COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0118-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. OLSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM ATKINSON, Judge. *Reversed and cause remanded with directions*.

¶1 PETERSON, J.[1] Richard Olson appeals a judgment of conviction for possession of cocaine, contrary to WIS. STAT. § 961.41(3g)(c). Olson claims that the court erred by denying his motion to suppress a cocaine bindle because:

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(1) he was unlawfully detained when officers executed a search warrant; and (2) the surrender of the cocaine bindle to the interrogating officer was an involuntary communication given in violation of ***Miranda***[2].

¶2 We conclude that Olson was lawfully detained. We do agree that the surrender of the cocaine bindle was a communication. However, because there is a factual dispute in the record, we remand to the circuit court to determine whether the surrender of the cocaine bindle was in violation of ***Miranda*** or involuntary.

BACKGROUND

¶3 On May 14, 1999, Olson was working at his place of employment, Creative Welding, in Ashwaubenon. Sometime between about 11 a.m. and noon, seven to nine narcotics officers executed a search warrant for the premises. The warrant authorized the officers to search for cocaine, United States currency, scales, ledgers or other records indicating the illegal sales of controlled substances.

¶4 Olson was immediately taken into custody, handcuffed at gunpoint, and frisked for weapons. The officers expected the owners of Creative Welding, Daniel Theys and Rick LaRock, to be present; however, they were not. The police then searched the premises and found approximately one pound of cocaine. At some point during the detention, Olson's handcuffs were removed, but he was not allowed to leave.

¶5 At approximately 1 p.m., officer VanErem began questioning Olson about his knowledge of the cocaine found in the search. VanErem testified that it

[2] ***Miranda v. Arizona***, 384 U.S. 436, 456 (1966).

was not an interrogation, rather he was simply talking to Olson because Olson was being very cooperative. VanErem wrote a statement for Olson to sign. According to VanErem, Olson was not under arrest. Olson was simply being held to prevent him from informing the owners of Creative Welding that officers had found cocaine on the premises.

¶6 However, according to Olson, VanErem asked Olson to promise that his fingerprints would not be found on the seized cocaine bags and that Olson had better cooperate or he would end up downtown. Finally, VanErem told him that if he was carrying anything or knew anything, he had better "fess up now, or it's going to be worse on you if we have to find it."

¶7 At some point, Olson reached into his shirt pocket and produced a small red paper bindle that contained cocaine. According to VanErem, Olson stated, "I guess you'll want this." Olson then signed the written statement. He had not been read his ***Miranda*** rights.

¶8 Olson moved to suppress the written statement and the cocaine bindle. The State conceded the inadmissibility of the written statement because Olson was in custody and ***Miranda*** warnings were not given. The circuit court suppressed the statement. However, the court stated that it was not satisfied that surrendering the cocaine bindle to VanErem was a statement suppressible under ***Miranda*** and denied that part of the motion. Olson then pled no contest and was convicted. This appeal followed.

DISCUSSION

I. Detention

¶9 Olson argues that he was unreasonably detained during the search. He concedes that the detention was lawful at its inception. However, he contends the length of the detention was unreasonable because it was prolonged beyond the time that the search was completed. As a result, he claims that the cocaine bindle was the fruit of an unreasonable detention.

¶10 We will not disturb a circuit court's findings of evidentiary or historical fact unless those findings are contrary to the great weight and clear preponderance of the evidence. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). However, we will apply those facts to constitutional principles independently of the circuit court. ***Id.***

¶11 In ***Michigan v. Summers***, 452 U.S. 692, 705 (1981), the United States Supreme Court held that for Fourth Amendment purposes, a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. Whether the purpose of the detention was reasonable depends upon the totality of the circumstances. ***Id.*** at 698.

¶12 The length of Olson's detention is not clear from the record. The officers stated they executed the warrant at around noon, while Olson claims that it was around 11 a.m. Olson signed the written statement at 1:39 p.m. Therefore, before signing the statement, Olson was detained either approximately one hour and thirty-nine minutes or two hours and thirty-nine minutes.

¶13 Olson argues that this detention was too long because the search had concluded and the officers were only holding him to keep him from tipping off his employers about the search. However, Olson's argument is based on a faulty premise. The search was not concluded. While it is true that the police had found cocaine, the warrant authorized a search for other items of evidence: United States currency, scales, and ledgers or other records indicating the illegal sales of controlled substances. In fact, when Theys arrived at Creative Welding around 2:30 p.m., police were still searching the premises. This shows that the search was still ongoing during Olson's interrogation.

¶14 Under all of these circumstances, we conclude that the detention was not unreasonable.

II. COCAINE BINDLE

¶15 Olson argues that the surrender of the cocaine bindle was: (1) a communication suppressible under ***Miranda***; (2) in direct response to the police interrogation; and (3) involuntary.

A. Suppressible Communication

¶16 The State argued before the circuit court that the surrender of the cocaine was not a suppressible statement. However, on appeal, the State now concedes that the surrender of the bindle was testimonial in nature and protected by ***Miranda***. We accept the State's concession that the surrender of the cocaine bindle was a communication suppressible under ***Miranda***.

¶17 Incriminating information, which is testimonial in nature, will be inadmissible if the police fail to inform a defendant of ***Miranda*** rights. ***Schmerber v. California***, 384 U.S. 757, 763 (1966). Here, while the cocaine itself

is physical evidence, Olson's surrender of the cocaine bindle with the statement, "I guess you'll want this," was a communicative act under ***Schmerber*** and thus protected by ***Miranda***.

B. Response To Interrogation

¶18 Olson argues that the surrender of the cocaine bindle was in response to VanErem's interrogation. Olson claims that VanErem asked Olson questions not only about the activities that occurred at Creative Welding, but also about Olson's personal use and purchase of illegal drugs. Olson claims that the handing over of the cocaine bindle was clearly a response to VanErem's questions.

¶19 The State disagrees. The State admits that VanErem asked Olson about his relationship with his employers and the cocaine. However, the State argues that VanErem's questioning regarding the cocaine trafficking was focused on Theys and LaRock, not on Olson. Further, the State contends that it is not evident from the record that the questions concerning the cocaine occurred immediately prior to Olson's surrender of the cocaine bindle.

¶20 The State may not use statements made by a defendant during custodial interrogation unless the defendant was given ***Miranda*** warnings. ***State v. Armstrong***, 223 Wis. 2d 331, 351, 588 N.W.2d 606 (1999). However, when a statement is not elicited by interrogation, it is not subject to ***Miranda*** even while made in custody. ***Martin v. State***, 87 Wis. 2d 155, 166, 274 N.W.2d 609 (1979).

¶21 Here, the circuit court did not find whether the surrender of the cocaine bindle was in response to the interrogation. Since the facts are in conflict, we remand to the circuit court to make this finding. If the surrender was in response to the interrogation, the court should suppress the evidence.

C. Involuntary

¶22 Olson also argues that the surrender of the cocaine bindle was involuntary. He contends that the show of deadly force, the handcuffing, the detention, the refusal to let him use the restroom alone, the interrogation, and his fear of VanErem were all improper and coercive police tactics.

¶23 The State disagrees. The State argues that Olson was cooperative and willing to discuss things with the officers. According to the State, VanErem and Olson sat together on a pile of steel while Olson smoked a cigarette. Olson was not the target of the investigation. Further the officers had no evidence that he was involved. The State contends that Olson's decision to surrender the bindle of cocaine came from his own appraisal of the situation and not from improper or coercive police tactics.

¶24 Police officers may not coerce an involuntary statement from a person. If a court finds a statement is involuntary, then the statement must be suppressed pursuant to the due process clause of the Fourteenth Amendment and art. I, § 8, of the Wisconsin Constitution. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). In determining whether a confession was involuntary, the essential inquiry is whether the confession was procured by coercive means or whether it was the product of improper police pressures. ***Barrera v. State***, 99 Wis. 2d 269, 291, 298 N.W.2d 820 (1980).

¶25 Here, the circuit court did not make a finding whether the surrender of the cocaine bindle was involuntary. Since the facts are in conflict, we remand to make this finding. If the surrender was involuntary, the court should suppress the evidence.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.