COURT OF APPEALS
DECISION
DATED AND FILED

October 26, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP169-CR **Cir. Ct. No. 2003CF211**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

KRISTEN K. CLEAVER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed*.

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

¶1 PER CURIAM. The State of Wisconsin appeals from a circuit court order suppressing Kristen Cleaver's custodial statements. The circuit court

suppressed the first statements because Cleaver was in custody but did not receive her ***Miranda***[1] warnings before she was interrogated. The circuit court suppressed a subsequent statement because it was tainted by the earlier, unwarned statements. We affirm.

¶2 Cleaver was charged with first-degree intentional homicide and hiding a corpse. The complaint alleges that in March 2003, seventeen-year-old Cleaver gave birth at home, drowned the child and hid the body in her bedroom closet. Some weeks later, her parents discovered the body.

¶3 Cleaver gave inculpatory statements to law enforcement on April 26, 2003 (in the parking lot of her home and during an interview at the police station) and on April 28, 2003 (during an interview at the jail while she was on a probation hold). It is undisputed that Cleaver did not receive her ***Miranda*** warnings on April 26; however, she was advised of and waived those rights before she gave the April 28 statement (which largely echoed the April 26 statement).

¶4 Cleaver moved to suppress her April 26 statements to law enforcement as the product of a ***Miranda*** violation. Cleaver also moved to suppress the April 28 statement as tainted by and derivative of the April 26 statements. The circuit court granted Cleaver's suppression motion, and the State appeals.[2]

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

[2] We previously remanded this case to the circuit court to make detailed historical findings on the suppression issue.

¶5 The issues on appeal are whether Cleaver was in custody on April 26 when she made inculpatory statements without receiving ***Miranda*** warnings, and whether the April 28 statement was tainted by and derivative of the April 26 statements such that it must also be suppressed.

¶6 We first address whether Cleaver was in custody on April 26. The ***Miranda*** rules provide as follows:

> The prosecution may not use a defendant's statements stemming from custodial interrogation unless the defendant has been given the requisite warnings. In ***Miranda,*** the Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." Subsequently, the Court held that the ***Miranda*** safeguards attach when a "suspect's freedom of action is curtailed to a 'degree associated with [a] formal arrest.'" The relevant inquiry is how a reasonable person in the suspect's situation would understand the situation.
>
> In reviewing the trial court's decision, we accept that court's findings of historical fact unless they are clearly erroneous; however, whether a person is "in custody" for ***Miranda*** purposes is a question of law, which we review de novo based on the facts as found by the trial court.
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> In determining whether an individual is "in custody" for purposes of ***Miranda*** warnings, we consider the totality of the circumstances, including such factors as: the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint. When considering the degree of restraint, we consider: whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved.

State v. Morgan, 2002 WI App 124, ¶¶10-12, 254 Wis. 2d 602, 648 N.W.2d 23 (alterations in original; citations omitted).

¶7 After a hearing on the suppression motion, the circuit court made the following findings.[3] Prior to April 26, 2003, Cleaver gave birth and placed the infant in a bag in her closet. The court found that a reasonable person the age and experience of Cleaver would know that her conduct toward the infant was a crime and that she was "in trouble."

¶8 Detective Busha was called to the Cleaver home on April 26 and informed about the dead infant found in Cleaver's bedroom closet. Busha, an officer for nineteen years and a detective with the Oshkosh Police Department for twelve years, believed that a serious crime had been committed. It was "pretty obvious" and "fair to say" that he immediately focused on Kristen Cleaver as the individual who committed the crime. Upon arriving at the Cleaver residence, Officer Dolan learned that Cleaver gave birth to the infant, and he was instructed to retrieve Cleaver from her place of employment and to tell Cleaver that she had to come home.

¶9 Dolan retrieved Cleaver, informing her that while she was not under arrest, she had to return to her home with him. Cleaver traveled in the rear, cage area of the squad car. She was neither handcuffed nor escorted at gunpoint, although Dolan, a physically robust officer, was in uniform and armed. Dolan denied Cleaver's request to bring her purse along. Cleaver believed that she did not have a choice about whether to accompany Dolan. At the Cleaver home, Dolan turned Cleaver over to Busha in the parking lot. Cleaver was not permitted to have any contact with her family or to enter her home, and her specific request to see her mother was denied. Cleaver testified at the suppression hearing that

[3] We take the findings from the original findings and the findings made on remand.

Busha introduced himself to her in the parking lot and then asked her, "Do you know why we're here today?" Cleaver testified that she responded "because of my baby." Busha testified that Cleaver responded "because of what you found in my basement." The court found that Cleaver's testimony about her contact with Dolan was reasonable and credible.

¶10 Based upon the following facts, the court determined that Cleaver was in custody on April 26 in the parking lot of her home. Cleaver knew that she was in trouble, she was confronted by a uniformed officer who said she had to go with him, and she was transported in the cage portion of the rear of the squad car from her workplace to her home without her purse or her own car. At her home, Cleaver found police, ambulance and fire vehicles, she was not allowed to enter her home or have contact with her family, and she was transferred directly from Dolan's vehicle to Busha's vehicle. Even though she was not handcuffed or told she was under arrest, the circuit court found that a reasonable person in Cleaver's position would have considered herself to be in custody under the circumstances.

¶11 Busha later transported Cleaver to the police department and took a statement from her over a three-hour period without giving her the ***Miranda*** warnings.[4] Having concluded that Cleaver was in custody in the parking lot, the circuit court further concluded that she was in custody at the time she gave the April 26 statement at the police station. Therefore, she should have received ***Miranda*** warnings on April 26.

[4] Busha testified that he did not believe that he had Cleaver in custody, and therefore he did not give her the ***Miranda*** warnings. However, the detective's perspective does not control on the question of custody; rather, the perceptions of a reasonable person in the suspect's situation control. ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23.

¶12 The circuit court's findings regarding Cleaver's contacts with Dolan and Busha on April 26 are not clearly erroneous based on the record of the suppression hearing. We therefore rely upon these findings to reach a legal conclusion as to whether Cleaver was in custody on April 26.

¶13 We consider the totality of the circumstances and apply the ***Morgan*** factors to the circuit court's findings. Cleaver was in the physical control of law enforcement from the time she was picked up at her workplace; her freedom was completely restrained, notwithstanding Dolan's statement that she was not under arrest. She was moved from location to location by law enforcement. Although she was not handcuffed, frisked or held at gunpoint, it is clear that Cleaver was restrained from the moment Dolan escorted her from work. Because Busha knew that Cleaver was a suspect in the crime, the detective had a purpose for questioning her in the parking lot and at the police station that should have alerted him to the need to give Cleaver her ***Miranda*** warnings before he elicited an inculpatory remark from her.

¶14 At the police station on April 26, Cleaver entered through a locked, private entrance and was interviewed in a small, windowless room across the hall from Busha's office. An officer stood outside the door on the one occasion Busha left the room during the three-hour period of interrogation. Cleaver asked if she could go to work at 4:00 p.m., and Busha informed her that she could not leave until she finished her statement. Busha denied Cleaver's request to contact her employer to explain her absence, and the detective informed the employer that Cleaver had been in a serious accident and would not be at work.

¶15 All of the foregoing facts permit a conclusion under ***Morgan*** that Cleaver was in custody. A reasonable person in Cleaver's position would have

believed that she was in custody because she did not have freedom of movement or association during the time she was in the control of the police. Therefore, ***Miranda*** warnings were required before interrogation. *See* ***Morgan***, 254 Wis. 2d 602, ¶10.

¶16 The circuit court also found that, using subtle tactics and conduct, the police intentionally deprived Cleaver of her ***Miranda*** warnings on April 26. Specifically, the court cited the order to Dolan to pick up Cleaver but inform her that she was not under arrest "as a clear attempt to avoid the constitutional rights of Kristen Cleaver." The court also considered the officers' experience and statements,[5] their belief that Cleaver was a suspect in the crime, and the physical control they exercised over Cleaver on April 26. From these findings, the court reasonably determined that the officers intentionally deprived Cleaver of her ***Miranda*** warnings.[6] Because Cleaver's statements on April 26 were the result of

[5] The circuit court, as the fact finder, was charged with determining the credibility of the officers' statements in this regard. ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981).

[6] The circuit court's finding that the police intentionally deprived Cleaver of her ***Miranda*** warnings undermines the State's argument that the failure to give ***Miranda*** warnings was the type of good-faith error recognized by the United States Supreme Court in ***Oregon v. Elstad***, 470 U.S. 298, 309 (1985), and discussed in ***State v. Armstrong***, 223 Wis. 2d 331, 362-63, 588 N.W.2d 606 (1999), *modified on other grounds*, 225 Wis. 2d 121, 591 N.W.2d 604 (1999).

an intentional violation of her ***Miranda*** rights, they must be suppressed.[7] ***State v. Knapp***, 2005 WI 127, ¶83, ___ Wis. 2d ___, 700 N.W.2d 899.[8]

¶17 Having upheld the circuit court's decision to suppress Cleaver's April 26 statements, we turn to whether the April 28 statement must be suppressed as the fruit of an intentional ***Miranda*** violation. Prior to the April 28 interrogation, Cleaver was given her ***Miranda*** warnings, which she then waived. Her April 28 statement echoed the April 26 statement. The State asserts the legality of the April 28 statement; Cleaver argues that the April 28 statement was tainted by the circumstances surrounding the April 26 statements and should be suppressed.

¶18 "The exclusionary rule applies to both tangible and intangible evidence and excludes derivative evidence if such evidence is obtained 'by exploitation of that illegality.'" ***Knapp***, 700 N.W.2d 899, ¶24 (citing ***Wong Sun v. United States***, 371 U.S. 471, 485-88 (1963)). "[E]vidence obtained as a direct result of an intentional violation of ***Miranda*** is inadmissible under Article I, Section 8 of the Wisconsin Constitution." ***Knapp***, 700 N.W.2d 899, ¶83.

¶19 The intentional nature of the police conduct on April 26 drives our assessment of the legality of the April 28 statement. In evaluating the April 28

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[7] We need not consider the voluntariness of Cleaver's statements. *Cf.* ***State v. Knapp***, 2005 WI 127, ¶¶1-2, ___ Wis. 2d ___, 700 N.W.2d 899 (even though statements voluntarily given, physical evidence obtained as the result of an intentional ***Miranda*** violation must be suppressed).

[8] The circuit court decided Cleaver's suppression motion on Fifth Amendment grounds. In ***Knapp***, 700 N.W.2d 899, ¶83, our supreme court decided the suppression issue based on article I, section 8 of the Wisconsin Constitution. We may affirm a correct decision of the circuit court even though that court relied on other grounds. ***State v. Rognrud***, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990).

custodial interrogation, the circuit court focused on the deterrent purpose of the exclusionary rule when the police have engaged in willful conduct. The court speculated that the April 28 statement may have been an attempt by the police to redress the problems with the April 26 statement when the same officers intentionally failed to give the ***Miranda*** warnings. The court specifically rejected the officers' claims that they returned to interrogate Cleaver on April 28 merely to clarify a few points from the April 26 interrogation. The circuit court's findings are not clearly erroneous.

¶20 Furthermore, the circumstances surrounding the April 26 statements would not have led Cleaver to think that she was free to decline to give the April 28 statement, despite receiving ***Miranda*** warnings on April 28. The ***Knapp*** court discussed the Supreme Court's plurality opinion in ***Missouri v. Seibert***, 542 U.S. 600 (2004), in which the Court discussed whether a second inculpatory statement may be suppressed if the first statement was given in violation of ***Miranda***.

> "[I]t is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." The plurality surmised that "[u]pon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again."

Knapp, 700 N.W.2d 899, ¶49 (citations omitted).

¶21 We conclude that these concerns apply here and when considered in conjunction with the intentional ***Miranda*** violation on April 26 provide grounds to suppress the April 28 statement as tainted by and derivative of the intentional

Miranda violation on April 26. "We will not allow those we entrust to enforce the law to intentionally subvert a suspect's constitutional rights." ***Knapp***, 700 N.W.2d 899, ¶83.

By the Court.—Order affirmed.

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