

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 6, 2016**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal No. 2015AP590-CR**

**Cir. Ct. No. 2014CF569**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JOHNNIE MERTICE WESLEY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Curley, P.J., Brennan and Brash, JJ.

¶1 BRASH, J. Johnnie Mertice Wesley appeals a judgment convicting him of felony murder. Wesley argues that the circuit court erred when it denied his motion to suppress statements he made to law enforcement officers. Specifically, Wesley argues: (1) that officers did not scrupulously honor his

requests to remain silent; and (2) he unequivocally invoked his right to remain silent during his third custodial interrogation. We disagree and affirm.

### **BACKGROUND**

¶2 On February 5, 2014, Wesley was arrested and taken into custody in connection with the shooting death of Bruce Lloyd on February 3, 2014. On February 6, 2014, at approximately 11:43 a.m., Detective Katherine Spano spoke with Wesley (first interrogation). Detective David Dalland was also present at the first interrogation. Dalland did not ask any questions during the first interrogation; he only observed the interaction between Wesley and Spano.

¶3 During the course of the first interrogation, the following exchange occurred between Spano and Wesley:

WESLEY: You got reason to believe I was responsible?

SPANO: Yes—and that’s what I wanna talk to you about okay? Umm—then—there’s a lot of information coming out—there’s a lot of—a lot of stuff going on with this case—

WESLEY: About me?

SPANO: Yea—about you—but before I can talk to you about all of that—I have to have an understanding with you—that you’re willing to chat with us about it.

WESLEY: Hell nahh-cuz I ain’t kill nobody.

SPANO: Okay—so you don’t want to talk to us about it—you don’t want to answer my questions?

WESLEY: I ain’t making no statements about no murder—

SPANO: Okay.

WESLEY: Cuz I ain’t kill nobody.

SPANNO: Okay—so you don't want to—so you don't wanna even hear me—can I at least read you your rights so you understand your rights?

WESLEY: I don't wanna know nothing about no—

SPANNO: Okay.

WESLEY: —murder cuz I ain't kill nobody.

SPANNO: Okay—so you don't want to talk to me right now?

WESLEY: About no murder no.

SPANNO: You don't want to hear the facts or the story—

WESLEY: About no murder no—

SPANNO: —or the reasons of why we believe you were responsible?

WESLEY: No.<sup>1</sup>

¶4 Following this exchange, Spano told Wesley that she would leave it up to him if he wanted to talk to her and that he would be taken back to his cell. The first interrogation was terminated at approximately 12:02 p.m. No *Miranda*<sup>2</sup> warnings were given.

¶5 On February 6, 2014, at 9:27 p.m., approximately nine hours after the first interrogation was terminated, Detective Kevin Klemstein briefly spoke to Wesley (second interrogation). Wesley, however, indicated that he did not wish to

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<sup>1</sup> Transcriptions from the first and third interrogations appear throughout this decision. We reviewed the video recordings of these interrogations to ensure their accuracy, but we rely primarily on Wesley's brief for the language used in these transcriptions. We note that the State did not object to the substance of these transcriptions. We also acknowledge the heavy use of colloquial language throughout.

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

answer any questions.<sup>3</sup> No recording of the second interrogation exists because Wesley did not want to talk.

¶6 On February 7, 2014, at approximately 2:50 p.m., police brought Wesley to the interrogation room (third interrogation). Detective David Dalland, who was present during the first interrogation, and Detective Kent Corbett spoke to Wesley. At the outset of the third interrogation, the following exchange took place between Dalland and Wesley:

DALLAND: Look, listen, let me get through what I need to do first and then we can talk if that's what you want. Okay. Is that fair?

WESLEY: *Ain't nothing to talk about doe.* That's what I'm sayin. Ya'll steady questioning me about nothing I don't know nothing about. I don't do nothing. I sit in the house all day. I don't do nothing.

¶7 Following this exchange, Dalland read Wesley his *Miranda* warnings. Throughout the remainder of the third interrogation, Wesley made the following statements: (1) "I ain't got shit to say about no homicide"; and (2) "Can I go back to my cell now?"

¶8 Subsequently, Dalland asked Wesley if it was the plan that someone would get shot that night. Wesley responded no. Dalland then asked if it was the plan that someone would get robbed that night. Wesley responded "yeah, but I didn't go to the robbery, but he shot himself." Wesley went on to say that he attempted to rob Lloyd at gun point, that Lloyd tried to wrestle the gun away from

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<sup>3</sup> The State and the defense disputed whether Wesley made this statement in his cell or in the interrogation room. The circuit court did not resolve this dispute. Because all parties seemingly agree that no statements were made during the second interrogation other than Wesley indicating he did not wish to talk, we see no reason to address this issue.

Wesley, and that Lloyd was shot in the process. The third interrogation was terminated at approximately 6:31 p.m.

¶9 Wesley was charged with one count of felony murder, contrary to WIS. STAT. § 940.03 (2013-14).<sup>4</sup> According to the complaint, Wesley caused the death of Lloyd while attempting to commit armed robbery as party to a crime, contrary to WIS. STAT. §§ 943.32(2) and 939.05. The complaint further states that, during the third interrogation, Wesley told law enforcement, among other things: (1) that Wesley planned to rob Lloyd of his marijuana and whatever else Lloyd had; (2) that Lloyd drove to Wesley's girlfriend's house and Wesley got in the front passenger seat of Lloyd's car; (3) that Wesley pulled out a gun when Lloyd gave him a three gram bag of marijuana; (4) that Lloyd grabbed the barrel of the gun and the gun went off, shooting Lloyd; and (5) that after Lloyd got shot, Wesley got out of Lloyd's car and ran.

¶10 On March 25, 2014, Wesley filed a motion to suppress all statements, oral or written, made to law enforcement officers. Wesley argued that his statements "were not voluntarily given in that they did not reflect deliberateness of choice, but rather, a conspicuously unequal confrontation in which repeated and persistent pressures were brought to bear on [him] by law enforcement officers until they exceeded [his] ability to resist."

¶11 A hearing regarding Wesley's motion to suppress was held on April 28, 2014. At the hearing, Spano and Corbett testified regarding their interactions with Wesley. Wesley did not testify. Furthermore, video recordings of the first

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<sup>4</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and third interrogations were moved into evidence. At the conclusion of the hearing, the circuit court denied Wesley's motion. The circuit court found that Wesley had the ability to resist, there was no misconduct on the part of law enforcement, Wesley's statements were voluntary, and Wesley did not unequivocally invoke his right to remain silent in the third interrogation.

¶12 Subsequently, on May 27, 2014, Wesley pled guilty to felony murder. On July 2, 2014, the circuit court sentenced Wesley to twenty-seven years. This appeal follows.

### ANALYSIS

¶13 Wesley argues that officers did not scrupulously honor his requests to remain silent, and that he unequivocally invoked his right to remain silent during the third interrogation. We disagree.

#### I. Wesley's Right to Silence was Scrupulously Honored.

¶14 “Both the United States and Wisconsin Constitutions protect persons from state compelled self-incrimination.” *State v. Cummings*, 2014 WI 88, ¶46, 357 Wis. 2d 1, 850 N.W.2d 915 (citation omitted); *see also*, U.S. CONST. amend. V; Wis. CONST. art. I, § 8. “The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence.” *State v. Hartwig*, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985).

¶15 After an individual has invoked his right to silence, however, the State may interrogate him again if his right to silence was scrupulously honored. *See id.* In *Michigan v. Mosley*, 423 U.S. 96 (1975), the United States Supreme Court set forth several factors to analyze whether an individual's rights were scrupulously honored. *See id.* at 104-07. The *Mosley* factors are:

(1) The original interrogation was promptly terminated. (2) The interrogation was resumed only after the passage of a significant period of time. (In *Mosley* it was two hours). (3) The suspect was given complete *Miranda* warnings at the outset of the second interrogation. (4) A different officer resumed the questioning. (5) The second interrogation was limited to a crime that was not the subject of the earlier interrogation.

*Hartwig*, 123 Wis. 2d at 284. The *Mosley* factors, however, do not establish a test that can be rigidly applied. See *Hartwig*, 123 Wis. 2d at 284-85. Rather, the factors provide a framework of analysis to aid in determining whether a defendant's right to silence was scrupulously honored. See *id.* at 285. "It is not determinative, absent other evidence of police overbearing or coercive tactics, that all of the *Mosley* factors were not satisfied." *State v. Turner*, 136 Wis. 2d 333, 360, 401 N.W.2d 827 (1987).

¶16 A determination of whether a defendant's right to silence was scrupulously honored requires the application of constitutional principles to the facts of the case and is subject to our independent review. See *State v. McNeil*, 155 Wis. 2d 24, 44, 454 N.W.2d 742 (1990).

¶17 *Mosley* makes clear that officers are not forever barred from resuming questioning. See *State v. Badker*, 2001 WI App 27, ¶12, 240 Wis. 2d 460, 623 N.W.2d 142. In determining whether the resumption of questioning was permissible in the present case, we consider the *Mosley* factors. See *Badker*, 240 Wis. 2d 460, ¶12.

¶18 Here, four of the five *Mosley* factors are satisfied. First, police terminated the first interrogation promptly after Wesley indicated he did not want to listen to his *Miranda* rights or talk about the homicide.

¶19 Second, police resumed questioning after a significant period of time. Officers attempted the second interrogation, which ultimately did not occur, approximately nine-and-a-half hours after the first interrogation concluded. Furthermore, the third interrogation did not begin until approximately twenty-seven hours after the first interrogation concluded. The period of time between interrogations in *Mosley* was two hours. *See id.*, 423 U.S. at 104. Furthermore, the Wisconsin Supreme Court has upheld intervening time periods which were significantly shorter. *See State v. Shaffer*, 96 Wis. 2d 531, 541, 292 N.W.2d 370 (1980) (nine-minute interval between invocation of right to silence and resumption of questioning comports with *Mosley*).

¶20 Third, Dalland gave Wesley complete *Miranda* warnings at the outset of the third interrogation. While *Miranda* warnings were not provided at the outset of the second interrogation, this issue is moot since the second interrogation never actually occurred.

¶21 Finally, a different officer, Dalland, resumed questioning for the third interrogation. Although Dalland was present during the first interrogation, our review of the video recording confirms that he asked no questions and only observed the interaction between Wesley and Spano. Wesley argues that the State points to no case law supporting the proposition that Dalland's presence at the first interrogation does not count because he did not ask any questions. *Mosley*, however, requires only that a different officer resume questioning; it does not say that the officer resuming questioning could not have been present during the first interrogation. *See Hartwig*, 123 Wis. 2d at 284.

¶22 Only the fifth *Mosley* factor—the subsequent interrogation was limited to a crime that was not the subject of the earlier interrogation—was not



present. The absence of one *Mosley* factor, however, is not dispositive. *See McNeil*, 155 Wis. 2d at 44 (*Mosley* factors are not to be rigidly applied). Accordingly, we conclude that Wesley’s right to remain silent was scrupulously honored.

## **II. Wesley Did Not Unequivocally Invoke His Right to Remain Silent in Third Interrogation.**

¶23 An individual must unequivocally invoke his right to remain silent in order to cut off questioning. *See Cummings*, 357 Wis. 2d 1, ¶48; *Berghuis v. Thompkins*, 560 U.S. 370, 398 (2010). The test is whether a reasonable officer would regard the individual’s statements and non-verbal cues to be an unequivocal invocation of the right to remain silent; this is an objective test. *See State v. Ross*, 203 Wis. 2d 66, 78, 552 N.W.2d 428 (Ct. App. 1996). Whether an individual has unequivocally invoked the right to remain silent turns on the person’s statements “[i]n the full context of [the] interrogation.” *See Cummings*, 357 Wis. 2d 1, ¶61. If an individual’s statement is susceptible to reasonable competing inferences as to its meaning, then the individual did not sufficiently invoke his right to remain silent. *See State v. Markwardt*, 2007 WI App 242, ¶36, 306 Wis. 2d 420, 742 N.W.2d 546.

¶24 When determining whether an individual unequivocally invoked his right to remain silent, we engage in a two-step analysis. *See Cummings*, 357 Wis. 2d 1, ¶44. We uphold the circuit court’s findings of historical facts unless they are clearly erroneous. *See id.* We review the application of constitutional principals to those facts *de novo*. *See id.*

¶25 The State spends a considerable portion of its brief arguing that Wesley did not unequivocally invoke his right to remain silent during the first

interrogation. As a preliminary matter, at the suppression hearing, the State did not challenge Wesley's invocation of the right to remain silent during the first interrogation. Because this argument was not raised in the circuit court, it is deemed forfeited. *See State v. Reese*, 2014 WI App 27, ¶14 n. 2, 353 Wis. 2d 266, 844 N.W.2d 396 ("This court need not address arguments that are raised for the first time on appeal."). Nevertheless, regardless of whether Wesley unequivocally invoked his right to remain silent during the first interrogation, Spano reacted as though he did and cut off questioning. Because we conclude that Wesley's right to remain silent was scrupulously honored following the first interrogation, and because Wesley did not make any incriminating statements during the first interrogation, whether or not Wesley actually invoked his right to remain silent is irrelevant. The only issue remaining, therefore, is whether Wesley unequivocally invoked his right to remain silent in the third interrogation.

¶26 Wesley points to three statements he made during the third interrogation to support his argument that he invoked his right to remain silent: (1) "Ain't nothing to talk about doe"; (2) "I ain't got shit to say about no homicide"; and (3) "Can I go back to my cell now?" We examine each in context. *See Cummings*, 357 Wis. 2d 1, ¶61.

**a. Ain't nothing to talk about doe.**

¶27 Wesley made the above statement near the beginning of the third interrogation. Specifically, the following exchange took place between Dalland and Wesley:

DALLAND: Look, listen, let me get through what I need to do first and then we can talk if that's what you want. Okay. Is that fair?

WESLEY: *Ain't nothing to talk about doe.* That's what I'm sayin. Ya'll steady questioning me about nothing I don't know nothing about. I don't do nothing. I sit in the house all day. I don't do nothing.

DALLARD: And if that's what you want to tell me, then that is your right and I am going to listen. Okay. But like I said, I have our little rules that we have to go by okay?

WESLEY: yea...I feel where you coming from and all but shit.

¶28 Dalland did not engage Wesley on this point, but rather began the interrogation by providing Wesley with his *Miranda* rights before anything substantive occurred. Viewing this statement in the full context of the interrogation, we conclude that a reasonable inference would be that Wesley was merely making exculpatory statements—that he did not kill Lloyd.

**b. I ain't got shit to say about no homicide.**

¶29 Wesley made the above statement after Dalland read Wesley his *Miranda* rights. The full exchange was as follows:

DALLAND: Having those rights in line is it okay if we—

WESLEY: Ughh—you can say—

DALLAND: —exchange information? Now can I ask you questions?

WESLEY: You can say what you want but it just, *I ain't got shit to say about no homicide.* I don't kill people. I never attempted to kill nobody I never ... I don't do that. I'm not that type of person. I just lost my momma November 7.

DALLARD: And I am sorry for your loss.

...

DALLARD: Well, you can pick and choose whatever you choose to respond to, and what you don't want to respond to. I am asking for a yes or no. Do you—are you—

WESLEY: I ain't got shit to talk about no homicide because I ain't know nothing about it. That's why I'm telling you now. You asking me questions about this homicide case I know nothing about it officer.

DALLAND: Okay.

WESLEY: Honest to God truth I don't know nothing.

¶30 As with Wesley's previous statement—"[a]in't nothing to talk about doe"—viewing this statement in the full context of the interrogation, we conclude that a reasonable inference would be that Wesley was merely making exculpatory statements.

**c. Can I go back to my cell now?**

¶31 Following an exchange in which Wesley continued to deny any involvement in Lloyd's death, Wesley stated that he bought marijuana from Lloyd months earlier. Shortly thereafter, Wesley exclaimed "Ain't no point in keep talking ... if I knew anything, I'd tell you." The following exchange then took place:

WESLEY: You're telling me you know for sure I was with dude?

CORBETT: Yep

WESLEY: What'd [Lloyd] say?

Corbett said he would not tell Wesley what Lloyd said because Corbett wanted to get Wesley's own statement. Wesley then exclaimed, "You know for sure I shot him though? Right? ... What's the point of us sitting here?" After this verbal sparring, the following exchange took place:

WESLEY: I don't know—that's why I'm trying to tell ya'll I don't know shit about shit—I been telling ya'll that for two days I don't know. All I know is ya'll got the wrong person. I still ain't

got my Newport—and we’ve been sitting here talking for at least 30 minutes. Chips and water but no Newport.

CORBETT: You’re two up on me. I don’t have water or chips.

[four to five seconds of silence]

WESLEY: *Can I got back to my cell now?*

CORBETT: Is that really going to help you?

WESLEY: Is me telling ya’ll something I don’t know going to help me? Well, it isn’t going to help me. But me finding some information can that help me?

DALLAND: Where were you? How can you vouch for where you were when this happened?

WESLEY: At my granny house.

¶32 Wesley’s saying “can I go back to my cell now?” is akin to the statement “[w]ell, then, take me to my cell. Why waste your time? Ya know?” that was at issue in *Cummings*. See *id.*, 357 Wis. 2d 1, ¶53. In *Cummings*, the supreme court concluded that such a statement was, at best, an equivocal one:

In the context of the ongoing back and forth between Cummings and the officers, this statement was susceptible to at least two “reasonable competing inferences” as to its meaning. *Markwardt*, 306 Wis. 2d 420, ¶36, 742 N.W.2d 546. Cummings is correct that his statement could be read literally: as a request that he be removed from the room because he was no longer interested in talking to the officers. Another possibility, however, is that his statement was a rhetorical device intended to elicit additional information from the officers about the statements of his co-conspirators. Indeed, the plain language of the statement seems to be an invitation to the *officer* to end the interrogation, presumably because continued questioning would prove fruitless unless the officer provided additional information to Cummings. Such a statement is not an unequivocal assertion that Cummings wanted to end the interrogation.

See *Cummings*, 357 Wis. 2d 1, ¶54.

¶33 The same is true here. Wesley repeatedly engaged in a back-and-forth with the detectives to find out how much they knew. Viewing this statement in the full context of the interrogation, therefore, we conclude that this statement is susceptible to reasonable competing inferences as to its meaning. *See Markwardt*, 306 Wis. 2d 420, ¶36.

¶34 Accordingly, we conclude that Wesley did not unequivocally invoke his right to remain silent during the third interrogation.

¶35 For the foregoing reasons, we affirm.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

