COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0061-CR **Cir. Ct. No. 99-CF-307**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN S. SCHATZKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Kevin Schatzke appeals a judgment of conviction and an order denying a postconviction motion to withdraw his plea. Schatzke argues that he received ineffective assistance of counsel during his trial because his attorney failed to raise a Fifth Amendment violation argument and preserve it for appeal. Because we reject Schatzke's claim of counsel's ineffectiveness, we

affirm the trial court's order. Because affirmation of the order removes the grounds on which Schatzke challenges his conviction, we also affirm that judgment.

Background

¶2 Appleton police officer John Ostermeier was investigating an incident where a man had allegedly made inappropriate comments to several young girls at Wilson Middle School in May 1999. A witness had obtained a license plate number from the man's vehicle and provided a description of the man. This information led Ostermeier to Schatzke. On May 16, Ostermeier contacted Schatzke and asked him to come to the station to talk. Schatzke claims that he offered to talk over the phone, but Ostermeier insisted he come in to the station. Schatzke was unable to go in immediately, but he went to the station around 7 p.m.

¶3 At the station, Ostermeier met Schatzke in the lobby, escorted him through a locked door, frisked him and took him to an interrogation room. Ostermeier read Schatzke's ***Miranda***[1] rights and although Schatzke first stated he did not want to talk, he ultimately signed a rights waiver. Ostermeier questioned him about the Wilson Middle School incident. Schatzke tried to avoid answering, then requested an attorney. Once Schatzke asked for a lawyer, Ostermeier stopped his questioning and escorted Schatzke from the building.

¶4 By May 19, Ostermeier had obtained a warrant to take Schatzke's photograph. Ostermeier testified at a motion hearing that he might have told

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

Schatzke he could execute the warrant at Schatzke's home, but Schatzke instead went to the station. Schatzke was once again led through the locked doors and frisked.[2] He made no statement at the photograph session and again claimed he asked for an attorney. Once the photograph had been taken, he was escorted from the building and allowed to leave.

¶5 At approximately the same time, Outagamie County Sheriff's Department sergeant Chris Proietti was investigating a May 15 incident where two young girls had been enticed into a vehicle. His investigation also led him to Schatzke. On May 21, Proietti asked Schatzke to come to the sheriff's department, and Schatzke asked if he had to. Schatzke says Proietti told him it was optional.

¶6 On May 24, Proietti arrested Schatzke. Schatzke claims he asked for an attorney when he was placed in the squad car, as well as several times thereafter. Proietti, however, testified that Schatzke never invoked that right at any time after his arrest.[3] Schatzke later implicated himself in the May 4 incident.

¶7 On May 24, Schatzke was charged with two counts of child enticement contrary to WIS. STAT. § 948.07(1) and one count of second-degree sexual assault contrary to WIS. STAT. § 948.02(2).[4] On August 31, Schatzke filed a motion to suppress his incriminating statements. The motion was denied after an

[2] He may or may not have been ***Mirandized***. Schatzke testified that Ostermeier read his rights again, but Ostermeier testified he did not.

[3] The trial court found Schatzke lacked credibility and discounted his testimony.

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

October 14 hearing. On December 3, Schatzke entered into a plea agreement in which he pled no contest to five counts from Outagamie, Brown and Winnebago Counties and had four counts from Outagamie, Brown and Dodge Counties dismissed. On January 21, 2000, he was convicted and sentenced to sixty-two years in prison plus a consecutive twenty years' probation.

¶8 On July 25, 2001, Schatzke filed a motion for postconviction relief seeking to withdraw his pleas and alleging ineffective assistance of counsel. Specifically, Schatzke claimed trial counsel was deficient because he failed to raise a Fifth Amendment right to counsel violation based on the State's failure to honor, at the May 24 interview, Schatzke's May 16 invocation of the right. Further, he claims this failure prejudiced him because the argument was not preserved for appeal, where Schatzke claims his self-incriminating statements would be suppressed and his conviction overturned. A hearing was held, and the his motion for relief was denied. Schatzke now appeals.

Standard of Review—Ineffective Assistance of Counsel Claims

¶9 There are two parts to an ineffective assistance of counsel claim: a demonstration that counsel's performance was deficient and a showing that this deficiency prejudiced the defendant. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). The defendant has the burden to prove both elements. ***Id.*** Determining whether particular acts constitute ineffective assistance is a mixed question of law and fact. ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). We will uphold the trial court's findings of fact concerning the circumstances of the case and counsel's conduct unless the findings are clearly erroneous. ***Id.*** But the questions whether counsel's performance was deficient

and prejudiced the defendant are questions of law we review de novo. ***Id.*** at 236-37.

I. Deficient Performance of Counsel

A. There Was No Failure to Preserve an Argument for Appeal Because There Was No Valid Argument

¶10 Schatzke argues that his trial attorney failed to preserve an alleged Fifth Amendment violation argument for appeal. Schatzke claims an ***Edwards*** violation when Proietti questioned him on May 24 and thereafter without recognizing his May 16 invocation of the right to counsel.

¶11 ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981), states:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. … [A]n accused, … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him …. (Footnote omitted.)

Schatzke claims that Proietti was not entitled to question him on May 24 because of his May 16 invocation and that his statements made on May 24 should therefore be suppressed. However, this argument fails because Schatzke was not in custody until May 24.

¶12 Both this court and the supreme court have recognized that ***Edwards*** applies only during custodial interrogations. *See, e.g.,* ***State v. Jennings***, 2002 WI 44, ¶¶26-27, 252 Wis. 2d 228, 647 N.W.2d 142; ***State v. Long***, 190 Wis. 2d 386, 394, 526 N.W.2d 826 (Ct. App. 1994). The United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after

a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way." ***State v. Morgan,*** 2002 WI App 124, ¶10, __ Wis. 2d __, 648 N.W.2d 23 (quoting ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966)).[5] The Court subsequently explained that ***Miranda*** safeguards, including the right to counsel, attach when a "suspect's freedom of action is curtailed to a 'degree associated with [a] formal arrest.'" ***Id.*** (quoting ***Berkemer v. McCarty***, 468 U.S. 420, 444 (1983) (per curiam)). The relevant inquiry is how a reasonable person in the suspect's situation would understand the situation. ***Id.***

¶13 When determining whether an individual is "in custody" for purposes of ***Miranda*** protection we consider the totality of the circumstances, including factors like the defendant's freedom to leave, the purpose, place, and length of the interrogation, and the degree of restraint. ***Morgan***, 2002 WI App 124 at ¶12. While the question whether a person is in custody is a question of law we review de novo, we accept the trial court's findings of historical fact unless they are clearly erroneous. ***Id.*** at ¶11. Review of the totality of the circumstances shows that under no reasonable interpretation of the evidence was Schatzke in custody before May 24, 1999.

¶14 On May 16, Ostermeier requested Schatzke to come to the Appleton police station. Although Ostermeier told Schatzke he had to come and could not discuss the matter over the telephone, Ostermeier did not insist on immediate appearance—in fact, there was nearly a four-hour delay between Ostermeier's call

[5] ***Edwards*** derives the right to counsel at issue in this case from ***Miranda***. *See* ***Edwards v. Arizona***, 451 U.S. 477, 482 (1981).

and Schatzke's appearance.[6] While the purpose was to attempt to question Schatzke, there was no line-up for identification, no fingerprinting and no photographing—nothing exceptionally imposing or threatening. The interrogation was also brief, and as soon as Schatzke requested an attorney the officer let him leave.

¶15 When we consider "degree of restraint" in our custodial evaluation, we consider whether the suspect is handcuffed, if a weapon was drawn, whether a frisk was performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle and the number of officers involved in the interrogation. ***Id.*** at ¶12. Nothing in the record indicates Schatzke was ever handcuffed, had a weapon drawn on him, was moved to a new location, interrogated in a vehicle or seriously questioned by anyone on May 16 other than Ostermeier. Although Ostermeier frisked Schatzke, there is nothing in the record to suggest this was anything more than a routine security procedure. Schatzke also argues that the locked door would lead one to believe this was a custodial interrogation, but Ostermeier testified that this was a secure area of the station and that the doors were not locked to people wishing to exit. The record does not lead to a reasonable conclusion that Schatzke was in custody on May 16.

¶16 Similar situations exist for the May 19 photograph session even though the session was predicated on a compulsory court order. Ostermeier testified the warrant could have been served initially at Schatzke's home, but

[6] The record indicates Ostermeier wanted Schatzke to appear in person to sign a rights waiver before questioning.

Schatzke came to the station. While Schatzke complains he had to wait an hour in the station before anyone came to take his photo, we have no reason to believe the delay was created so as to pressure Schatzke. Schatzke was also released after he was photographed. This, too, fails to rise to the level of custodial interrogation or formal arrest.

¶17 In sum, Schatzke argues an ***Edwards*** violation because he invoked his right to counsel on May 16 with Ostermeier but Proietti did not honor this request on May 24. However, ***Edwards***, which prevents further questioning once the right to counsel is invoked, does not apply if there is no custodial interrogation, and Schatzke was not in custody on May 16 or 19. Therefore, ***Edwards*** does not apply to the May 24 session.[7]

[7] We note that Schatzke could have conferred with an attorney at any time before his May 24 arrest, but he did not. He testified he did not consult an attorney because he could not afford one. This did not, however, prevent him from contacting the public defender if he thought he might qualify. In any event, ***Miranda*** protections do not require the State to produce attorneys on demand, only that the suspect be informed of the right to counsel and that counsel will be appointed if the suspect cannot afford an attorney. ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). We additionally take judicial notice that the police are not responsible for determining eligibility for a public defender nor are the police responsible for conducting indigency hearings. Thus, the record is uncertain as to what Schatzke thought would happen when he requested a lawyer.

Schatzke nevertheless argues that ***Minnick v. Mississippi***, 498 U.S. 146 (1990), applies. He claims the case states that in order for an attorney to be made available, there must be more than just the opportunity to confer with an attorney. This mischaracterizes the holding. ***Minnick*** is a corollary of ***Edwards*** and prevents the State from resuming custodial questioning of a defendant who has invoked the right to counsel until counsel is actually present during questioning. ***Minnick***, 498 U.S. at 150. However, because ***Edwards*** does not apply in this case, ***Minnick*** is inapplicable as well.

B. A Suppression Motion Was Made on Other Grounds

¶18 There is a strong presumption that a trial attorney acts reasonably and within professional norms, ***Smith***, 207 Wis. 2d at 273, and judicial scrutiny of the attorney's performance will normally be highly deferential. ***Id.*** at 274. A strategic trial decision rationally based on the facts and law will not support a claim of ineffective assistance of counsel. ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

¶19 Schatzke's trial counsel testified at the ***Machner***[8] hearing that he did not believe there would be merit under applicable law in arguing that Schatzke was in custody on May 16. Therefore, he concluded that ***Edwards*** did not apply and that a motion to suppress on that ground was inappropriate. He instead challenged the May 24 statements on voluntariness grounds. The trial court denied that motion as well. The attorney's trial strategy, however, was based on interpretations of law consistent with our holding in this case, and we cannot conclude that the attorney's performance was deficient.

II. There is No Prejudice Because Appeal Would Not Lead to Suppression

¶20 Prejudice is the second prong to the ineffective assistance of counsel claim. However, there is no prejudice because we see no reason why, on appeal, we would exclude admission of Schatzke's statements. Schatzke was ***Mirandized*** at every appropriate time. He signed waivers of his rights. On May 16, questioning ceased as soon as Schatzke requested an attorney. The trial court already ruled that his statements on May 24 were voluntary. There is nothing to

[8] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

suggest the court's findings were clearly erroneous, and Schatzke has not shown how he might have prevailed on appeal had the argument been preserved.

Conclusion

¶21 There was no ***Edwards*** violation because Schatzke was not in custody until May 24, and when he was taken into custody he did not request an attorney. Trial counsel recognized that ***Edwards*** did not apply and made a strategic decision to seek suppression by challenging the voluntariness of Schatzke's statements. Although suppression was denied, this court cannot say that trial counsel's performance was deficient. Additionally, there is no showing of prejudice; we have no reason to believe an appeal would have succeeded even with the ***Edwards*** argument preserved.

By the Court.—Judgment and order affirmed.

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