COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP450-CR **Cir. Ct. No. 2005CF1425**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENT O. EHRET,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Brent O. Ehret has appealed from a judgment convicting him of homicide by use of a motor vehicle with a detectable amount of

a controlled substance in his blood in violation of WIS. STAT. § 940.09(1)(am) (2007-08).[1] We affirm the judgment.

¶2 This criminal proceeding was commenced after Ehret drove his vehicle across the center line of a road and into the path of an oncoming vehicle, causing the death of the passenger in that vehicle. Ehret was questioned by police officers at the scene of the accident and at the hospital where he was taken for treatment and surgery. Officer Peter Lynkiewicz testified that at the accident scene, Ehret told him that he had a pipe in his vehicle and consented to a search of the vehicle. In response to questioning by Sergeant Chad Dornbach in the emergency room where Ehret was taken after the accident, Ehret also signed a written statement and a written consent for a blood draw, which revealed the presence of tetrahydrocannabinols (THC) in his blood. The written consent signed by Ehret indicated that he was consenting to a voluntary blood draw and that the purpose of the test was to determine whether any drugs or alcohol were used by him prior to the accident that he had been involved in that day. In the form, Ehret also acknowledged that he understood he could face criminal charges if the results were positive.

¶3 Ehret was convicted pursuant to a no contest plea. Prior to entering his plea, he moved to suppress the statements made by him to the police at the scene of the accident and at the hospital. He also moved to suppress the evidence obtained from the search of his vehicle and the blood draw. He contended that he was physically injured and emotionally and mentally distraught at the time the police questioned him and that the police questioning constituted improper pressure and coercion exceeding his ability to resist. He contended that neither his statements nor

[1] All references to the Wisconsin statutes are to the 2007-08 version.

his consent to the search of his vehicle and the blood draw were therefore voluntary, entitling him to suppression of the evidence.

¶4 The trial court denied Ehret's suppression motion after an evidentiary hearing, concluding that Ehret's statements and consents were all voluntary. On appeal, Ehret's sole challenge is to the trial court's denial of his suppression motion. *See* WIS. STAT. § 971.31(10).

¶5 The sole issue on appeal is whether the trial court erred in determining that Ehret's statements and consents were voluntary. Our review of the trial court's decision as to voluntariness involves the application of constitutional principles to the historical facts. ***State v. Hoppe***, 2003 WI 43, ¶34, 261 Wis. 2d 294, 661 N.W.2d 407. The trial court's findings of historical fact will not be disturbed unless they are clearly erroneous. ***State v. Franklin***, 228 Wis. 2d 408, 413, 596 N.W.2d 855 (Ct. App. 1999). However, the issue of whether the statement or consent to a search was voluntary under constitutional standards is reviewed by this court de novo. ***Id.***; ***State v. Giebel***, 2006 WI App 239, ¶11, 297 Wis. 2d 446, 724 N.W.2d 402.

¶6 In determining whether a statement was voluntary, a court must consider the totality of the circumstances, which includes balancing the personal characteristics of the defendant against the pressures applied by the police. ***Hoppe***, 261 Wis. 2d 294, ¶38. Among the factors to be considered are the suspect's age, education and intelligence, physical and emotional condition, and prior experience with the police. ***Id.***, ¶39. The defendant's personal characteristics are balanced against any police pressure and tactics used to induce the statements. ***Id.*** Factors include the length of the questioning; the general conditions under which questioning took place; any excessive physical or

psychological pressure brought to bear on the defendant; any inducements, threats, methods, or strategies used by the police to compel a response; and whether the defendant was informed of his or her right to counsel and to refrain from self-incrimination. ***Id.*** The State has the burden of proving by a preponderance of evidence that the statements were voluntary. ***Id.***, ¶40.

¶7 Coercive or improper police conduct is a prerequisite for a finding of involuntariness. ***Id.***, ¶37. However, while some coercive or improper police conduct must exist, it need not be egregious or outrageous in order to be coercive. ***Id.***, ¶46. Subtle pressures are considered coercive if they exceed the defendant's ability to resist. ***Id.***

¶8 Similar standards apply when evaluating whether a defendant's consent to a search was voluntary. The test for voluntariness is whether consent was given absent actual coercive, improper police practices designed to overcome the resistance of a defendant. ***Giebel***, 297 Wis. 2d 446, ¶12. No single factor is dispositive in making this determination. ***Id.*** The court must examine the totality of the circumstances, with special emphasis on the circumstances surrounding the consent and the characteristics of the defendant. ***Id.*** The State has the burden of demonstrating by clear and convincing evidence that the defendant gave consent without any duress or coercion, express or implied. ***Id.*** However, the State need not prove that the defendant knew of his or her right to refuse consent. ***Id.***

¶9 Applying these standards here, we affirm the trial court's denial of Ehret's suppression motion. Evidence at the suppression hearing indicated that when Officer Lynkiewicz arrived at the scene of the accident, Ehret was lying on his back on a parking lot pavement being tended to by one or two individuals that Lynkiewicz believed to be citizens. Lynkiewicz testified that Ehret had a cloth over

his eyes to block the sun, had a hole above his knee with a diameter the size of a quarter, and complained of chest pain. Lynkiewicz testified that he initially spoke to Ehret for "a minute or two." He testified that he asked Ehret what had happened and Ehret answered, but was "perhaps" a little confused and repeated his answers. Lynkiewicz testified that he then went to check on the other people involved in the accident, and returned to Ehret five to seven minutes later. He testified that Ehret did not seem confused at this time, was coherent, and answered questions appropriately.

¶10 Lynkiewicz testified that he observed a partially full bottle of alcohol in Ehret's car and asked Ehret whether he had been drinking that day. Ehret said "no," a fact corroborated by a preliminary breath test given to Ehret at the scene. Lynkiewicz testified that he may have asked whether Ehret was under the influence of any drugs "or something along those lines," and that Ehret then told him that he had a pipe in the vehicle, which Lynkiewicz understood to mean a drug pipe. Lynkiewicz testified that he asked Ehret whether he had smoked marijuana or consumed any controlled substances that day, and Ehret responded that he had not. Lynkiewicz testified that he also asked Ehret if he could search his vehicle, and Ehret said he could. In addition, Lynkiewicz testified that he asked Ehret if he would consent to a voluntary blood draw, and Ehret said that he would.

¶11 Lynkiewicz indicated that he spoke to Ehret for a total of ten to fifteen minutes, and that even though Ehret appeared to be in pain, it did not appear to affect his ability to have a conversation or his understanding of what Lynkiewicz was asking. Lynkiewicz testified that he never observed Ehret lose consciousness, that he did not place Ehret under arrest or in handcuffs, that he made no promises or threats, and that he did not touch Ehret or display a firearm. He also testified that Ehret never asked to stop the questioning or said it was hard to concentrate because of pain.

¶12 Evidence indicated that Ehret was strapped on a longboard and received some medical assistance during some of the time Lynkiewicz was speaking to him. Lynkiewicz indicated that he stopped talking to Ehret when ambulance personnel arrived to transport Ehret to the hospital.

¶13 Sergeant Dornbach also testified at the suppression hearing. He testified that he spoke to Ehret in the emergency room of the hospital about forty minutes after Ehret was admitted. Dornbach testified that Ehret was receiving medical attention at the time, so he spoke to Ehret near the head of Ehret's bed. He testified that he identified himself to Ehret and explained that he was investigating the car accident, including whether drugs or alcohol were involved. Dornbach testified that although Ehret was upset and scared, he was alert, appeared to understand what was being said, and was able to carry on a conversation. Dornbach testified that he initially spoke to Ehret for about ten minutes, during which time he told Ehret he was not under arrest. He testified that Ehret provided identifying information and a description of how the accident occurred. Dornbach testified that Ehret was conscious, coherent, and cooperative, and did not appear to be confused or impaired by any pain medication he had received at the hospital. Dornbach also testified that Ehret never indicated that he did not want to talk, and that medical personnel never indicated that he should not be talking to Ehret. Dornbach further testified that he did not threaten Ehret or promise him anything.

¶14 Dornbach testified that he spoke to Ehret a second time about an hour later, after Ehret returned from testing and was placed in a private room located in the emergency room. Evidence indicated that Ehret's parents were present at the time, but that Dornbach asked them to allow him to speak to Ehret in private. Dornbach described Ehret as alert, cooperative, and able to speak clearly. During this time, Dornbach recapped what Ehret had told him, wrote it down, read the

written statement to Ehret, and gave him an opportunity to read it. Dornbach testified that Ehret agreed that the written statement was accurate and signed it. Dornbach further testified that he did not read Ehret his ***Miranda***[2] rights before he signed the statement because Ehret was not under arrest.[3]

¶15 Dornbach also testified that he asked Ehret whether he had consumed alcohol or drugs that day, and Ehret replied that he had had no alcohol, but had used marijuana "either last night or the night before." Dornbach testified that he again told Ehret that he was not under arrest, and asked for consent to a blood draw. Dornbach testified that Ehret consented to the blood draw and signed the written consent form after Dornbach read it to him. Dornbach testified that no threats or promises were made to Ehret, that he was not handcuffed, and that he did not complain about being uncomfortable or needing medical attention. Dornbach testified that Ehret was not receiving active medical treatment when he talked to him in the private room, and that he had no concerns about Ehret's ability to give a statement or consent.

¶16 An hour after the blood draw, Ehret had surgery on his leg. Evidence indicated that he remained hospitalized for a couple of days. Ehret did not testify at the suppression hearing.

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

[3] The police are required to give ***Miranda*** warnings before engaging in custodial interrogation. ***State v. Morgan***, 2002 WI App 124, ¶10, 254 Wis. 2d 602, 648 N.W.2d 23. Custodial interrogation is questioning by law enforcement officers after a person has been taken into custody or when his or her "freedom of action" has been curtailed in a way that is comparable to an arrest. ***Id.*** (citation omitted). An officer engaging in general at-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens during the fact-finding process is not required to give ***Miranda*** warnings. ***State v. Kraimer***, 99 Wis. 2d 306, 330, 298 N.W.2d 568 (1980).

¶17 Based on the evidence, the trial court concluded that Ehret's statements and consents were voluntary. While acknowledging that Ehret had little prior contact with the criminal justice system, it found that the evidence did not indicate that he had suffered any kind of head trauma or that his consciousness was impaired. It found that while Ehret was initially confused when medical personnel arrived, his confusion dissipated, and that he gave answers that were responsive and appropriate. While acknowledging that hospital personnel administered pain medication to Ehret, it noted that the hospital termed his pain only "moderate." It found that the officers' questioning of Ehret was brief, totaling about forty or forty-five minutes in a three-hour period, and that the officers did not impede Ehret's medical treatment. It found that Ehret was not in police custody, and that Ehret understood he was not in police custody.[4] It determined that the circumstances were not coercive, and that the officers engaged in "perfectly appropriate conduct." It further determined that Ehret was competent to make decisions and to answer questions, and found that he voluntarily consented to the search of his vehicle and the blood draw.

¶18 No basis exists to disturb the trial court's findings and conclusions. Ehret relies on the testimony of Shelly Jacobi, a paramedic who provided care to Ehret at the scene of the accident after he was placed on the longboard, and who testified that he was very upset and disoriented or "foggy." However, the record does not indicate that Jacobi was present when Lynkiewicz questioned Ehret. Moreover, another EMT who was present when Lynkiewicz questioned Ehret

[4] As indicated by the trial court, regardless of whether Ehret's need for medical treatment prevented him from leaving the accident scene or hospital, this did not mean that he was in police custody and the subject of custodial interrogation.

testified that Ehret was alert and responsive, and did not appear disoriented or confused. In addition, Jacobi testified that when she calmed Ehret down, he gave appropriate answers to her questions.

¶19 While Ehret cites to testimony indicating that his eyes were covered when Lynkiewicz spoke to him, he cites to no evidence establishing that he did not know Lynkiewicz was a law enforcement officer. In contrast, Ehret's discussion of the pipe in his car and his consent to Lynkiewicz's request to search the vehicle indicates that he knew Lynkiewicz was a police officer. Moreover, as noted by the State, nothing in the evidence indicated that Ehret ever told Lynkiewicz or Dornbach that he did not want to talk.

¶20 In contending that his statements and consent at the hospital were involuntary, Ehret also relies upon the testimony of his father, who testified that Ehret was distressed and lethargic at the hospital. However, Ehret's father acknowledged that Ehret was responsive and answered questions appropriately, which was consistent with Ehret's hospital records, which indicated that he was alert and cooperative. Ehret's father also acknowledged that he did not see Ehret when Dornbach questioned him, and did not know what Ehret's demeanor was like at that time.

¶21 Under these circumstances, we agree with the trial court that nothing in the officers' conduct can be deemed coercive or improper. Merely questioning a suspect after an accident or injury does not constitute coercive conduct. *See* ***State v. Clappes***, 136 Wis. 2d 222, 237-38, 401 N.W.2d 759 (1987). The mere fact that Ehret was in pain and experiencing distress as a result of being involved in a serious accident did not render his statements and consents involuntary. *See* ***id.*** at 238-40. Proof of physical pain does not affect the admissibility of evidence absent

proof that the defendant was irrational, unable to understand the questions or his or her responses, or reluctant to answer the questions posed by the authorities.[5] ***Id.*** at 241-42.

¶22 Nothing in the record supports the conclusion that the pain and distress suffered by Ehret elevated him to the category of being "uncommonly susceptible to police pressures," or provides a basis for concluding that the officers engaged in any coercive conduct that exceeded Ehret's ability to resist.[6] *See* ***Hoppe***, 261 Wis. 2d 294, ¶46. We therefore uphold the trial court's ruling that Ehret's statements and consents were voluntary, and the evidence obtained was admissible.

By the Court.— Judgment affirmed.

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

[5] We reject Ehret's apparent contention that merely because police questioning of him exceeded the limited questioning that occurred in ***State v. Clappes***, 136 Wis. 2d 222, 401 N.W.2d 759 (1987), his statements and consents must be deemed involuntary. Nothing in ***Clappes*** indicates that when police officers investigating a traffic fatality engage in questioning that exceeds the questioning in ***Clappes***, it necessarily constitutes coercion. Rather, as stated in ***Clappes***, it is the totality of the circumstances that must be considered, necessitating a balancing of the defendant's personal characteristics against the coercive or improper pressures brought to bear on him during questioning. ***Id.*** at 239. However, the amount of pressure and coerciveness cannot decrease to none. ***Id.*** at 240.

[6] Ehret contends that the trial court improperly concluded that his statements and consents were voluntary merely because the circumstances were not as egregious as those existing in ***State v. Hoppe***, 2003 WI 43, 261 Wis. 2d 294, 661 N.W.2d 407. Nothing in the trial court's decision supports such a conclusion. While the trial court discussed the facts in ***Hoppe*** and compared them to the facts of this case, its findings of fact and analysis reveal that it clearly considered the totality of the circumstances in this case, made thorough findings of fact, and, based on those facts, properly determined that Ehret's statements and consents were voluntary.