

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2014AP2261-CR

Cir. Ct. No. 2010CF294

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES G. WIESE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
JON M. COUNSELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Wiese appeals a judgment of conviction for manufacturing THC and felon in possession of a firearm. Wiese challenges the denial of a suppression motion, arguing that the circuit court erred by concluding Wiese did not unequivocally invoke his right to silence during police questioning

such that officers had to end the interview. Assuming without deciding that Wiese invoked the right to remain silent, we conclude that Wiese validly waived that right by initiating further communication with the police. We therefore affirm the conviction.

¶2 The Portage County Sheriff's Department conducted several months of surveillance and investigation of Wiese's property and a neighboring lot after an informant told police that the informant had observed a marijuana plant on property near where Wiese was living.

¶3 Several officers interviewed Wiese as part of the investigation. Wiese admitted sole responsibility for the marijuana grow operation. A subsequent search of a trailer on the property pursuant to a search warrant revealed grow lights and other items used to grow and cultivate marijuana plants, several .308 caliber AR-10 assault rifles, a 12-gauge shotgun, ammunition, 35 other marijuana plants, marijuana growing catalogs and magazines, and prescription pills. The search also revealed that one of the rooms of the trailer had been converted into a grow chamber. An amended Information charged Wiese with manufacturing THC; felon in possession of a firearm; two counts of bail jumping; possession of prescription drugs without a prescription; and possession of drug paraphernalia.

¶4 Wiese moved to suppress his statements and any derivative evidence on the grounds that he had invoked his right to remain silent during questioning, and the police failed to honor that invocation. The circuit court denied the suppression motion, concluding that Wiese did not unequivocally invoke his right to remain silent. Wiese subsequently pleaded no contest to manufacturing THC

and felon in possession of a firearm, and the remaining charges were dismissed and read in. Wiese now appeals.

¶5 “Whether a person has invoked his or her right to remain silent is a question of constitutional fact.” *State v. Cummings*, 2014 WI 88, 357 Wis. 2d 1, ¶43, 850 N.W.2d 915. When presented with a question of constitutional fact, we engage in a two-step inquiry. First, 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. *Id.*, ¶44.

¶6 After a suspect has been given *Miranda* warnings,¹ and waived those rights, the suspect retains the right to remain silent, which includes the right to cut off questioning during a custodial interrogation. *See Cummings*, 357 Wis. 2d 1, ¶47. In order to cut off questioning under these circumstances, a suspect must unequivocally invoke the right to remain silent. *Id.*, ¶48. Once a suspect has invoked the right to remain silent, all police questioning must cease, unless the suspect later validly waives that right and initiates further communication with the police. *Id.*, ¶52.

¶7 Wiese argues that he unequivocally invoked his right to remain silent, and the officers questioning him understood his statement to be an invocation of that right. Assuming without deciding that Wiese invoked the right to remain silent, we conclude that Wiese validly waived that right by initiating further communication with the police.

¹ Referring to *Miranda v. Arizona*, 384 U.S. 436 (1966). There is no dispute in the present case that Wiese waived his *Miranda* rights.

¶8 The transcript of Wiese's recorded statement was entered into evidence at the suppression hearing. At the commencement of the statement, Wiese waived his *Miranda* rights. The officers then asked Wiese questions concerning his current place of residence, and the conversation turned to whether Wiese was going to be incarcerated that day. Wiese stated, "You're, you're the boss. But I, I really would not like that to happen. But I, but I need to hear it from you before I proceed any further with anything." One of the officers told Wiese that he would be going to jail. Wiese stated, "And I can't do anything to dissuade you? I can't give you anything?" The officers told Wiese that providing information may benefit him in the long run but they also stated "it's your decision what you want to do Jim."

¶9 Shortly after that, the following exchange occurred:

Wiese: Mm. Then I guess I have the right to remain silent. That's, that's too bad.

[Officer]: Okay. That's your choice. Are you sure?

Wiese: Well at this point, you know. I mean at this point.

[Officer]: Okay.

[Officer]: If that changes, let us know at any point. You know.

Wiese: But what would that do? I mean I, why do you have to charge me? I mean why can't you just

[Officer]: Well because the decision has been made that you're gonna go to jail

....

[Officer]: We're [] looking to get the truth. We're just looking to sit and have a conversation with you. Um, you know, you got a lot riding on your plate.

Wiese: But what would the conversation be? It, it'd be on, be on me implicating uh, myself uh, with some admission if it

[Officer]: It, it would. Yes.

Wiese: But, but uh, beyond that, that's as, I, I think that's as far as you would [] go. You'd just secure, you know

[Officer]: Well it would be you being honest, you know, and forthcoming.

Wiese: Yup. Well it'd be, be, I mean about others or about

[Officer]: Well mainly right now about you.

Wiese: Yeah. Yeah.

[Officer]: And like John said, this doesn't prevent you from giving us information or dealing with us later.

¶10 The conversation continued, with the officers further indicating that “one of the reasons that obviously we'd like to talk to you right now [is to] have you own up for the things that you're responsible for.” However, the officers emphasized that anything he said would not prevent the State from going forward with charges. “Is it gonna do any more than that for you at this point? At this point, probably not. You're still going to jail.”

¶11 The interview continued, during which Wiese indicated some hesitation about talking to the officers. When told by an officer that they wanted “to get a statement from [him] now,” Wiese told the officers that he was “struggl[ing] with that” because he did not know what evidence they had on him. The officers responded by accurately telling Wiese that they had physical evidence to support charges of marijuana manufacturing. The interview went on without

Wiese again bringing up his right to silence and Wiese eventually admitted sole responsibility for the marijuana grow operation.

¶12 The record supports the conclusion that Wiese understood his right to silence, understood he was waiving that right, and voluntarily participated in the interview. As the circuit court correctly observed, Wiese expressed a deliberate choice to continue the interview immediately after the officers told Wiese to let them know if he changed his mind:

[A]fter the officers say, all right, let us know if you change your mind and they appear to be done, the defendant continues to ask questions.... It is a statement that says, ... well, I want to keep talking.

¶13 Wiese contends that he did not reinitiate questioning, but “folded under the pressure of continued interrogation after invoking his right to remain silent.” However, the officers did not even indirectly pressure Wiese, and there is no legitimate basis to conclude that Wiese’s immediate initiation of further communication with police was in any way coerced. As mentioned, it was Wiese who initiated further communication, and the officers thereafter encouraged Wiese to be honest and forthcoming while reminding him that talking to them was his decision and would not result in dropped or lowered charges.

¶14 The officers also specifically reminded Wiese several times that he could end the interview. The officers stated, “You can stop talking, you know that,” to which Wiese replied, “Yep.” The officers later stated, “All you have to say is you don’t want to talk.” In fact, the transcript reveals that Wiese exercised his ability to decline to answer particular questions. For example, when he was asked about whether another individual was involved in the grow operation, Wiese

told the officers, “I’m not willing to speak to that,” and the officers moved on to other topics.

¶15 We conclude that Wiese’s unprompted initiation of further communication qualified as a “course of conduct indicating waiver” of his right to remain silent. *See Berghuis v. Thompson*, 560 U.S. 370, 386 (2010) (quoted source omitted). The circuit court properly denied Wiese’s suppression motion.

¶16 Because we conclude that Wiese’s communication operated as a valid waiver, we need not reach other issues raised such as harmless error. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

