COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 6, 1995

No. 94-2008-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CURTIS ELLIS, JR.,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. A jury found Curtis Ellis guilty of first-degree intentional homicide, a violation of § 940.01(1), STATS., and attempted first-degree intentional homicide, a violation of §§ 940.01(1) and 939.32, STATS. Ellis appeals, contending that the trial court erred when it denied suppression of two statements he gave to police. Ellis maintains that the first statement should have been suppressed because it was involuntary. He contends that the second

statement was inadmissible at trial because it was the product of the allegedly involuntary first statement. We reject Ellis's arguments and affirm.

On December 23, 1990, a limousine was parked in front of a Milwaukee tavern. In the limousine were two passengers and a driver. One of the passengers left the limousine. As the passenger walked away, he was followed by a man who shot him. The shooter then turned and fired three shots into the front of the limousine, but the driver and the other passenger managed to get away.

Police arrested Ellis for the shootings in March 1991. Officer David Orlowski was assigned to complete an "arrest show up" form. Officer Orlowski subsequently testified that when police interview arrestees regarding their background, they use these forms to compile the information they obtain. Officer Orlowski testified that while he filled out the form, Ellis told him about the shootings.

Within one hour after completing the show-up, Ellis was interviewed by another officer, Detective Leroy Shaw. Detective Shaw informed Ellis that he was aware Ellis had told Officer Orlowski about the shootings. Detective Shaw testified that Ellis then told police about the shootings.

Prior to trial, Ellis moved the trial court to suppress the statements he gave to the police. He maintained that the information he gave to Officer Orlowski should be suppressed because Officer Orlowski had interrogated him without providing him with any ***Miranda***[1] warnings, and that his statement was involuntary. Ellis sought suppression of the statement he gave to Detective Shaw, contending that the statement had been obtained by exploiting the information police obtained in the initial statement he had given to Officer Orlowski. Ellis thus contended that the second statement was in part the

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

product of the improper interrogation by Officer Orlowski and was inadmissible.[2]

Officer Orlowski testified at the suppression hearing regarding his actions at the show-up interview with Ellis. He told the trial court that to complete the show-up form, officers ask arrestees questions about their personal history, including questions about their names, birth dates, height, weight, family history, and whom to notify in an emergency.

Officer Orlowski testified that, at the time he completed the form with Ellis, Ellis was seated at a desk without handcuffs. Officer Orlowski testified that Ellis began "rambling on about things" during the interview. The officer stated that he told Ellis he knew "a lot" of Ellis's historical background because, during the investigation into the shooting, he had spoken with people who knew Ellis, including his family. Officer Orlowski testified that Ellis stated that he wished to talk to him "because [I] was listening to him." Ellis then began to tell Officer Orlowski about his involvement in the shootings, and also about "an incident with his girlfriend."

Officer Orlowski admitted that at the time Ellis began talking about these incidents, Ellis had not been provided with any ***Miranda*** warnings. Officer Orlowski noted, however, that he had not asked Ellis about the shootings, but that Ellis volunteered the information and continued talking about the shootings throughout the show-up interview. Although Officer Orlowski testified that he asked no specific questions of Ellis regarding the shootings, he conceded that he had asked two questions seeking clarification of terms Ellis used. Officer Orlowski testified that when Ellis began speaking of "units," he asked him to explain what he meant by a "unit," and Ellis told him he meant guns. Officer Orlowski also testified that Ellis told him that one of "the guys" suggested that they "break it." Officer Orlowski testified that he asked Ellis what "break it" meant, and Ellis told him that to "break it" means to commit a robbery.

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[2] Ellis also contended that the police had not apprised him of his ***Miranda*** rights prior to his giving the second statement. Police testified that they had, and the trial court found the police version of the interrogation more credible. Ellis has abandoned this issue on appeal.

Ellis denied that he gave Officer Orlowski a statement regarding the shootings. On cross-examination, however, he admitted that he had spoken to Officer Orlowski about an incident with his girlfriend. He testified that Officer Orlowski did not threaten him in any way, or make any promises to him. Ellis also admitted that he had been arrested before and that he was familiar with his ***Miranda*** rights. He affirmed that he had spoken with Officer Orlowski willingly. The trial court found that Officer Orlowski had not given Ellis any ***Miranda*** warnings, but also implicitly found that Ellis had given a statement to Officer Orlowski about the shootings.[3] The trial court held that Ellis had given the information to Officer Orlowski voluntarily.

On appeal, Ellis contends that Officer Orlowski subjected him to a custodial interrogation without informing him of his constitutional rights. While Ellis concedes that Officer Orlowski was courteous and "nice," he contends that Officer Orlowski's "gentle manner" was inherently coercive under the circumstances. Thus, he contends that his initial statement was involuntary, and therefore should have been suppressed. We disagree.[4]

As Ellis notes, this court's review of a trial court's determination that a custodial statement was voluntary is a question of constitutional fact subject to independent review. *See* ***State v. Turner***, 136 Wis.2d 333, 343-44, 401 N.W.2d 827, 832-33 (1987). When presented with questions of constitutional fact, a "reviewing court has the duty to apply constitutional principles to the facts as found" by the trial court. ***Id***. at 344, 401 N.W.2d at 832. The trial court's findings of historical fact, to which the reviewing court applies the constitutional principles, will not be upset unless clearly erroneous. ***Id***. at 343, 401 N.W.2d at 832.

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[3] We note that the trial court did not specifically find that Ellis had given a statement to Officer Orlowski about the shootings. However, such a finding is a necessary prerequisite to the trial court's determination that Ellis's initial statement about the shootings was voluntarily given.

[4] Because we hold that Ellis voluntarily gave his first statement, his contention that the statement he gave to Detective Shaw should also have been suppressed as the fruit of the first statement fails of necessity. We will therefore not address that argument further. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed on appeal).

We have no difficulty in holding that the police did not violate any constitutional principles when Ellis made his first statement about the shootings. "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment," *see* ***Colorado v. Connelly***, 479 U.S. 157, 167 (1986), but even the presence of coercive police activity "does not, in and of itself, establish involuntariness." ***State v. Deets***, 187 Wis.2d 630, 635, 523 N.W.2d 180, 182 (Ct. App. 1994). In addition, a defendant's custodial statement "is not presumed compelled simply because interrogators may have taken it in violation of ***Miranda***." ***State v. Camacho***, 170 Wis.2d 53, 75, 487 N.W.2d 67, 77 (Ct. App. 1992), *rev'd on other grounds*, 176 Wis.2d 860, 501 N.W.2d 380 (1993).

The trial court's findings that Ellis spoke to Officer Orlowski about the shootings and that he did so without police prompting are not clearly erroneous *See* § 805.17(2), STATS. (trial court's findings of fact will not be reversed unless clearly erroneous). Ellis's own testimony indicates that his statement was voluntary. Ellis admitted that because of numerous prior contacts with the police he was aware of his ***Miranda*** rights. He also admitted that he voluntarily chose to speak with Officer Orlowski. Neither Officer Orlowski nor Ellis testified that Officer Orlowski asked questions about the shootings, other than the two clarifying questions Officer Orlowski asked after Ellis began supplying information about the shootings. Ellis denied telling Officer Orlowski about the shootings, but the trial court found that testimony not credible, another finding that is not clearly erroneous.

While it is undisputed that Officer Orlowski was courteous and "nice" to Ellis, we are aware of no case law suggesting that courteous behavior by police toward an arrestee is inherently coercive. There was no evidence presented to suggest that Officer Orlowski was attempting, by behaving courteously, to undermine Ellis's desire to remain silent. We cannot and will not hold that police courtesy toward a prisoner is coercive behavior as a matter of law.[5]

[5] In support of his contention that Officer Orlowski's gentle manner was coercive, Ellis cites to ***Woods v. Clusen***, 605 F. Supp. 890 (E.D. Wis. 1985), a case that holds "gentle inducements" can be unconstitutional in certain circumstances. In ***Woods***, the person being questioned was a juvenile with no prior criminal record. His shoes and clothes were taken and he was permitted to wear only jail coveralls. ***Id***. at 897. He was placed in an interrogation room where "he was confronted with

By the Court.—Judgments affirmed.

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

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gruesome photographs" of the crime for which he had been arrested. ***Id***. He was not given his ***Miranda*** rights and he was not asked if he wished to submit to an interrogation. ***Id***. at 893. There was evidence that one police officer cajoled the defendant and misrepresented the evidence in police possession. ***Id***. at 897. The other officer was "fatherly," and offered advice to Woods that things would "be easier" or "go better" if Woods confessed. ***Id.*** Woods confessed after lengthy questioning by police.

The facts here are easily distinguished from ***Woods***. Ellis had experience with the criminal justice system and was aware of his ***Miranda*** rights from that experience. Officer Orlowski was alone with Ellis, and merely indicated that he was familiar with some of his background. Ellis began telling Officer Orlowski about the shootings without any prodding from the police officer shortly after they began filling out the show-up. Officer Orlowski asked no specific questions about the crime and there is no allegation that he made any representations about the crime or what information police had about the crime. There was no evidence that Officer Orlowski cajoled Ellis. When he asked questions, he did so in an attempt to understand the terms Ellis was using. The record is devoid of any indication that Ellis gave his statement involuntarily because his will had been overridden by Officer Orlowski's courtesy.