COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0165-CR **Cir. Ct. No. 02CF000304**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

SAMUEL V. PEREZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Reversed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 SNYDER, J. Samuel V. Perez is charged with one count of second-degree sexual assault of a person under age sixteen, contrary to WIS. STAT.

§ 948.02(2) (2001-02).[1] Perez moved to suppress inculpatory statements he made to law enforcement officers and the trial court granted suppression on the basis that the statements were an impermissible "sew-up" confession. The trial court denied the request for reconsideration of the order and the State appeals.[2] We reverse.

BACKGROUND

¶2 On June 3, 2002, Naomi C., age thirteen, told Sheboygan police officers that Perez had kissed her on the lips and fondled her breasts. Naomi stated that the incident had occurred in the hallway of a church building where Perez served as a minister.[3] The assault allegations resulted in two separate interviews of Perez by city of Sheboygan police detectives. The first interview started at approximately 9:37 p.m. on June 4, 2002, and ended at 4:37 a.m. on June 5, 2002, when Perez was released to the community. The second interview started at 9:10 p.m. on June 5 and concluded at 1:00 a.m. on June 6, 2002, when Perez was jailed. We review each interview period separately to determine the legality of the suppressed statements.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise stated.

[2] Under WIS. STAT. § 974.05(1)(d)3, the State may appeal from an order suppressing a confession or statement.

[3] Reverend Jerome Huber testified at the motion hearing that Perez "is a licensed pastor with the Assembly of God."

The First Interview

¶3 On June 4, 2002, at 9:20 p.m., City of Sheboygan Police Detective Cameron Stewart contacted Perez by phone and requested that Perez meet him at the Sheboygan police station. Stewart met Perez in the station lobby at 9:30 p.m., told Perez that he was not under arrest and provided him with the ***Miranda***[4] warnings. He explained to Perez that, though he was not under arrest, Stewart still had to advise him of his ***Miranda*** rights before asking any questions. Stewart interviewed Perez from "approximately 9:37 till 11:15 p.m."

¶4 Stewart advised Perez that "allegations had been brought forth against him that he had been inappropriately touching a thirteen-year-old member of the church." Perez denied the allegations and provided Stewart with his own version of the event. At 11:15 p.m., Stewart told Detective Lieutenant Donald A. Sorensen that "[Perez] was close to confessing, but I couldn't get the confession out of him." Sorensen then questioned Perez until 4:37 a.m. on June 5, obtaining a written statement from Perez of his version of the incident as provided earlier to Stewart. Sorensen testified that the interview ended because "we didn't have anything more to say and there was the determination made that Detective Stewart wanted to do further investigation." The first interview ended at 4:37 a.m. on June 5, 2002, and Perez was released to the community.

¶5 Stewart testified that after this first interview, "both Lieutenant Sorensen and I agreed that we had probable cause to place [Perez] under arrest," but that further investigation was warranted. Stewart wanted to talk to other

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

potential witnesses or victims and, subsequently, obtained statements from Darcy B. and Hannah K. Stewart also took a second statement from Naomi at about 3:30 p.m. on June 5.

The Second Interview

¶6 Stewart requested that Perez return to the Sheboygan police department and Perez did so voluntarily at 9:00 p.m. on June 5, 2002. Stewart testified that Perez was told he was going to jail that night, and that Perez would be arrested whether or not he provided a statement. Steward stated that if Perez got up to leave during the interview he would be taken into custody. Stewart again provided Perez with the ***Miranda*** warnings and the second interview began at 9:10 p.m. During the second interview, Stewart confronted Perez with additional information that Perez "had been touching other females inappropriately and intentionally." Stewart turned the second interview of Perez over to Sorensen at 11:05 p.m.

¶7 Sorensen told Perez near the beginning of his interview that Perez would be going to jail. In response, Perez requested to talk to his wife. He phoned her and Sorensen observed Perez well up and tear up after the phone conversation. Perez then orally admitted to kissing Naomi and to intentionally touching Naomi's breasts. Perez stated that the touching was not an accident or misunderstanding, and agreed that Naomi had told the truth. Sorensen left the interview room to get a written statement form and returned at 11:45 p.m. Perez completed a written statement consistent with his verbal admissions at approximately 12:40 a.m. on June 6, 2002. Perez requested a lawyer at 1:00 a.m. and the detectives asked no further questions of Perez. However, Perez

voluntarily thanked Sorensen for calling the scriptures to his attention, and said that he had no ill feelings towards Sorensen and wanted forgiveness.

¶8 The circuit court suppressed the admissions as being obtained during an impermissible "sew-up" interrogation solely because the statements were "made during an unreasonably long detention." The court stated that "this interrogation went on for some 10 hours over the course of 3 calendar days" and raised "substantial concerns that it was no longer the intention of the officers to secure additional evidence from [Perez] to decide whether he should be charged or released."

ISSUE

¶9 The sole appellate issue presented here is whether Perez's statements were the result of an impermissible "sew-up" interrogation that violated his constitutional rights under the Fifth Amendment of the United States Constitution and under article I, section 8 of the Wisconsin Constitution.[5]

STANDARD OF REVIEW

¶10 Our review requires the "application of constitutional principles to the facts as found." ***State v. Hartwig,*** 123 Wis. 2d 278, 283, 366 N.W.2d 866 (1985) (citations omitted.) We independently determine such questions of "constitutional" fact. ***Id.***

[5] Perez raised other motion challenges to the statements but the circuit court granted suppression of the statements solely "because the statements obtained were a 'sew-up' statement" obtained "during an unreasonably long detention." We address only the specific issue raised under WIS. STAT. § 974.05(1)(d)3.

"SEW-UP" CONFESSIONS

¶11 Confessions obtained during unreasonable periods of detention amount to a constitutional denial of due process. ***State v. Hunt***, 53 Wis. 2d 734, 741, 193 N.W.2d 858 (1972). The suppression order here is premised upon the admissions being the product of an impermissible "sew-up" confession. The parameters of detention and interrogation tactics in "sew-up" confessions were first addressed by our supreme court in ***Phillips v. State***, 29 Wis. 2d 521, 139 N.W.2d 41 (1966). The court stated:

> While one may be detained by the police and interrogated to secure sufficient evidence to either charge him with a crime or to release him, the police cannot continue to detain an arrested person to "sew up" the case by obtaining or extracting a confession or culpable statements to support the arrest or the guilt.

Id., at 535.

¶12 The ***Phillips*** decision reflects upon two United States Supreme Court cases, ***McNabb v. U.S.***, 318 U.S. 332 (1943), and ***Mallory v. U.S.***, 354 U.S. 449 (1957), that were concerned about prevention of the illegal detention of a defendant when he or she is not promptly brought before a magistrate. The resulting ***McNabb-Mallory*** rule does not focus on the voluntariness of the defendant's inculpatory statements, but is applicable when an individual is detained for an unreasonable length of time without being charged; a confession obtained during that time period, regardless of voluntariness, is a "sew-up"

confession that can be excluded from evidence.[6] *See* ***Krueger v. State***, 53 Wis. 2d 345, 357, 192 N.W.2d 880 (1972).

¶13 The ***Phillips*** court disfavored long detentions because they "impair the voluntariness of the confession from the standpoint of psychological aspects of the usual police-station hazards." ***Phillips***, 29 Wis. 2d at 535**.** Further, the rationale for excluding "sew-up" confessions during illegal detention "is to prevent the weakening of the resistance of an accused by the psychological pressure of being held in custody and 'worked upon' by the police in order to obtain evidence." ***Hunt***, 53 Wis. 2d at 741. This is part of the grander scheme requiring that for confessions to be admissible they "must be the voluntary product of a free and unconstrained will." ***Phillips***, 29 Wis. 2d at 528. Evaluating what is a voluntary confession in a particular fact situation requires consideration of the totality of the circumstances surrounding the confession. ***Id.*** at 528-29 (citing ***Fikes v. Alabama***, 352 U.S. 191 (1957)).

DISCUSSION

¶14 We now turn to whether the Perez circumstances support the suppression of an impermissible "sew-up" confession. Our supreme court has stated that "a person can be detained for a period of time *after his arrest* in order for authorities to determine whether to release the suspect or to make a formal

[6] "Due to congress's concern that ***McNabb*** [***v. U.S.***, 318 U.S. 332 (1943),] and ***Mallory*** [***v. U.S.***, 354 U.S. 449 (1957),] focused too much on delay and too little on a confession's voluntariness, the present rule of law is simply that a confession 'shall be admissible in evidence if it is voluntarily given.'" ***U.S. v. Pugh***, 25 F.3d 669, 675 (8th Cir. 1994) (citing 18 U.S.C. § 3501(a)). "Delay between arrest and presentment is only one of five factors a trial judge must consider when determining whether a confession was voluntary, *see* 18 U.S.C. § 3501(b), but delay is not dispositive." ***Pugh***, 25 F.3d at 675.

complaint." ***Hunt***, 53 Wis. 2d at 742 (citing ***Phillips***, 29 Wis. 2d at 534) (emphasis added). We discern no record support for Perez being under arrest or in custody during the first interview period. Stewart met Perez at the police station, told him that he was not under arrest, and at the end of the interview Perez was released to the community and allowed to return to his home. Accordingly, we conclude that the first interview time period is not relevant to the length of the period during which Perez provided his inculpatory admissions to Sorensen because it was not a detention period after his arrest.

¶15 In addition to Perez not being arrested or in custody during the first interview period, Perez was not detained, arrested or in custody during the period of time between the first and second interview. The "sew-up" confession analysis requires detention during a time period after Perez is under arrest, a status not present from his 4:37 a.m. release to his return to the police station at 9:00 p.m. on June 5. Accordingly, we conclude that the applicable detention period relevant to a "sew-up" confession analysis must exclude the time period of the first interview and the time during which Perez was released back to the community.

¶16 The "sew-up" confession here must have occurred, if at all, during the second interview period which started at 9:10 p.m. on June 5 and resulted in a written inculpatory statement from Perez at 12:40 a.m. on June 6, three hours and thirty minutes later. While the detectives determined that they had probable cause to charge Perez with a crime at the conclusion of the first interview, a confession is not inadmissible merely because the State, prior to the confession, had information sufficient to sustain a charge. *See* ***State v. Benoit***, 83 Wis. 2d 389, 405, 265 N.W.2d 298 (1978) (the question "revolves solely on the point whether the delay was inordinate and the detention illegal"). There is no set period of time during which questioning can take place, but beyond which a defendant must

either be released or taken before a court and charged with a crime. ***Hunt***, 53 Wis. 2d at 742. The question is whether or not the period of time is inordinate or unreasonable.

¶17 The State contends that Perez was not in custody when he confessed to the assault during the second interview. We disagree. Stewart testified that Perez was going to be arrested and would go to jail when he returned for the second interview, whether he gave a statement or not. Stewart further testified that he took the keys to Perez's truck and would not have allowed Perez to leave if Perez would have tried. Stewart gave Perez the ***Miranda*** warnings at the beginning of the second interview. Prior to the admissions, Sorensen had told Perez that he was going to jail. In response, Perez asked to phone his wife. After talking to her, Sorensen noticed Perez well up and tear up prior to then admitting to kissing and touching Naomi.

¶18 A suspect is in custody for purposes of the ***Miranda*** protections when his or her freedom of action is curtailed "to a degree associated with formal arrest." ***State v. Swanson***, 164 Wis. 2d 437, 449, 475 N.W.2d 148 (1991) (citing ***Berkemer v. McCarty***, 468 U.S 420, 440 (1984)). We are satisfied that Perez was in custody when he provided the inculpatory statements to Sorensen. However, a confession is not made inadmissible merely because the State, prior to the confession, had information sufficient to sustain a charge. ***Benoit,*** 83 Wis. 2d at 405. The "[p]ostarrest detention should be permitted as long as the purpose is reasonable and the period of detention is not unjustifiably long." ***Hunt***, 53 Wis. 2d at 742.

¶19 The purpose of the second interview was to confront Perez with the assault allegations and with the additional investigative information from Naomi

and two other witnesses obtained after the first interview. Detention may be reasonably undertaken to interrogate the suspect or witnesses, check out the story of the suspect or witnesses and to gather evidence. ***Wagner v. State***, 89 Wis. 2d 70, 76, 277 N.W.2d 849 (1979). We conclude that the purpose of the second interview detention was reasonably related to the need for additional investigation after the first interview detention. We now turn to the length of the second interview period.

¶20 The duration of the ***Phillips*** interrogation is instructive here even though the courts have not established a set time limit beyond which a suspect must be either released or formally charged. In ***Phillips***, our supreme court affirmed the conviction of a suspect who was interrogated for nearly three and one-half hours before orally confessing to a robbery. ***Phillips***, 29 Wis. 2d at 525. The ***Phillips*** court stated that the detention period prior to obtaining the confession was not so unreasonable as to deny due process and indicated that "[s]uch length of detention does not violate fundamental fairness or fair play in the criminal process under our accusatorial system." ***Id***. at 536. Perez was also detained for three and one-half hours prior to providing his written admissions. The Perez detention was, therefore, not unjustifiably long.

¶21 In sum, Perez was in custody during the second interview, had been read his ***Miranda*** rights and was confronted with new information obtained from additional investigation that occurred after the first interview. Perez was detained for three and one-half hours prior to his inculpatory admissions to Sorensen. The relevant detention time correlates with the time period in ***Phillips*** that our supreme court held was not unreasonable. We are satisfied that the detention of Perez resulting in his statements was not inordinate and continued only for "as long as necessary to conduct the investigation." *See* ***Benoit***, 83 Wis. 2d at 405.

Accordingly, an impermissible "sew-up" confession did not occur under the circumstances.

By the Court.—Order reversed.

Not recommended for publication in the official reports.