



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 24, 1999

RECEIVED

JUN 24 1999

MARILYN L. GRAVES,
CLERK OF SUPREME COURT
MADISON, WISCONSIN

Ms. Marilyn L. Graves
Clerk, Wisconsin Supreme Court
110 East Main Street, Suite 215
Post Office Box 1688
Madison, WI 53701-1688

Re: State v. Jonathan L. Franklin
Case Nos. 98-2420-CR and 98-2421-CR

Dear Ms. Graves:

Enclosed for filing in the above matter are the original and nine copies of Response to Petition for Review. A copy of this response has been served by mail today on counsel for defendant-appellant-petitioner.

Sincerely,

Marguerite M. Moeller

Marguerite M. Moeller
Assistant Attorney General

MMM:slp

Enclosure

c: Archie E. Simonson
Attorney for Defendant-Appellant-Petitioner

Diane Nicks
District Attorney
Dane County

STATE OF WISCONSIN
I N S U P R E M E C O U R T

Case Nos. 98-2420-CR and 98-2421-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN L. FRANKLIN,

Defendant-Appellant-Petitioner.

FILED

JUN 24 1999

Marilyn Graves
Clerk of Supreme Court
Madison, WI

RESPONSE TO PETITION FOR REVIEW

The plaintiff-respondent, State of Wisconsin, by undersigned counsel, opposes the granting of the petition for review filed in this case. For the reasons discussed below, this court should decline to review any of the four issues raised in the petition.

Issue One

Franklin first asks this court to decide if statements made after invocation of his Fifth Amendment right to counsel are admissible for impeachment purposes. He claims this is an issue of first impression and that the court of appeals' reliance on State v. Harris, 199 Wis. 2d 227, 544 N.W.2d 545 (1996), in concluding that such statements are admissible is unsatisfactory because Harris only impliedly so held.

In the court of appeals, Franklin did not claim that statements taken in violation of the Fifth Amendment right to counsel are never admissible for impeachment. Rather, he claimed a "presumption of involuntariness" attaches to such statements and that the trial court erroneously failed to consider this presumption in ruling on the voluntariness of his statements. The precise issue he is now raising is therefore different from his court of appeals' argument.

Be that as it may, Franklin does not claim that the court of appeals incorrectly decided this issue or that the court's decision is contrary to Harris or contrary to other decisions of this court or the Supreme Court. In fact, a review of the cases on which the court of appeals relied reveals that the issue Franklin wants this court to decide is not a question of first impression. Rather, cases on which the court of appeals relied hold that statements made in response to custodial interrogation, following the defendant's invocation of his Fifth Amendment right to counsel, are admissible for impeachment if voluntarily made.

For example, in State v. Camacho, 170 Wis. 2d 53, 75, 487 N.W.2d 67 (Ct. App. 1992), rev'd on other grounds, 176 Wis. 2d 860, 501 N.W.2d 380 (1993), the court of appeals held that "a statement is not presumed compelled simply because interrogators may have taken it in violation of Miranda." While the court in Camacho referred to the statements at issue as having been taken in violation of

Miranda, Camacho was actually alleging an Edwards violation, claiming police continued to question him after he requested a lawyer. 170 Wis. 2d at 75. Because the court had just cited Edwards in the paragraph preceding the statement quoted above, the court's reference to statements taken in violation of Miranda must also be read to encompass statements taken in violation of Edwards. Because the statements challenged in Camacho were used solely for impeachment purposes (see 170 Wis. 2d at 75), Camacho supports the court of appeals' holding that Franklin's statements--which the state agreed not to use in its case-in-chief--were admissible for impeachment were he to testify even though such statements were made after he invoked his Fifth Amendment right to counsel.

Camacho is consistent with State v. Moats, 156 Wis. 2d 74, 457 N.W.2d 299 (1990), where this court--faced with the state's concession that there was an Edwards violation--decided that Moats' statements were nevertheless voluntary so that they could be used to impeach him were he to testify at trial. In so deciding, this court cited a trio of Supreme Court decisions and one of its own cases for the proposition that "a constitutionally tainted confession may be used to impeach a defendant who chooses to testify in his own behalf at trial." 156 Wis. 2d at 93. This court noted that an "exception is made for compelled or involuntary testimony which is inadmissible at trial for any purpose." Id.

Moats is therefore direct authority for the view that statements taken in violation of the Fifth Amendment right to counsel are nevertheless admissible for impeachment, assuming such statements are found to be voluntary rather than compelled.

The court of appeals correctly applied the above cases in upholding the trial court's determination that Franklin's statements would be admissible for impeachment even though they were obtained after he invoked his Fifth Amendment right to counsel. Review of the first issue is therefore unwarranted.

Issue Two

The second issue Franklin wants this court to review--whether he waived his Fifth Amendment right to counsel after initially invoking it--has never been an issue in this case. The state never argued in the trial court or the court of appeals that Franklin waived this right before making the statements he sought to suppress. And, significantly, Franklin did not identify this as an issue in his court of appeals brief. The only issues he raised in his brief-in-chief were 1) whether his statements made after invocation of his Fifth Amendment right to counsel were voluntary; and 2) whether he established a fair and just reason for plea withdrawal. See Brief of Defendant-Appellant in the court of appeals at 1.

Because the second issue raised in the petition is not present in this case, it necessarily follows that this court should refuse to decide it.

Issue Three

Franklin next asks this court to review the issue of whether his statements were voluntary. However, he conditions this request on a determination that "the issue of voluntariness is appropriate." See petition at 7.

The voluntariness of Franklin's statements clearly was an issue in the court of appeals. However, it is not the type of issue warranting supreme court review. This is because if the defendant establishes coercive police conduct, that conduct is then balanced against the defendant's personal characteristics to determine whether his statement was voluntary. State v. Clappes, 136 Wis. 2d 222, 235-37, 401 N.W.2d 759 (1987). As a result, a finding on the voluntariness of a statement is normally fact-intensive, so that a decision in one case is of limited applicability to other cases.

Thus, absent a situation in which this court is called upon to establish a bright-line rule regarding voluntariness of a statement, this is not the type of issue meriting this court's attention.

Issue Four

The final issue Franklin asks this court to review is whether he established a fair and just reason for withdrawing his guilty pleas. The court of appeals correctly found that two of the three reasons Franklin advanced on appeal as "fair and just reasons" were never presented to the circuit court. State v. Franklin, Nos. 98-2420-CR and 98-2421-CR, slip op. at 8-9 (Wis. Ct. App. Dist. IV May 20, 1999); Pet-Ap. at 108-09. The court therefore found that Franklin had waived this portion of his argument or, alternatively, that the trial court could not have erroneously exercised its discretion in failing to discuss reasons not presented to it. Id.

While Franklin takes issue with this determination, the following excerpt from the state's court of appeals brief supports that court's conclusion:

[N]either in the plea withdrawal motions giving rise to the hearing of December 10, 1997 (see 74:Exs. 4 and 5), nor during the hearing itself (119) did Franklin ever claim that the prosecutor's involvement or the defendant's desire to discharge Van Wagner prior to the guilty plea hearing was a reason to allow him to withdraw his pleas.

In his pro se motion filed July 17, 1997 (74:Ex. 4), the defendant essentially gave three reasons supporting plea withdrawal: 1) his ignorance and fear; 2) a conflict of interest with attorney Van Wagner; and 3) the unfairness of the suppression hearing. In a subsequent "Motion to Amend, 'Motion to Withdraw Guilty Plea,'" Franklin again claimed he entered his pleas out of fear and ignorance, but he also cited the following factors as supporting his motion: 1) he was not told the reason for his arrest or given an attorney when he requested one; 2) he was deprived of information concerning

the evidence against him; 3) Van Wagner coerced him into pleading guilty; 4) the trial court violated sec. 971.08, Stats., in taking his pleas; and 5) Van Wagner violated his constitutional rights by refusing to call witnesses in his favor (74:Ex. 5). This latter motion was filed August 29, 1997 (id.).

At the plea withdrawal hearing on December 10, 1997, defendant's attorney, Reesa Evans,¹ represented that she was relying largely on the two pro se motions filed by Franklin (119:4). However, Evans explained that she was abandoning some of the reasons for plea withdrawal which Franklin had asserted, such as the unfairness of the suppression hearing and the trial court's noncompliance with sec. 971.08, Stats. (119:5-6). Evans indicated she planned to concentrate on the issues of "confusion, misunderstanding the allegations involving contacts with his attorney" (119:6). At no time during the hearing did Evans contend that the nature of the prosecutor's involvement in the case or Franklin's desire to discharge Van Wagner as his attorney some time prior to plea entry constituted a fair and just reason for plea withdrawal.

Because these factors were neither cited in the defendant's pro se plea withdrawal motions nor presented to the court by Franklin's attorney at the hearing on the motions, the trial court certainly cannot be faulted for failing to discuss whether the prosecutor's involvement in the case or Franklin's desire to discharge Van Wagner shortly before entering his pleas constituted a fair and just reason for plea withdrawal. While the defendant in an affidavit filed with the trial court the day before sentencing mentioned these factors (92:4:para. (r)), this belated mention did not require the trial court to reopen the issue of defendant's entitlement to presentencing plea withdrawal or to specifically discuss whether the prosecutor's involvement in the case or Franklin's desire to

¹Evans was Franklin's fourth attorney. His first attorney, Daniel Dunn, was allowed to withdraw due to a conflict of interest (120:3-4). Franklin's third and fourth court-appointed attorneys, Christopher Van Wagner and Mark Sukowaty, were allowed to withdraw after the defendant accused them of misconduct (see 45:2-3; 47; 49; 2420:49:27-28).

fire Van Wagner before entering pleas qualified as a fair and just reason for plea withdrawal.

Brief of Plaintiff-Respondent in State v. Franklin, Nos. 98-2420-CR and 98-2421-CR, at 19-20.

Because Franklin never raised the second or third reasons in the trial court, review of the fourth issue would amount to deciding whether the trial court erroneously exercised its discretion in ruling that Franklin's attorney's alleged failure to investigate did not present a fair and just reason for plea withdrawal. So stated, this issue most certainly does not merit supreme court review.

Wherefore, this court should deny the petition for review in its entirety.

Dated this 24th day of June, 1999.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in sec. 809.62(4) for a response produced with a monospaced font. The length of this response is 8 pages.

Marguerite M. Moeller
MARGUERITE M. MOELLER