COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1433-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH KOROTKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: ROGER MURPHY, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Kenneth Korotka entered a no contest plea resulting in a judgment of conviction of second-degree reckless homicide, homicide by intoxicated use of a motor vehicle, and failure to stop and render aid, causing death. Korotka appeals and the sole issue is whether his written statement to a sheriff's detective should have been suppressed because the detective did not

honor Korotka's invocation of his right to silence. We conclude that the error was harmless and affirm the judgment of conviction.

¶2 In the early morning hours of May 14, 1998, Korotka struck and fatally injured a construction worker while driving on closed portions of an interstate highway. Korotka did not stop but was detained after exiting the highway a few miles farther up the highway. After Korotka was placed under arrest by Waukesha County Sheriff Deputy Juan Rodriguez, he was advised of his constitutional rights. Asked if he wished to make any statement, Korotka indicated: "I know my rights, I'm not saying anything."

¶3 Korotka was taken to the hospital for a blood draw. He was again advised of his rights. Korotka told Rodriguez that he did not want to answer any questions on the form and Rodriguez did not question Korotka any further. Five to ten minutes later, sheriff's detective James Kindt spoke to Korotka. Kindt asked Korotka if he had any questions about what had happened. Korotka asked what happened and indicated that "some guy said I killed somebody." During the conversation, Korotka told Kindt that he thought he hit something and that he exited the highway because his tire blew. Kindt prepared a two-page written statement summarizing what Korotka had told him. Korotka reviewed and signed the statement.

¶4 The trial court found that Korotka resumed the interrogation by asking Kindt what happened and by not indicating that he did not want to speak to Kindt. The court denied Korotka's motion to suppress the oral and written statements given to Kindt. The State does not defend the trial court's ruling. We take this as a confession of error with respect to the motion to suppress. *See*

Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶5 The State argues that Korotka abandoned his right to challenge the suppression ruling on appeal because he utilized his written statement. At sentencing, Korotka argued, as a mitigating factor, that he had provided a full statement admitting that he drank and drove and was cooperative with the authorities. The State contends that Korotka's use of his statement at sentencing was a strategy choice contrary to his previous position that the statement should be suppressed. *See* ***State v. Jones***, 179 Wis. 2d 215, 225, 507 N.W.2d 351 (Ct. App. 1993); *see also* ***State v. Fleming***, 181 Wis. 2d 546, 557-58, 510 N.W.2d 837 (Ct. App. 1993) (litigant should not be permitted to manipulate the judicial system by arguing inconsistent positions).

¶6 We reject the State's waiver argument. In ***Vanlue v. State***, 87 Wis. 2d 455, 462, 275 N.W.2d 115 (Ct. App. 1978), *rev'd on other grounds*, 96 Wis. 2d 81, 291 N.W.2d 467 (1980), we recognized that efforts to minimize the prejudicial impact of evidence that the trial court has, over the defendant's objection, ruled admissible do not constitute a strategic waiver. Korotka objected to admission of his statement and tried to minimize the impact of the trial court's ruling by alluding to the statement at sentencing. The holding in ***Vanlue*** must be adhered to and the State should not assert waiver.

¶7 The State also argues that the denial of Korotka's motion to suppress was harmless error. Korotka counters that without a trial, the effect of the error cannot be evaluated. ***State v. Armstrong***, 223 Wis. 2d 331, 367-68, 588 N.W.2d 606 (1999), was an appeal taken after entry of a no contest plea and the court applied a harmless error analysis to the trial court's refusal to suppress a statement.

The court concluded that because the suppressed oral statements were only cumulative evidence of guilt, there was no basis for believing that Armstrong would not have taken the plea agreement or would not have been convicted had suppression been ordered. *See* ***id.*** at 370-71.

¶8 Korotka attempts to distinguish ***Armstrong*** on the grounds that the cumulative nature of the written statement here is not as clear as it was in ***Armstrong***. As evidence of weaknesses in the State's case, Korotka cites the prosecutor's statement at a pretrial hearing that the prosecutor "began to fear" that there would be no conviction for reckless homicide if the case went to trial. We place little significance on the prosecutor's then assessment of the case. In reality, the State had a very strong case without the written statement.

¶9 The complaint relates how construction workers followed Korotka after the accident and confronted him when he exited the highway. The workers reported that Korotka asked, "What did I hit?" The first responding officer to the place where Korotka was detained by the construction workers reported that Korotka appeared to be severely intoxicated and acknowledged that he had been in an accident and would take responsibility for it. Before his arrest, Korotka told officer Rodriguez where he got on the highway and that he was heading home. He also said that he knew he had hit something while driving in the right lane but that he did not see what he hit. Not only did these statements not vary significantly from what Korotka told Kindt, but witnesses would testify about the location of construction barrels and vehicles with flashing yellow lights, signs and reflective tape. The workers indicated that Korotka was travelling at a high rate of speed and was unaffected by their attempts to warn him. These witnesses would have had a more compelling impact than anything contained in Korotka's written statement. When tested after the accident, Korotka's blood alcohol level was

0.152%. Given the evidence that Korotka was driving while intoxicated, this is a case like ***Armstrong*** where there is no basis for believing that Korotka would not have entered his plea or not have been convicted if his written statement had been properly suppressed. The error was harmless.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).