COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP233-CR **Cir. Ct. No. 2011CF428**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CAIN T. MOSS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Cain Moss seeks to vacate a judgment reflecting convictions for first-degree reckless homicide and hiding a corpse on the grounds that the circuit court should have suppressed evidence and erred in making evidentiary rulings at trial. Moss also argues that a new trial should be ordered

because the real controversy was not fully tried. For the reasons explained below, we reject these arguments and affirm.

BACKGROUND

¶2 The following facts were among those stipulated to by the parties and included in the circuit court's decision on the motion to suppress evidence.

¶3 On August 4, 2011, at approximately 11:00 a.m., an anonymous caller informed La Crosse police that Cain Moss and Christina Lorenz had used narcotics with "Tony" (subsequently identified as Anthony DuCharme), and that DuCharme had died. The caller alleged that Moss had hidden DuCharme's body at a location unknown to the caller.

¶4 Following leads from this caller, police located Moss and Lorenz shortly after 12:00 p.m. on August 4. Moss told police that he had smoked crack cocaine with DuCharme, but that Moss had no knowledge of where DuCharme had gone after that. In a separate interview, Lorenz told police that she, Moss, and DuCharme had consumed the pain medication Fentanyl at their residence on Wood Street, that DuCharme had died, and that Moss had taken DuCharme's body to another location, but that Moss would not tell Lorenz the location.

¶5 Police arrested Moss and Lorenz and transported them to the police department for questioning at approximately 1:23 p.m. Det. Sgt. Daniel Kloss went to speak with Robert Moss, Cain Moss's father, at the Wood Street address, where Kloss and Robert Moss were later joined, at 4:25 p.m., by Sgt. Matt Malott.

¶6 Meanwhile, at approximately 1:46 p.m. at the police department, police read Cain Moss a summary of his rights under ***Miranda***,[1] which he waived, during the course of a recorded interview. However, shortly thereafter Moss requested counsel. Police nevertheless continued to question Moss, without first allowing him access to an attorney. The State conceded before the circuit court that this violated Moss's constitutional rights, *see* ***Edwards v. Arizona***, 451 U.S. 477 (1981), and the State does not take a contrary position on appeal.

¶7 Under the continued questioning, Cain Moss agreed to take police to DuCharme's body. As directed by Moss, police found the body at approximately 2:25 p.m. on August 4, in a public park in La Crosse, more specifically an area called "Indian Hill."

¶8 At the Wood Street residence, Robert Moss told Sgt. Malott that he had driven Tyler Yogmas's vehicle to Leonard Erickson's residence and borrowed Erickson's van.

¶9 The next day, August 5, Sgt. Malott interviewed Yogmas. Yogmas said that on August 3, at about 9:00 p.m., Robert Moss had asked to borrow Yogmas's car, and that Yogmas brought his car to Robert Moss. Yogmas said that Patrick Valiquette was at the Moss residence when Yogmas brought his car, that Valiquette gave Yogmas and his son a ride to their home, and then, on August 4 at about 1:00 a.m., Valiquette returned Yogmas's car to Yogmas.

¶10 Police conducted a recorded interview of Valiquette on August 5. Valiquette said that on August 3 he had given Yogmas and his son a ride in

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

Yogmas's car and returned to the Moss residence. Robert Moss left and came back with Erickson's van. Valiquette said he then saw Cain Moss lift a big object, wrapped in blue and silver material, into the van, which Valiquette learned was a body. Valiquette said that he drove the van, at Robert Moss's direction, to the "Indian Hill" area. There, Cain Moss took the body out of the van and dragged it over a hill, before returning to the van without the body.

¶11 The circuit court found that "it does not appear that" police used "any information" they gained in the August 4 interview of Cain Moss during the August 5 interview of Valiquette.

¶12 In addition, the circuit court found that "[d]uring the time" that police interviewed Cain Moss on August 4, "Investigator Kloss and Officers Hanson and Pretasky were speaking with Robert Moss at a different location."

¶13 Cain Moss filed a motion to suppress statements that he made during the in-custody interview and all derivative evidence, based on the fact that he made these statements, including where police could find DuCharme's body, during the course of an interview that violated his constitutional rights. The circuit court granted the motion as to Moss's statements, but concluded that derivative evidence regarding DuCharme's body was admissible under the "inevitable discovery" doctrine.

¶14 At trial, the State presented evidence that Moss delivered Fentanyl to DuCharme, that DuCharme used it, and that the Fentanyl was a substantial factor in causing his death. Following a four-day jury trial, Moss was convicted of first-degree reckless homicide and hiding a corpse. We provide additional background below as necessary to specific evidentiary issues raised by Moss.

DISCUSSION

¶15 When reviewing an order denying a motion to suppress evidence, "[f]irst, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." ***State v. Tullberg***, 2014 WI 134, ¶27, ___ Wis. 2d ___, 857 N.W.2d 120 (quotation marks and citations omitted).

¶16 The inevitable discovery doctrine applies if the State demonstrates "by the preponderance of the evidence that the tainted fruits inevitably would have been discovered." ***State v. Avery***, 2011 WI App 124, ¶29, 337 Wis. 2d 351, 804 N.W.2d 216. The State must prove:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

Id. (quoting ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992)).

¶17 The circuit court denied the motion to suppress after determining that there was a reasonable probability that police would have discovered DuCharme's body reasonably promptly, even if the police had ceased the interview with Moss upon his request for an attorney, through either of two alternative means: (1) given the location of the body, approximately 37 feet from a road and in a public park with numerous amenities, the body would have attracted attention as it began to "decompose, emit an odor and attract carrion

eaters"; and (2) given the information Valiquette provided, as part of an investigation that did not depend on information that police gained from Moss after Moss invoked his right to counsel.

¶18 We need not address the first ground for the court's decision, because we conclude that the record supports the circuit court's determination that investigative steps already in motion at the time of Moss's in-custody interview, which did not depend on any information gained in that interview, would have led the police to discover DuCharme's body on or about August 5.

¶19 We reach this conclusion based on the facts summarized above. Putting aside the unconstitutional Cain Moss interview, police made separate, lawful efforts to move through a series of witness interviews to unearth details regarding the fate and location of the reported overdose victim. The circuit court determined that the police would have conducted a search and found the body based on statements from the last person in this chain of witnesses, Valiquette, and Moss does not dispute this determination on appeal.

¶20 Moss argues that Valiquette's revelation as to the location of the body might not have been an independent lead for police, but could instead have been tainted by the illegality of the unconstitutional interview of Moss, because it is "reasonable to infer that Valiquette knew," when police interviewed him, "that DuCharme's body had already been found." However, Moss fails to point to any suggestion in the record that this occurred, and we reject this argument on the grounds that it is premised on a factual assertion that is purely speculative.

¶21 One argument advanced by Moss on appeal focuses on scientific evidence used at trial arising from forensic analysis of DuCharme's body. Moss's argument is that, even if the discovery of the body is deemed to have resulted from

an alternate line of investigation, the State failed to prove that there was a reasonable probability that the autopsy and toxicology results admitted at trial would have been of equal probative power if the body had been discovered on August 5, based on Valiquette's statement, instead of on August 4, based on Moss's excluded statement, given the passage of time while exposed to the elements in hot weather.

¶22 The State argues that we should ignore this argument, because Moss did not make it to the circuit court at the time of the suppression hearing, and it is therefore forfeited. *See* ***State v. Caban***, 210 Wis. 2d 597, 604-08, 563 N.W.2d 501 (1997). In reply, Moss appears to concede that he did not raise the issue in his suppression motion or at the suppression hearing. Further, Moss does not dispute the following assertion by the State: "[E]ven at trial, [Moss] presented no evidence that results of the autopsy and toxicology that existed when the body was discovered August 4 (after the death occurred on August 2) would have been different if the body was not discovered until August 5 or after." Instead, Moss contends that he was not required to raise this issue in his motion or at the suppression hearing, because the State had the burden to prove each prong of the inevitable discovery test.

¶23 We agree with the State that it is too late for Moss to raise this scientific issue. *See* ***id.*** (defendant forfeited his right to raise issue of probable cause to search his vehicle by failing to include this issue in written motion to suppress and at suppression hearing). Moss did not argue in his suppression motion or during the suppression hearing that the forensic evidence regarding the body would have been different in any way that mattered if police had discovered the body on August 5 instead of on August 4, and, therefore, the State did not have the opportunity to respond to such an argument and the court did not have the

opportunity to decide it. It would blindside the circuit court to reverse based on a specific scientific question never raised in that court.

¶24 Moss challenges the circuit court's suppression decision regarding the second inevitable discovery doctrine requirement on the ground that police did not possess the leads making the discovery inevitable at the time of the misconduct. Moss argues that he invoked his right to counsel *before* Det. Sgt. Kloss went to speak with Robert Moss, and therefore the State cannot rely on the chain of interviews from Robert Moss to Yogmas to Valiquette. This argument is based on the fact that, after Moss was left alone in the police interview room, Moss "was heard saying 'I want a lawyer.'" Moss now submits that this occurred "as early as 1:27:07 p.m. on August 4," presumably before Kloss began to speak with Robert Moss.

¶25 As the State points out, one problem with this argument is that Moss stipulated to the fact that the violation of his rights occurred after he was read his ***Miranda*** rights at 1:46 p.m., and indeed he based his arguments to the circuit court on this premise. On this basis, the State argues that Moss "cannot be heard to argue for the first time on appeal that the police misconduct occurred at an earlier point in time." Moss fails to reply to this argument, which we construe as a concession that we accept. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838.

¶26 Further, even if Moss had not conceded this argument regarding the second element of the inevitable discovery test on appeal, there is another problem. The circuit court made a finding that Moss was alone in the room when he spoke of wanting an attorney. Moss fails to explain on what basis we could conclude that this was clearly erroneous, and does not point to any suggestion in

the record that Moss's statement was directed toward, and heard by, an officer. We agree with the State that "[a] request for counsel that is not heard or known by the police does not constitute an unequivocal request for counsel that requires the police to forgo questioning."

¶27 Turning to the third prong of the test, Moss argues that the State was not pursuing the alternate line of investigation that led to the key revelation by Valiquette *prior* to the misconduct. Moss bases this argument in part on the same timing argument we rejected above, and we reject this part of his argument for the same reason here.

¶28 Moss also asserts that the only "lead" that police received from Robert Moss occurred "sometime after 4:25 p.m." when Robert Moss told one of the officers that he had borrowed Erickson's van. However, Moss fails to explain why the timing of this "lead" matters for the purpose of determining whether the police were pursuing the alternate line of investigation, given the circuit court's finding that at least one police officer went to Wood Street to interview Robert Moss prior to Cain Moss's request to police that he have access to an attorney.

¶29 Moss also suggests that there is something about the relationship between Robert and Cain (that they are father-son, that they were alleged co-actors in hiding the corpse) which undermines the use of Robert's statements as being part of an alternate line in the investigation. However, we cannot discern a developed legal argument in these suggestions.

¶30 In sum, we are satisfied that, under the circumstances, the evidence in the record is sufficient to demonstrate a reasonable probability that DuCharme's body would have been discovered on August 5 by lawful means, even if the unconstitutional interview of August 4 had not occurred, that police possessed the

leads making the discovery inevitable at the time of the unconstitutional interview, and that police were actively pursing an alternate line of investigation before the unconstitutional interview.

¶31 We turn now to evidentiary decisions by the circuit court challenged on appeal. We uphold evidentiary rulings when the circuit court applied the correct legal standards to the pertinent facts "'and using a rational process, reached a reasonable conclusion."' ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850 (quoted source omitted). We review de novo whether the circuit court applied the correct legal standards. ***Id.***, ¶25.

¶32 Moss argues that the circuit court erred in preventing him from presenting evidence of DuCharme's long-term drug use history because such evidence would have showed that DuCharme was opiate tolerant at the time of his death, lowering the chances that Fentanyl intoxication was a substantial factor in causing his death. We reject this argument on the grounds that Moss forfeited an argument based on an opiate tolerance theory of admissibility in the circuit court by failing to raise it, including failing to make an offer of proof.

¶33 Moss does not contest the State's proposition that forfeiture is appropriate if he failed to raise this issue before the circuit court. Instead, he contends that he did raise the issue before the circuit court. However, the portions of the record he now points to fail to support this position. In the portions of the record Moss cites, he sought to allow the jury to hear evidence about drugs DuCharme might have consumed, without any suggestion that this evidence could be relevant to an opiate tolerance defense. Indeed, one portion of the record he cites on this issue confirms that he *affirmatively declined* to pursue any such theory of admissibility. Counsel for Moss agreed with the court that she was "not

going to be bringing in witnesses saying they saw Mr. DuCharme use drugs two months ago, or two years ago, or things like that to try to establish drug use."

¶34 Moss makes a related, but separate, argument that the circuit court violated his constitutional right to present a defense by admitting selective portions of evidence regarding DuCharme's drug use history, to the benefit of the State. However, a review of the passages of transcript cited by the parties reveals that the court appears to have been consistent in enforcing objections to evidence based on the following two rulings, which are not themselves inconsistent: (1) permitting the parties to ask questions about findings and conclusions in expert reports prepared for the case, and to this degree pertinent aspects of DuCharme's drug use were potentially before the jury, and (2) accepting Moss's concession, referenced above, that DuCharme's general history of drug abuse was not relevant.

¶35 Raising a separate evidentiary issue, Moss challenges rulings of the circuit court regarding the scope of testimony by his expert, James Oehldrich, on the grounds that the court applied an improper expert testimony standard that prohibited Moss's expert from testifying to the cause of DuCharme's death. The court informed Oehldrich that he did not have to be "definitive[]," but that his testimony had to go beyond "just speculation." We reject Moss's argument because Moss fails to explain how the court's characterization of the obligations of any witness, including expert witnesses, was in error, and because Oehldrich in fact testified to his opinion on the cause of death on both direct and cross-examinations.

¶36 The last evidentiary issue Moss raises challenges one piece of evidence admitted during the testimony of the medical examiner, namely, the admission of toxicology reports, which were attached to the autopsy report. Moss

argues that the court should have required the testimony of persons who actually took and analyzed the blood and urine samples. Moss acknowledges that he did not object to admission of the reports at trial, but argues that the reports lacked authentication and constituted hearsay and therefore their admission constitutes plain error. Putting aside the details of review for plain error, we reject this argument on the grounds that Moss fails to provide a sufficient reason to distinguish his arguments from those recently rejected by this court in ***State v. Heine***, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409.

¶37 The rationale of ***Heine*** applies here: the testimony of the medical examiner (as it happens, the same medical examiner in this case) that he regularly relied on toxicology reports in opining about cause of death "laid the proper foundation for him to have relied on the toxicology report irrespective of whether that report was admissible into evidence or disclosed to the jury," and the medical examiner was "no mere conduit for the toxicology report." *See* ***id.***, ¶¶14-15.

¶38 Moss argues briefly that, individually and collectively, the effect of the alleged errors that we discuss above is that "the real controversy has not been fully tried" and that we should grant a new trial pursuant to WIS. STAT. § 752.35 (2011-12). We decline to exercise this discretionary power in this case. This is a power to be exercised "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). The litigation to date and briefing in this appeal do not demonstrate that this is the rare appeal showing that the real controversy has not been fully tried.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).