Hayes’s act of vomiting that he was in such severe distress that continuation of the questioning rendered his statements involuntary.

response. See *Clappes*, 136 Wis. 2d at 241-42. “[I]nvoluntariness is not to be measured solely by the presence or absence of pain, whether major or minor, but rather should depend upon the presence or absence of actual coercive, improper police practices designed to overcome the resistance of a defendant.” *Id.* at 245.

¶11 Nothing in the record supports a determination that the officers engaged in coercive conduct or otherwise exerted improper pressure on Johnson-Hayes. The trial court’s conclusion that Johnson-Hayes was in such physical or emotional distress at the time he vomited as to necessitate a cessation of questioning and render his statements involuntary is simply not supported by the undisputed evidence. The description of the vomiting does not permit a conclusion that Johnson-Hayes was suffering a medical crisis, was irrational or incoherent, or was otherwise physically, emotionally or mentally disabled in the minutes after he vomited. The officers testified that Johnson-Hayes appeared to be all right. They also testified that they asked him repeatedly if he was all right and whether he needed anything or needed to go to the hospital. Zuehlke testified that Johnson-Hayes responded that he was “fine.”

¶12 Under these circumstances, the continuation of questioning by the officers cannot be deemed coercive or overbearing. Absent coercive or improper practices by the police, and because the act of vomiting alone does not permit a determination that Johnson-Hayes’s statements were involuntary, the trial court’s order suppressing the statements must be reversed. See *id.* at 241-44.

*By the Court.*—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

