COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Appeal Nos. 2005AP1380-CR
2005AP1382-CR

Cir. Ct. Nos. 2004CF74
2004CF75

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

NO. 2005AP1380-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ANDREW L. REIMAN,

DEFENDANT-RESPONDENT.

NO. 2005AP1382-CR

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JASON M. HEIN,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J.[1] The State of Wisconsin appeals orders suppressing a statement and the future trial testimony of Gary Gilbertson, a witness against Andrew Reiman and Jason Hein. The State argues the trial court failed to properly analyze the facts under the attenuation doctrine and therefore arrived at an erroneous decision to suppress Gilbertson's statements. We conclude the State has failed to meet its burden of proof and, accordingly, we must affirm the orders.

Background

¶2 On April 6, 2004, Patricia Sullivan and Hein went to a pharmacy where Sullivan bought medicine containing the drug pseudoephedrine. An hour later, Sullivan and Reiman returned the medicine as "not what they wanted" and attempted to purchase larger quantities of pseudoephedrine.

¶3 Because pseudoephedrine is commonly used in the production of methamphetamine, the pharmacist kept larger quantities behind the counter in order to safeguard the drug. After Sullivan and Reiman attempted to make their purchase, the pharmacist called the police and gave his name, a description of the vehicle Reiman was in, and its Minnesota license plate. Two officers spotted and followed the car while a third was on his way to the pharmacy for more

[1] At the outset, we would like to acknowledge the work of attorneys Mark A. Neuser, Catherine R. Munkittrick, and Francis X. Rivard in this case. Neuser's brief for the State and Munkittrick's brief for Hein—which was joined by Reiman—were particularly well written. We further appreciate the candor and excellent assistance of all three attorneys at oral argument.

information. The officer at the pharmacy directed the other officers to stop the vehicle pending his interview with the pharmacist, and the car was stopped twelve miles from the Minnesota border.

¶4 Once the car was stopped, the officers saw in plain view various other components of methamphetamine manufacturing, including muriatic acid and plastic tubing. The officers obtained consent to search the car and found other incriminating items. Reiman implicated both Hein and himself and identified Gary Gilbertson as the owner and co-tenant of the house where they were manufacturing the methamphetamine.

¶5 Police obtained a search warrant for Gilbertson's home and discovered a significant amount of methamphetamine-making supplies. Meanwhile, Gilbertson was arrested on outstanding warrants while police executed the search warrant.

¶6 Police reinterviewed Reiman at the station. He stated that he, Hein, and Gilbertson all participated in the methamphetamine-making at Gilbertson's home. When the police interviewed Gilbertson, he essentially confirmed Reiman's statement. All four—Reiman, Hein, Gilbertson, and Sullivan—were charged with crimes relating to methamphetamine.

¶7 The four moved to suppress evidence seized and statements obtained after the traffic stop. The State argued collective knowledge and inevitable discovery. The court granted Reiman's, Hein's, and Sullivan's motions but denied Gilbertson's, stating he lacked standing to challenge the traffic stop.

¶8 The State dropped the charges against Sullivan but brokered a plea agreement with Gilbertson to testify against Reiman and Hein. Reiman and Hein

moved to suppress Gilbertson's statement to police as well as any future testimony. The State argued Gilbertson's testimony was admissible based on the attenuation doctrine. The court granted the motion without an evidentiary hearing and suppressed Gilbertson's testimony.[2] The court held the State had not demonstrated Gilbertson would ever have become a witness against Reiman and Hein "except for the illegal stop"—Gilbertson was caught because of evidence from the tainted traffic stop. The State appeals.

Discussion

¶9 "Whether evidence should be suppressed because it was obtained in violation of the Fourth Amendment is a question of constitutional fact that this court reviews under a two-step standard of review." ***State v. Smith***, 2000 WI App 161, ¶5, 238 Wis. 2d 96, 617 N.W.2d 678. We accept the trial court's findings of evidentiary or historical facts unless contrary to the great weight and clear preponderance of the evidence, but we independently apply constitutional principles to those facts. ***Id.***

¶10 In ***Wong Sun v. United States***, 371 U.S. 471, 485-86 (1963), the Supreme Court expanded the exclusionary rule to apply to verbal evidence, not just physical, tangible evidence. The exclusionary rule, of course, "is a judicially created remedy that prohibits the government from introducing at the defendant's trial evidence of guilt obtained through violations of the Fourth Amendment." ***United States v. Ienco***, 182 F.3d 517, 526 (7th Cir. 1999). The rule "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the

[2] A second witness's testimony was also suppressed, but the State does not appeal that decision.

constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." ***Brown v. Illinois***, 422 U.S. 590, 599-600 (1975).

¶11 Still, a court need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of police. ***State v. Tobias***, 196 Wis. 2d 537, 544, 538 N.W.2d 843 (Ct. App. 1995). Indeed, the Supreme Court has specifically rejected any sort of "but for" or "per se" rule that makes inadmissible any evidence that was discovered through a chain of causation beginning with an illegal action. ***Brown***, 422 U.S. at 603; ***State v. Simmons***, 220 Wis. 2d 775, 780, 585 N.W.2d 165 (Ct. App. 1998).

¶12 Thus, we have the attenuation doctrine, "a product of considerations underlying the exclusionary rule and the constitutional principles it is designed to protect." ***Simmons***, 220 Wis. 2d at 780. Under the attenuation doctrine, the determinative issue is "whether, granting establishment of the primary illegality," the evidence came about from the "exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ***Id.*** at 781. The government bears the burden of proving the discovery was not tainted by the initial illegal conduct. ***Ienco***, 182 F.3d at 528.

¶13 To determine whether the causal chain is sufficiently attenuated, we consider: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. ***Brown***, 422 U.S. at 603-04. However, when the evidence in question is a witness' statement or testimony, "[t]he voluntariness of the statement is a threshold requirement. … And the burden of showing admissibility rests, of course, on the prosecution." ***Id.*** at 604.

¶14 ***Ienco***, citing ***United States v. Ceccolini***, 435 U.S. 268, 276 (1978), identifies several factors we should consider in determining the voluntariness of a statement. These include:

> (1) whether the testimony given by the witness was an act of free will or coercion or induced by official authority as a result of the initial illegality;
>
> (2) whether the illegality was used in questioning the witness;
>
> (3) how much time passed between the illegality and contact with the witness and between the contact and the testimony;
>
> (4) whether the identity of the witness was known to the police before the illegal conduct; and
>
> (5) whether the illegality was made with the intention of finding a witness to testify against the defendant.

Ienco, 182 F.3d at 529-30.

¶15 The trial court held Gilbertson was not an ordinary citizen seeking "to come forward so that the truth can come to light." Instead, he sought "to evade the consequences of [his] actions by providing testimony against Reiman and Hein." Implicit in these statements is a finding that Gilbertson's statements were involuntary. This appears consistent with observations by the federal courts in similar circumstances. *See* ***Brown***, 422 U.S. at 605 n.12 (anticipation of leniency bolstered pressure to make a second statement); ***Ienco***, 182 F.3d at 530 (a choice between testifying for lighter sentence or going to trial against tainted evidence suggested co-defendant "was not speaking of a free will uninfluenced by the initial illegality").

¶16 The State takes issue with this holding, arguing that the determination of Gilbertson's motive was made in the absence of any factual

record. At oral argument, the parties noted that the trial court's decision on the motion to suppress was made on briefs, without an evidentiary hearing. The resulting problem for the State is that it had the burden to show Gilbertson's statements were voluntary and "uninfluenced by the initial illegality," but it never sought to introduce evidence. Indeed, the State conceded that it had no reason to believe or argue it was improperly denied such a chance—only that it never sought the opportunity. Accordingly, we decline to give the State a second chance to meet its burden.

¶17 We are aware of the admonition to apply the exclusionary rule with greater reluctance when the evidence is live witness testimony as opposed to physical evidence. ***Ceccolini***, 435 U.S. at 280. However, we do not believe we must apply such flexibility when the State fails to meet its evidentiary burden.

¶18 We share the State's concern that Reiman and Hein have evidently managed to insulate themselves from prosecution. We stress, however, that in this case, on these facts, the State failed to meet its burden of proof. Accordingly, we do not reach the attenuation doctrine's application to the facts any further than the required threshold of a statement's voluntariness.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

¶19 PETERSON, J. (*concurring*). The State made two miscalculations in this case. First, it failed to present any evidence on its attenuation theory, even though it had the burden of proof. On that score, I agree entirely with the majority opinion. Second, however, the State failed to appeal the trial court's initial suppression order based on an illegal stop. In my opinion at least, the stop of the vehicle was legal because the officers had reasonable suspicion.

¶20 In Wisconsin, a police officer may stop a person if the officer "possesses specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996). The determination of reasonableness is a common sense test that depends on the totality of the circumstances. ***Id.*** at 53, 55.

¶21 The testimony at the suppression hearing showed that a pharmacist called police concerned that people who had been in his pharmacy might be involved in manufacturing methamphetamine. It is common knowledge that methamphetamine is a scourge in this part of the country. Two of the people had first purchased a small quantity of the drug pseudoephedrine, which can be used in making methamphetamine. Shortly after, one of them and another person returned the drug because they wanted a larger quantity. The pharmacist gave police a description of the car and its Minnesota license plate number. Two officers found and stopped the vehicle twelve miles from the Minnesota border, while another officer went to the pharmacy to learn more from the pharmacist.

¶22 In other words, for articulable reasons, the officers were suspicious that the vehicle's occupants, who had been trying to purchase large quantities of pseudoephedrine, might be involved in manufacturing methamphetamine. I think that suspicion was reasonable and demonstrated good police work. The intrusion was minimal—simply stopping the vehicle. *See* ***State v. Guzy***, 139 Wis. 2d 663, 675-76, 407 N.W.2d 548 (1987). The officers were merely freezing the situation until another officer finished talking to the pharmacist. *See* ***Waldner***, 206 Wis. 2d at 61; *see also* ***Guzy***, 139 Wis. 2d at 676 ("[T]he law must be sufficiently flexible to allow law enforcement officers under certain circumstances, the opportunity to temporarily freeze a situation, particularly where failure to act will result in the disappearance of a potential suspect."). Granted, it is legal to purchase even large quantities of pseudoephedrine. However, the fact that there is an innocent explanation does not negate a contrary possibility. ***Waldner***, 206 Wis. 2d at 60.

Hoover, P.J., joins in this concurrence.