COURT OF APPEALS
DECISION
DATED AND RELEASED

November 1, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-2614-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE GREEN-WHITAKER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Dale Green-Whitaker (the defendant) appeals from a judgment convicting her of first-degree intentional homicide in the death of her mother and from an order denying her postconviction motion for a new trial. She argues counsel was not timely appointed for her and the evidence was insufficient to support the guilty verdict. We disagree and affirm.

An August 6, 1992, criminal complaint charged the defendant in the January 5, 1984 death of her mother, Helen Acheson. The complaint was based upon statements the defendant made in February 1992 to Detective Mark Stigler of the Waukesha police department that she suffocated her mother with a pillow in 1984. At the time she confessed to suffocating her mother, the defendant was in the Waukesha County jail after having been found guilty of sexually assaulting her son. Other relevant facts will be stated as we address the issues on appeal.

APPOINTMENT OF COUNSEL

The defendant argues that the state public defender failed to timely appoint counsel for her when she was being investigated by the police about possible criminal activity. As a consequence, she argues that she gave inculpatory statements to the police which were used against her at trial. She contends that the state public defender's operating procedures and guidelines establish a right to counsel which is subject to procedural due process protections of the Fifth Amendment to the United States Constitution.

On February 2, 1992, while she was in the Waukesha County jail after having been convicted of sexually assaulting her son, the defendant left a telephone message at the Waukesha police department saying that she wanted to speak with Detective Lee Houk.[1] When Houk visited the defendant at the jail the next day, she told him that she wanted to tell him about other crimes with which she could possibly be charged. Houk advised the defendant of her ***Miranda*** rights; she stated that she wanted to speak with him without an attorney. The defendant then told him that she was going to prison for a long time and was afraid other things she had done would come back to haunt her. She then admitted physically abusing her daughter and attempting to smother her daughter with a pillow several times. Houk advised the defendant that he would relay this information to the district attorney and would get back in touch with her.

[1] Houk had been involved in the sexual assault case but was not investigating any matter involving the defendant at the time she asked to see him.

On February 5, the defendant contacted the state public defender's local office requesting counsel "for some possible new charges ... of attempt [sic] homicide and murder." The next morning, Assistant Public Defender Yvonne Vegas spoke with the defendant about appointing counsel. The defendant told Vegas that she believed she was a suspect in a homicide investigation and that two officers had questioned her the day before about untrue allegations being made by her family. The defendant told Vegas that she had not made any incriminating statements to the police. Vegas advised the defendant not to make any further statements to the police and directed her to immediately notify the public defender if the police returned to speak with her further. Vegas informed the defendant that an attorney would be appointed for her if she called.

That afternoon, the defendant again contacted the Waukesha police department to speak with an officer. Detective Mark Stigler went to the jail without any idea of what the defendant wanted to say. The defendant told him that she killed her mother in 1984 by smothering her with a pillow. After the defendant made this startling admission, Stigler advised her of her ***Miranda*** rights. The defendant waived her rights, including her right to an appointed attorney, and made a statement regarding the specifics of the murder.

On February 11, Houk, aware that the defendant had made incriminating statements to Stigler, returned to the jail to speak with the defendant. Houk advised the defendant of her ***Miranda*** rights, and she waived them. The defendant told the detective that she spoke with her brother on February 5 and that her brother told her the family was questioning the circumstances of her mother's death. Based upon his experience in the criminal justice system, her brother advised her to admit all of her criminal conduct before going to prison. The defendant told Houk that she was bothered by her conversation with her brother because she knew she had suffocated her mother. She stated that this is why she wanted to speak with an officer on February 6. The defendant then described the circumstances under which she suffocated her mother and further described how she had attempted to suffocate her daughter.

Houk also advised the defendant of her ***Miranda*** rights on February 12 when they met at the Waukesha police department. The defendant told Houk what led her to kill her mother. Houk also met with the defendant

on April 16 at the Taycheedah Correctional Institution. She waived her right to counsel and stated that she was aware her mother had been exhumed and wanted to know results of the autopsy. The defendant then made an incriminating statement to Houk. The public defender appointed counsel for the defendant in May 1992.

The defendant argues that she had a Fifth Amendment due process right under the United States Constitution to the appointment of counsel as of February 6, 1992, the date she met with counsel from the public defender's office.

Our analysis of the defendant's argument falls into two parts. First, we examine whether the defendant had a due process right to counsel. We then turn to whether the defendant waived her right to counsel.

The defendant finds her due process right in the state public defender's March 1994 policies and procedures manual. The manual permits case credit for attorneys who "giv[e] advice to a client who is being investigated, anticipates being charged in the future, and needs an attorney but who is never charged ...."

To be subject to due process protection, an entitlement must be legitimate and have its roots in "an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." ***Board of Regents v. Roth***, 408 U.S. 564, 577 (1972). Such an independent source can be state law or an administrative rule or policy. *See* ***id.*** at 578.

We do not agree that the state public defender's policies and procedures manual created an entitlement to counsel subject to due process clause protection. The manual is not a statute or administrative rule. The excerpt relied upon by the defendant is part of a list of case activity which requires approval for case credit. The defendant attempts to transform this list into a requirement that the state public defender represent all financially eligible persons who are being investigated or anticipate being charged in the future. The manual does not mandate such representation; rather, it establishes

guidelines by which an attorney can receive case credit for such representation.[2] The defendant does not refer us to any portion of ch. 977, STATS., or rule in WIS. ADM. CODE CH. SPD, which requires the appointment of counsel under the circumstances outlined in the excerpt or under the facts of this case.[3]

Although the defendant also claims an entitlement to counsel under the Wisconsin Constitution, we are not persuaded by her argument. The cases cited by the defendant discuss the appointment of counsel after criminal proceedings have begun. *See* ***Sparkman v. State***, 27 Wis.2d 92, 98, 133 N.W.2d 776, 779-80 (1965) (appointment of counsel at preliminary examination). Here, the defendant was not subject to criminal proceedings when she contacted the state public defender.

Even if we were to conclude that the defendant was entitled to counsel, we would conclude that she waived that right. *See* ***State v. Beaver,*** 181 Wis.2d 959, 966, 512 N.W.2d 254, 256 (Ct. App. 1994). The defendant does not claim that she did not knowingly and intelligently waive her right to counsel. *See* ***id.*** She initiated contact with the police on several occasions to discuss criminal conduct and made incriminating statements each time. Contacts with the police after the morning of February 6 contravened Vegas' specific advice not to make any further statements to the police. Each time she met with the police, the defendant received ***Miranda*** warnings. The defendant never told authorities that she had contacted the state public defender, never invoked her right to counsel, and never advised the state public defender that she was continuing to have contact with the police.

SUFFICIENCY OF THE EVIDENCE

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[2] We acknowledge that Robin Dorman, First Assistant State Public Defender for the Waukesha region, testified at the defendant's postconviction motion hearing that the defendant should have received representation in February 1992. However, this view does not detract from our holding that the defendant did not have a due process right to counsel. Rather, the testimony merely means that in retrospect the state public defender believes it should have appointed counsel, not that it was obligated to do so.

[3] Because we conclude that the defendant did not have a due process right to counsel under the facts of this case, we need not address her claim that her trial counsel was ineffective for failing to explore why she did not receive counsel until May 1992.

The defendant claims that the evidence was insufficient to convict her. Specifically, she argues that her confession was not corroborated and, without a confession, the evidence was not sufficient to demonstrate that she committed the crime.

While a conviction may not be grounded solely on the defendant's admission or confession, all of the elements of the crime need not be proved independently of the confession. ***State v. Verhasselt,*** 83 Wis.2d 647, 661-62, 266 N.W.2d 342, 349 (1978) (quoted source omitted). There need only be corroboration of a "significant fact" to sustain the conviction. *See* ***id.*** at 662, 266 N.W.2d at 349 (quoted source omitted).

In her various statements to police, the defendant stated that in the early morning hours of January 5, 1984, she suffocated her sleeping mother with a pillow. She testified that the evening before the murder, she and her mother had a big argument. Her mother had passed out due to the effects of alcohol, and the defendant entered her room and smothered her with a pillow. She stated that her mother fought little and that she held the pillow over her mother's face until she stopped moving. The defendant then placed her mother's arms by her side and left the room.

At trial, one of the defendant's sisters, Linda Versailles, testified that her mother telephoned her on the evening of January 4, 1984. Her mother was upset and crying but would not say why. This testimony corroborates the defendant's statement that she and her mother had a big argument on the night of her mother's death. From this evidence, the jury could infer that the defendant had a motive to kill her mother. *Cf.* ***Schultz v. State,*** 82 Wis.2d 737, 754-55, 264 N.W.2d 245, 253-54 (1978) (evidence of recent marital disturbance corroborated defendant's murder confession).

The defendant's description of the manner in which she smothered her mother, who slept alone, is supported by other evidence in the case. The defendant's stepfather testified that he and his wife slept separately. Additionally, officers who responded to the scene confirmed the defendant's description of the scene as she left it after smothering her mother. While the defendant might argue that she obtained her knowledge of the scene because she saw the body in the morning, the jury was free to infer that she obtained this

information because she set the scene after the murder. The details of the murder scene were also corroborated by one of the defendant's brothers.

The defendant stated that her mother was drunk on the night she died. On autopsy, her mother had alcohol in her liver and kidneys, and relatives stated that she regularly consumed alcohol. Additionally, there was testimony at trial that elderly and frail people, particularly when incapacitated by alcohol, are classic victims of homicide by smothering. The defendant's mother fit this victim profile. *Cf.* ***Schultz,*** 82 Wis.2d at 752, 264 N.W.2d at 252 (height and weight of female victim supported conclusion that victim was strangled as stated in defendant's confession).

The defendant's statement that she smothered her mother with a pillow was also corroborated by other evidence in the case. Pathologists testified that autopsy results were consistent with a death by suffocation and revealed no other explanation for the victim's death. We conclude that the defendant's confession was sufficiently corroborated by other evidence at trial.

The defendant argues that the pathologists relied heavily upon her confession in determining the cause of death. We have already observed that the defendant's confession was not made in violation of her right to counsel and we have held that it was sufficiently corroborated. Therefore, the pathologists' testimony is not undermined by their reliance on the defendant's confession.

The defendant also argues that her incriminating statements were not reliable because she is alcohol dependent and suffers from a borderline personality disorder and recurrent major depression. While there was psychiatric testimony to this effect, the jury was free to weigh it and draw reasonable inferences from it. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990); *see also* ***Krueger v. Tappan Co.,*** 104 Wis.2d 199, 203, 311 N.W.2d 219, 222 (Ct. App. 1981) (jury not bound by expert's opinion, even where opinion is uncontradicted). The jury could accept or reject the psychiatric testimony and consider it in light of the evidence corroborating the defendant's confession.

By the Court.—Judgment and order affirmed.

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