

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2010

A. John Voelker
Acting 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. 2009AP2916-CR

Cir. Ct. No. 2008CF3217

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY M. SAHS,

DEFENDANT-APPELLANT.

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

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Gregory M. Sahs appeals from a judgment of conviction entered after he pled guilty to one count of possession of child

pornography, contrary to WIS. STAT. § 948.12(1m) (2007-08)¹. Sahs argues that the trial court erred when it denied both his motion to suppress statements made to his probation agent and his motion to suppress evidence obtained subsequent to those statements because a probation form he received promised such statements could not be used against him. Because the evidence that Sahs relies upon does not appear in the record, we affirm.

BACKGROUND

¶2 In 2005, Sahs pled guilty to one count of possession of child pornography. He was convicted and placed on probation for three years. As a condition of his probation, Sahs was required to attend sex offender treatment. This included group therapy sessions. Prior to beginning the therapy sessions, Sahs was expected to submit a disclosure report in which he was to disclose all sexual activities which occurred prior to the incident leading to his 2005 conviction. However, according to the treatment provider, Sahs refused to participate in the group therapy sessions in any meaningful way. Sahs's probation agent, Michael Krause, then arranged for a polygraph test to further focus on Sahs's prior sexual history. After sitting through a pre-test interview in which Sahs revealed his prior sexual history, and after passing the polygraph test, Sahs was eventually readmitted into the program at some point in the later half of December 2006.

¶3 In January 2007, Sahs called Agent Krause and asked if they could meet to discuss "some things." They agreed to meet on January 12, 2007. At this meeting, Sahs made oral statements to Agent Krause in which he admitted to

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

violating the rules of his probation by accessing child pornography. Sahs admitted to using a computer that he kept at the home of a friend, Sara Butterfield. According to Sahs, Agent Krause documented the contents of Sahs's admissions on a Department of Corrections ("DOC") form at some point after their meeting. Sahs was taken into custody for a probation violation and revocation proceedings were initiated.

¶4 Agent Krause notified the West Allis Police Department of Sahs's statements, and on January 24, 2007, Detective Jacque Chevremont met with Sara Butterfield's mother, Dana, to retrieve the computer used by Sahs. The detective went to the Butterfields' residence, where Dana showed him the area in which Sahs stored his computer equipment. The following day, Detective Chevremont met with Sahs while he was in custody and read him his *Miranda* rights, which Sahs indicated he understood. Sahs waived his right to an attorney and gave a statement admitting to downloading child pornography while on probation. On February 1, 2007, Detective Chevremont obtained a search warrant to examine the computer recovered from the Butterfields' residence and detectives located child pornography on the computer. Sahs's probation was revoked, and he began serving an eighteen-month revocation sentence. On June 26, 2007, Sahs agreed to speak with Detective Chevremont and again waived his *Miranda* rights. He admitted to leaving a computer at the Butterfields' residence. He further admitted to making statements to his probation agent regarding downloading and masturbating to child pornography while on probation.

¶5 On June 28, 2008, Sahs was charged with two counts of possession of child pornography, contrary to WIS. STAT. § 948.12(1m) and (3)(a), for the contents found on his computer. On July 24, 2008, Sahs pled not guilty to both counts. On October 27, 2008, Sahs filed the two motions to exclude evidence that

are the basis of this appeal. The first motion sought to suppress the statements Sahs made to his probation agent on the grounds that the statements were compelled, incriminating and testimonial.² According to Sahs, his oral confession was later written down by Agent Krause on a DOC form. Sahs stated that Agent Krause checked a box on the form indicating that Sahs was required to provide information about his actions and whereabouts, though that information could not be used against him in a criminal proceeding. The second motion sought to suppress evidence of child pornography discovered on Sahs's computer, as well as statements made by Sahs to police investigators. Sahs argued that the evidence retrieved from his computer and his statements to investigators were a direct consequence of the compelled statements made to Agent Krause. Sahs's motions were denied.³ This appeal follows Sahs's guilty plea and sentencing.

DISCUSSION

¶6 Sahs argues that the trial court erroneously denied his motions to suppress evidence. A circuit court's ruling on a motion to suppress evidence presents a mixed question of fact and law. *State v. Casarez*, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. When reviewing the denial of a motion to suppress, we uphold the trial court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).

² For "a statement to be properly excluded under the Fifth Amendment privilege against self-incrimination ... it must be testimonial, compelled, and incriminating." *State v. Mark*, 2006 WI 78, ¶2, 292 Wis. 2d 1, 718 N.W.2d 90. The issue on appeal is whether the statements were compelled.

³ On December 17, 2008, Judge John Franke orally denied Sahs's motions. Judge Jeffrey Conen, who received Judge Franke's calendar, signed a written order dated January 12, 2009.

¶7 Sahs contends that his oral statements to Agent Krause were later documented on a DOC form containing the following notification:

I have been advised that I must account in a true and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. I have also been advised that none of this information can be used against me in criminal proceedings.

Sahs claims that Agent Krause check-marked this notification on the form, thereby creating a requirement for him to provide information pertaining to activities that would constitute a violation of his probation, and that such information could not be used against him in a criminal proceeding because the statements were compelled upon threat of revocation.

I. The document Sahs relies upon does not appear in the record.

¶8 The document that Sahs relies upon is not a part of the record. Sahs did not offer the DOC form with his written statements into evidence at the motion hearing. Therefore, we have nothing before us indicating that Sahs's statements were ever written down, let alone compelled. We will not "reweigh the evidence ... but will search the record for evidence that supports findings the trial court made, not for findings it could have made but did not." *Dickman v. Vollmer*, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202. Neither party requested an evidentiary hearing and both parties determined that the trial court should make findings of fact based upon the briefs. The trial court also noted that it did not have an affidavit before it, but rather was dealing only with Sahs's assertions. The trial court found Sahs's statements on January 12, 2007, were not made in response to questions from Agent Krause. The trial court further noted that Sahs voluntarily called Agent Krause and made admissions to violating

his probation rules at the outset of their meeting. None of his admissions appear in the record on a DOC form. “[W]hen an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the trial court’s ruling.” *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993). There is evidence to support the trial court’s assessment of the facts and its resulting determination that Sahs’s statements were not compelled.

II. Sahs’s statements were not compelled.

¶19 The Wisconsin Supreme Court has addressed the issue of whether statements made to probation agents constitute compelled statements. Relying on *Minnesota v. Murphy*, 465 U.S. 420 (1984), the court found “the mere fact that an individual is required to appear and report truthfully to his or her probation (or parole) [agent] is insufficient to establish compulsion.” *State v. Mark*, 2006 WI 78, ¶25, 292 Wis. 2d 1, 718 N.W.2d 90.⁴ Further, “[t]he answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.” *Id.*, ¶26 (emphasis and citation omitted; brackets in *Mark*). Sahs does not argue that he saw the form prior to his discussion with his probation agent. Nothing on the record indicates that Sahs was even aware of the notification’s existence at the time of his voluntary admissions. Because Sahs was not compelled to incriminate himself, he could not successfully invoke the

⁴ Although our supreme court upheld the Court of Appeals’s determination that remand was necessary for determining whether two of the four statements at issue made by Mark to his parole agent were compelled, we cite to *State v. Mark*, 2006 WI 78, 292 Wis. 2d 1, 718 N.W. 2d 90, for its recognition that statements made to parole or probation agents do not necessarily constitute compelled statements. Our analysis of the circumstances surrounding Sahs’s statements leads us to conclude that Sahs’s statements were not compelled.

privilege to prevent the information he volunteered to his probation agent from being used against him in a criminal prosecution unless he made a prior valid claim of privilege. *See id.*, ¶28 n.9. Therefore, the facts in the record are insufficient to show compulsion. The trial court properly denied the motions to suppress.

By the Court.—Judgment affirmed.

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