COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2560-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

WALTER F. CLINE,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Affirmed.*

¶1 DYKMAN, P.J.[1] In this criminal case, Walter F. Cline filed a motion with the trial court seeking to suppress two confessions. The State appeals

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

from the part of the trial court's order suppressing one of the confessions. Cline cross-appeals from the part of the order denying his motion to suppress the other confession. Cline, a prisoner, was suspected of peeping into staff bathrooms in order to observe female guards. He confessed after a prison guard confronted him with the allegations, and later confessed to a police detective. The guard did not inform Cline of his ***Miranda*** rights before the initial confession, but Cline was informed of his ***Miranda*** rights before his second confession to the detective. The trial court ordered the suppression of Cline's first confession, because the guard failed to read him his ***Miranda*** rights. The trial court denied Cline's motion to suppress the second confession, because both confessions were voluntary, and therefore the second confession was admissible. Because the prison guard had a duty to inform Cline of his ***Miranda*** rights, but failed to do so, we affirm the trial court's order suppressing the first confession. Because both confessions were voluntary, and Cline was read his ***Miranda*** rights before he confessed to the detective, we also affirm the trial court's order denying Cline's motion to suppress the second confession.

BACKGROUND

¶2 Cline was a prisoner at the Waupun Correctional Institution. In August 1998, Captain Steve Houser, a prison guard, overheard several other guards voicing suspicions that Cline was peeping into the female staff bathroom. Houser then spoke with an inmate who claimed to have seen Cline peeping into the bathroom, and to have heard Cline tell other inmates that he had seen a guard changing her clothes. Following his investigation, Houser located Cline in order to escort him to the segregation building pending a full investigation. On the way to the segregation building, Houser discussed the accusations with Cline. During

the discussion, Cline confessed to peeping, or attempting to peep, at female guards on several occasions. Houser then placed Cline in the segregation building.

¶3 Ten days later, Cline met with Captain Michael Dittman, another prison guard, and Detective JoAnne Swyers of the Dodge County Sheriff's Department. Swyers informed Cline of his ***Miranda*** rights, and provided him with a waiver form, which Cline signed. Swyers asked Cline questions concerning the alleged peeping incidents. During the course of the questioning, Cline admitted to peeping at a female guard on at least one occasion. Following the interview, Swyers signed a criminal complaint, alleging two counts of disorderly conduct in violation of WIS. STAT. §§ 947.01 and 939.62(2) (1997-98).[2]

¶4 Cline filed a pretrial motion to suppress his confessions to Houser and Swyers. The trial court granted the motion to suppress Cline's confession to Houser, and denied the motion to suppress his confession to Swyers. The State appeals from the part of the order suppressing the first confession, and Cline cross-appeals from the part of the order refusing to suppress the second confession.

ANALYSIS

¶5 In reviewing a trial court's holding as to constitutional issues, we apply two different standards of review. *See* ***State v. Turner***, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). The trial court's findings of historical or evidentiary fact will not be upset on appeal unless they are clearly erroneous. *See* ***id.*** But, we review questions of law or constitutional fact independently. *See* ***id.*** at 344. Using the facts found by the trial court, we are to independently determine

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

whether any constitutional principles were offended. *See* ***id.*** This standard applies when we are examining the voluntariness of a confession and whether a defendant's ***Miranda*** rights were violated. *See* ***id.***

(1) State Actor

¶6 In ***Miranda v. Arizona***, the Supreme Court held that individuals subjected to custodial interrogation are entitled to be advised of their rights against self-incrimination under the United States Constitution. 384 U.S. at 436, 444 (1966). The Court defined a custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Id.*** Neither party disputes that Cline was in custody or interrogated for ***Miranda*** purposes. Any individual who is incarcerated in a state prison is in custody for ***Miranda*** purposes. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 355, 588 N.W.2d 606 (1999). Because Cline was a prisoner at the Waupun Correctional Institution at the time of his questioning, he was in custody under the holding in ***Armstrong***. The United States Supreme Court has defined an interrogation for ***Miranda*** purposes as "either express questioning or its functional equivalent." ***Rhode Island v. Innis***, 446 U.S. 291, 300 (1980). Houser expressly questioned Cline as to whether he was guilty of peeping, an act which falls squarely within the definition of an interrogation as defined by the Court in ***Innis***.

¶7 Because all other elements of a custodial interrogation were met, the only element in dispute is whether Houser was acting as a law enforcement officer, otherwise known as a "state actor," for ***Miranda*** purposes. ***Mathis v. United States*** sets out the boundaries for the definition of a state actor. 391 U.S. 1 (1968). In ***Mathis***, the Court held that a defendant was entitled to ***Miranda***

warnings upon questioning by an Internal Revenue Service agent. ***Id.*** at 4-5. In reaching its conclusion, the Court found that the determinative factor was whether there was a possibility that the investigation could lead to a criminal prosecution. *See* ***id.*** at 4. Even though a "routine tax investigation" could be conducted for a purpose other than a criminal investigation, the possibility of criminal prosecution was enough to invoke the defendant's ***Miranda*** rights. ***Id.***

¶8 The State argues that because Houser did not have any authority to conduct criminal investigations or make arrests, he cannot be considered a state actor. In support of this theory, the State cites a federal court of appeals case in which a Veteran's Administration pharmacist made incriminating admissions to his supervisor, which in turn were used by federal prosecutors in a drug prosecution against him. *See* ***United States v. Eide***, 875 F.2d 1429, 1431-33 (9th Cir. 1989). The Ninth Circuit held that the supervisor was not a state actor in that he was not acting as an agent of the police. *See* ***id.*** at 1434. The State also references Wisconsin Statutes that define and limit the duties of prison guards, making them incapable of conducting criminal investigations or prosecutions. *See, e.g.*, WIS. STAT. §§ 978.05 and 102.475(8)(a)-(c).

¶9 We find the situation at hand more analogous to the one in ***Estelle v. Smith***, 451 U.S. 454 (1981). In ***Estelle***, a court-appointed psychiatrist conducted a pretrial examination of a prisoner suspected of murder. *See* ***id.*** at 456-57. The prisoner was found guilty, and at sentencing the psychiatrist was called to testify as to the prisoner's future dangerousness based on the pretrial examination. *See* ***id.*** at 459-60. The United States Supreme Court held that the psychiatrist was a state actor for ***Miranda*** purposes once his testimony was used in a prosecutorial manner. *See* ***id.*** at 467. The use of the psychiatrist's examination in a criminal prosecution was sufficient to invoke the prisoner's ***Miranda*** rights. *See* ***id.*** Like

Houser, the psychiatrist in ***Estelle*** was not "a police officer, government informant, or prosecuting attorney." ***Id.*** However, the Court found his lack of authority immaterial, focusing instead on the self-incriminating nature of the prisoner's statements. *See* ***id.***

¶10 Houser's lack of authority is likewise immaterial, as is any debate as to whether he was knowingly performing a prosecutorial function. What is important is the fact that there was a possibility that the interrogation could produce evidence that would be used against Cline in a criminal prosecution. Houser acknowledged that he has aided the police in the past in a similar capacity so the possibility existed. Houser was a government employee conducting an interrogation that could potentially be used in a criminal prosecution. As such, he was a state actor for ***Miranda*** purposes. Since all elements of a custodial interrogation were met as defined in ***Miranda***, Cline should have been informed of his ***Miranda*** rights. Because he was not informed of his rights before his confession to Houser, we affirm the order suppressing that confession.

(2) Voluntariness of Confession

¶11 Cline was informed of his ***Miranda*** rights before his confession to Swyers and neither party contends that this second confession was involuntary. However, Cline argues that his second confession should be suppressed under a variation of the "fruit of the poisonous tree" doctrine outlined in ***Wong Sun v. United States***, 371 U.S. 471 (1963).

¶12 The fact that Cline was not warned of his ***Miranda*** rights before his first confession is not sufficient to suppress subsequent confessions under the "fruit of the poisonous tree" doctrine. ***Oregon v. Elstad***, 470 U.S. 298, 314 (1985). Unless the first, unwarned confession was involuntarily coerced, the

subsequent administration of ***Miranda*** warnings ordinarily will remove the conditions that preclude admission of the first confession. *See* ***id.*** Cline contends that his first confession was involuntary due to Houser's use of coercion, and therefore his second confession should be suppressed as "fruit of the poisonous tree." Because we find that Cline's first confession was voluntary, we disagree.

¶13 A confession is deemed involuntary if it was "procured via coercive means or ... was the product of improper pressures exercised by the police." ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). The determination of whether a confession is voluntary is made while considering the "totality of the facts and circumstances" surrounding the confession. ***Id.*** at 236. This involves balancing the personal characteristics of the confessor against the pressures imposed by the questioner in order to induce a response. *See* ***id.*** Relevant personal characteristics include age, education and intelligence, physical and emotional condition, and prior experience with the police. *See* ***id.*** These are balanced against tactics used to induce confessions such as:

> [T]he length of the interrogation, any delay in arraignment, the general conditions under which the confession took place, any excessive physical or psychological pressure brought to bear on the declarant, any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the individual was informed of his right to counsel and right against self-incrimination.

Id. at 236-37.

¶14 Aside from Houser's failure to inform Cline of his ***Miranda*** rights, we conclude that Cline's first confession was voluntary, and not a result of coercion. Cline's personal characteristics did not put him at any disadvantage during Houser's interrogation. At the time of his confession, he was forty-one

years old, had the equivalent of a high school education, and had extensive experience with law enforcement officials as a prison inmate. These characteristics are to be balanced against Houser's interrogation tactics. *See* ***Clappes***, 136 Wis. 2d at 235-37. During the first interrogation, Houser urged Cline to "come clean" because there were other inmates who were willing to testify against him in the absence of a confession. Cline contends that this was the coercion that made his initial confession involuntary. However, "the confrontation of the defendant with the information against him, whatever that may be, does not amount to the utilization of overwhelming force or psychology." ***Turner v. State***, 76 Wis. 2d 1, 22, 250 N.W.2d 706 (1977). We agree with the trial court that Houser was not telling Cline anything that he did not already know, given his age, education, and experience. The interrogation was brief, lasting approximately five minutes. As a prison inmate, Cline was in surroundings that were familiar rather than intimidating. *See* ***State v. Bergeron***, 162 Wis. 2d 521, 533, 470 N.W.2d 322 (Ct. App. 1991). None of the circumstances surrounding the interrogation were either physically or psychologically coercive.

¶15 As we discussed earlier, failure to inform Cline of his ***Miranda*** rights is grounds for suppression of his first confession, but not for subsequent confessions following ***Miranda*** warnings, absent some form of coercion. *See* ***Elstad***, 470 U.S. at 309. Because there was no coercion here and Cline was subsequently given his ***Miranda*** warnings, we affirm the trial court's order denying suppression of Cline's second confession.

CONCLUSION

¶16 We affirm the trial court's order granting the motion to suppress Cline's first confession to Houser and denying the motion to suppress his second confession to Swyers.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.