COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP753-CR **Cir. Ct. No. 2006CF219**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD A. VANCLEVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gerald VanCleve appeals a judgment of conviction for two counts of armed robbery. He argues he was questioned by detectives after invoking his right to an attorney and the court should have suppressed statements

he made as a result. Because VanCleve never unambiguously invoked his right to counsel, we affirm.

BACKGROUND

¶2 On February 28, 2006, the Green Bay SWAT team executed a search warrant at a residence occupied by VanCleve and his wife, April White. VanCleve and White were arrested during the search, and VanCleve was taken to the Brown County Sheriff's Department for questioning. While at the sheriff's department, VanCleve confessed to robbing two Green Bay area pharmacies.

¶3 VanCleve was charged with two counts of armed robbery. He moved to suppress statements obtained during questioning at the sheriff's department. At the motion hearing, detective David Eklund testified he introduced himself while VanCleve was being walked from the house to a patrol car. VanCleve said, "Royce Finne is my attorney." Eklund said, "Okay," and VanCleve said, "What's this all about?" Eklund told VanCleve they would talk about it at the police department. Eklund testified VanCleve was read his ***Miranda***[1] rights and agreed to waive them at the beginning of the interview at the police station. Around the time the warnings were given, VanCleve said something to the effect of "I just want someone to call my attorney and let him know I'm here."

¶4 Detective James Drootsan was also present at VanCleve's interview at the sheriff's department. Drootsan testified he read VanCleve his rights, and VanCleve agreed to waive his rights. After agreeing to waive his rights, VanCleve

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

stated that "I just want someone to call my attorney let him know I'm here." Drootsan then asked VanCleve whether he was willing to discuss the case, and VanCleve said he was.

¶5 The circuit court denied VanCleve's suppression motion. It found VanCleve's statements were ambiguous, and did not rise to the level of a request that counsel be present at the interview. VanCleve then pled guilty to the two armed robbery counts. Before sentencing, VanCleve retained new counsel and filed a motion to withdraw his plea, arguing his suppression motion had not been fully litigated because he had not testified at the motion hearing. The State agreed to allow VanCleve to reopen the motion hearing to present more testimony. The court then took VanCleve's plea withdrawal motion under advisement and scheduled a supplemental evidentiary hearing on VanCleve's suppression motion.

¶6 At the hearing, VanCleve testified he had been angry and belligerent when the warrant was executed. According to VanCleve, he told the officers in the house that he wanted to go to jail, not the police station, and that he "ain't answering shit until my attorney's here." VanCleve said when Eklund introduced himself, he told Eklund he wanted to call his attorney before answering any questions. VanCleve also testified that while he was at the sheriff's department, he repeatedly told both detectives he would not answer questions without his attorney. He said the detectives continued to press him to give information, and he eventually signed a waiver of rights. He said after he signed the waiver, he again told the detectives all he wanted was for them to get his attorney there. White essentially corroborated VanCleve's account of what had happened inside the house. She testified VanCleve demanded an attorney when officers inside arrested them and read them their rights.

¶7 The State then recalled the detectives, who denied VanCleve's account of what had happened. Detective Eklund testified VanCleve had been "kind of tired," not belligerent. He also testified SWAT team members as a matter of practice would not read suspects their rights; rather, the rights would be read from a form in a controlled setting.

¶8 The court found the detectives' testimony credible and VanCleve's testimony not credible. The court denied VanCleve's motion, incorporating its earlier findings and conclusions of law. VanCleve then withdrew his plea withdrawal motion. He was sentenced to ten years in initial confinement, to be followed by thirty years on extended supervision.

DISCUSSION

¶9 Whether a suspect invoked his right to counsel is a question of constitutional fact. ***State v. Jennings***, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142. On appeal, we will uphold the circuit court's findings of historical fact unless clearly erroneous. ***Id.*** Whether the facts found by the circuit court indicate the suspect invoked his or her right to counsel is a question of law reviewed without deference. ***Id.***

¶10 Here, VanCleve does not argue the court erred in accepting the detectives' accounts of his interrogation as true.[2] The only question on appeal,

[2] VanCleve argues this finding does not extend to VanCleve's and White's account of what happened inside the house. However, Eklund testified that based on his experience on the SWAT team, events inside the house could not have occurred in the way VanCleve and White testified. When the court found the detectives' accounts credible and VanCleve's account not credible, it necessarily rejected VanCleve's and White's contrary version of what happened inside the house. VanCleve does not argue this finding is clearly erroneous.

then, is whether VanCleve's statements—"Royce Finne is my attorney" and "I just want someone to call my attorney and let him know I'm here"—were sufficient to invoke his right to counsel. We conclude they were not.

¶11 The right to counsel is invoked when a suspect expresses a "desire to deal with the police only through counsel." ***State v. Jones***, 192 Wis. 2d 78, 94, 532 N.W.2d 79 (1995) (citation omitted). Such a statement must be unambiguous—in other words, the suspect must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." ***Davis v. United States***, 512 U.S. 452, 459 (1994). If the suspect makes an ambiguous or equivocal reference to an attorney, officers need not stop questioning the suspect or clarify the comment. ***Id.***

¶12 VanCleve's first statement does not indicate any desire to have an attorney present. It simply indicates that he has an attorney and gives the attorney's name. "[A] suspect's reference to an attorney who had previously or is currently representing him in another matter is not a request for counsel." ***Jones***, 192 Wis. 2d at 95-96.

¶13 VanCleve's second statement—"I just want someone to call my attorney and let him know I'm here"—is similarly ambiguous. As the circuit court noted, had VanCleve indicated he wanted police to call his attorney, without more, his statement would have been less equivocal. However, VanCleve's statement identifies why he wants the attorney contacted—not so that the attorney could be present during questioning, but so the attorney would "know I'm here." The statement simply does not communicate a "desire to deal with the police only through counsel"—unambiguously or otherwise. *See* ***id.*** at 94.

¶14 In addition, VanCleve made the statement immediately after telling the officers he was willing to waive his rights, including his right to an attorney.[3] If VanCleve had in fact intended to invoke his right to counsel, the logical time to do it would have been after his rights had been read, not after they were waived. Taken in context, then, the most likely meaning of VanCleve's statement was that he was willing to answer questions, but wanted his attorney notified so the attorney could come to the police station if the attorney felt it was necessary.

¶15 VanCleve argues his statement is more explicit than other statements in which suspects successfully invoked their right to counsel. *See* ***Wentela v. State***, 95 Wis. 2d 283, 292, 290 N.W.2d 312 (1980) ("I think I need an attorney"); *see also* ***State v. Billings***, 110 Wis. 2d 661, 663, 329 N.W.2d 192 (1983) ("maybe I ought to see an attorney"). However, our supreme court explicitly overruled ***Wentela*** in ***Jennings***, 252 Wis. 2d 228, ¶33. In ***Jennings***, our supreme court held the Supreme Court's decision in ***Davis*** overruled ***Wentela***, and further held that under ***Davis*** the statement "I think maybe I need to talk to a lawyer" was not sufficient to invoke the right to counsel. ***Jennings***, 252 Wis. 2d 228, ¶¶33-36. VanCleve's reliance on ***Wentela*** and ***Billings*** as controlling authority here evinces either extremely poor legal research or a deliberate misstatement of the law.

[3] VanCleve argues he made the statement immediately after he was read his ***Miranda*** rights. ***Miranda v. Arizona***, 384 U.S. 436 (1966). However, Drootsan testified VanCleve made the statement after *waiving* his rights. VanCleve agreed with that portion of Drootsan's testimony, although he disagreed on the content of his statement. Eklund said he did not remember whether VanCleve made the statement before, during, or after he was read his rights. Both the witnesses who remembered that particular detail, then, testified VanCleve made the statement after he waived his rights, not immediately after they were read.

By the Court.—Judgment affirmed.

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