COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP981-CR **Cir. Ct. No. 2008CF2149**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL J. DEHNE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Paul J. Dehne appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree reckless homicide. Dehne also appeals from an order denying his postconviction motion for a new trial. Dehne contends that he did not validly waive his rights under

Miranda v. Arizona, 384 U.S. 436 (1966), because the detective interviewing him provided misleading information. We reject this argument and affirm.

¶2 Dehne was questioned regarding the death of a co-worker, Christopher Angus, who had been asphyxiated by a homemade safety harness. Angus had been wearing the harness, which he had attached to a rope looped over an I-beam in the factory where both men worked.[1] During the course of an argument, Dehne pushed Angus, causing him to fall from a staircase and begin hanging from the beam. Part of the harness dislocated and slipped up around Angus's throat, ultimately choking him to death. Dehne watched Angus struggle for approximately a minute, doing nothing to assist him despite knowing that the harness was cutting off blood and oxygen to Angus's brain and despite knowing that Angus's death was a possibility.

¶3 When originally interviewed by police, Dehne denied knowing anything about Angus's death and had even assisted Angus's family in searching the factory for him after the family reported Angus missing. Approximately a week later, Dehne was interviewed by Detective Michael Braunreiter, who recorded their conversation. Dehne ultimately provided an incriminating statement, facts from which were later incorporated into the criminal complaint. The next day, Dehne was interviewed again, and he confirmed the first statement.

¶4 Dehne moved to suppress the first statement based on potential ***Miranda*** violations—specifically, whether Dehne had invoked the right to counsel

[1] The harness was evidently not work-related. Rather, it appears that Angus enjoyed rock or wall climbing, and it may have been that he set up the harness so that he could climb a wall at the factory.

from the outset of the interview with Braunreiter, whether Braunreiter had provided misleading information about Dehne's rights, and whether Dehne's statements were voluntary. Dehne also sought to suppress the second, confirmatory statement under the "fruit of the poisonous tree" doctrine. *See* ***Wong Sun v. United States***, 371 U.S. 471 (1963).

¶5 The circuit court denied the motion to suppress.[2] It noted that Dehne had been properly advised of his ***Miranda*** rights and found that Dehne understood those rights; that Dehne had made only an ambiguous reference to counsel, which Braunreiter properly handled by reiterating that the choice was Dehne's; that Dehne made a knowing, intelligent, and voluntary waiver of his rights; that there had been no improper or coercive police tactics; and that Dehne's statement was voluntary.[3] Dehne was then tried and convicted of first-degree reckless homicide, and sentenced to twenty years' initial confinement and ten years' extended supervision.

¶6 Dehne filed a postconviction motion for a new trial, renewing his argument that suppression should have been granted because of misleading information from Braunreiter. Dehne argued that although pretrial counsel had raised the issue, she had not really developed her argument, causing the circuit court to overlook the issue. The circuit court denied the motion, noting that counsel had raised the issue, and it was reasonable to assume that the circuit court

[2] The case was originally assigned to the Honorable John Franke, who issued an oral decision on the suppression motion. The case was subsequently transferred to the Honorable Jeffrey A. Conen, who presided over the trial and denied the postconviction motion.

[3] Implicitly, then, the "fruit of the poisonous tree" argument regarding the second statement was necessarily rejected.

had considered all aspects of counsel's argument when making its decision. Dehne appeals.

¶7 "[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation[.]" ***Miranda***, 384 U.S. at 471. If a statement is given without an attorney present, the State has the burden to show the defendant knowingly and intelligently waived the privilege against self-incrimination and the right to counsel. ***Id.***, 384 U.S. at 475.

¶8 When the admissibility of a confession or other statement by the defendant is challenged, courts conduct hearings designed to examine, among other things, "whether an accused in custody received ***Miranda*** warnings, understood them, and thereafter waived the right to remain silent and the right to the presence of an attorney[.]" ***State v. Jiles***, 2003 WI 66, ¶25, 262 Wis. 2d 457, 474, 663 N.W.2d 798, 806 (boldface added). "[E]vidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." ***Miranda***, 384 U.S. at 476.

¶9 The circuit court's findings of evidentiary or historical fact will not be overturned unless clearly erroneous. ***State v. Berggren***, 2009 WI App 82, ¶23, 320 Wis. 2d 209, 228, 769 N.W.2d 110, 119. We independently review the facts to determine whether any constitutional principles have been violated. ***Ibid.***

¶10 Here, Dehne alleges that his waiver of the right to counsel was involuntary and unknowing because Braunreiter gave him misleading information about the right. Specifically, Dehne complains:

> Here, the officer told Mr. Dehne, "If you wanna talk to me, you have to understand you'll do so without a lawyer present, OK?" … About 30 minutes later, repeatedly told Mr. Dehne if he wanted an attorney, they had to stop talking "because those are the rules" but if he didn't want an attorney, he could continue to talk to the officer.

Dehne contends this was misleading because the right to counsel is the right to have counsel *during* an interrogation. *See* ***Miranda***, 384 U.S. at 471. Thus, because Braunreiter misled him, Dehne argues he could not have validly waived the right to counsel, and his first statement should have been suppressed.

¶11 It is not wholly clear that Dehne's representation of Braunreiter's statement is accurate. Pretrial counsel had a secretary prepare a transcript of the recorded interview, from which appellate counsel now cites. However, when the recording was played in open court, the court reporter transcribed as follows:

> Well, with that statement from you, now in my mind, in my heart, I (unintelligible) identify if you want to talk to me, you have (unintelligible) and can do so without an attorney present, okay, because – and its gotta be – I'm not gonna break the rules.

There is no factual finding about what precisely was said, though the circuit court commented that Braunreiter had "emphasize[d] that this will be talking without a lawyer present and that it has to be clear."

¶12 Even using Dehne's interpretation of the recording, though, we discern no error: Braunreiter's statements were accurate. Once a defendant invokes the right to counsel, police must terminate their interview or interrogation of the defendant until counsel arrives or the defendant himself reinitiates the discussion. *See* ***Miranda***, 384 U.S. at 474; *see also* ***State v. Stevens***, 2012 WI 97, ¶¶48–49, 343 Wis. 2d 157, 178–179, 819 N.W.2d 798, 809. Once the right is invoked and the interrogation terminated, however, there is no constitutional

requirement that police ever resume the interrogation. Accordingly, Dehne was not "tricked or cajoled" into surrendering his rights. *See* ***Miranda***, 384 U.S. at 476. The circuit court properly rejected the postconviction argument that the first statement should have been suppressed.

¶13 Dehne also complains that his second inculpatory statement to police should be suppressed as "fruit of the poisonous tree" under ***Wong Sun*** because it was tainted by the improper acquisition of his first statement. However, ***Wong Sun***'s applicability to ***Miranda*** violations was effectively rejected by ***Oregon v. Elstad***, 470 U.S. 298 (1985). There, the Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questions is not thereby disabled from waiving his rights and confessing after he has been given the requisite ***Miranda*** warnings." ***Elstad***, 470 U.S. at 318.

¶14 Here, the circuit court concluded that the first statement was not improperly obtained, and we agree. For that reason alone, the attempt to suppress the second statement fails—that is, there is no poisonous tree whose fruits must be discarded. However, it is also undisputed that Dehne received proper ***Miranda*** warnings prior to giving his second statement. Consistent with ***Elstad***, those new warnings were sufficient in this case to make the second statement fully knowing and voluntary. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 359–364, 588 N.W.2d 606, 618–620 (1999). Thus, the second statement was not required to be suppressed, either, and the circuit court properly denied postconviction relief.

By the Court.—Judgment and order affirmed.

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