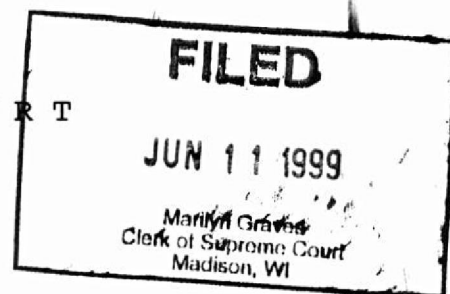


FWA - SPD apt.

STATE OF WISCONSIN
IN SUPREME COURT

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

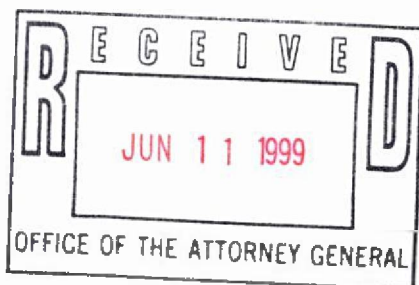


STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
JONATHAN L. FRANKLIN,
Defendant-Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX OF
DECISION OF COURT OF APPEALS, DISTRICT
IV, FILED MAY 20, 1999.

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Appellant-Petitioner



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

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JONATHAN L. FRANKLIN,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

Jonathan L. Franklin, defendant-appellant, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to sec. 808.10, Wis. Stats., and Rule 809.62, to review the decision of the Court of Appeals, District IV, in State of Wisconsin v. Jonathan L. Franklin, case numbers 98-2420-CR and 98-2421-CR on the 20th day of May, 1999 on the grounds herein set forth.

Dated this 9th day of June, 1999.



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STATEMENT OF ISSUES FOR REVIEW

1. After invoking his Fifth Amendment right to counsel, were the defendant's custodial statements to police during interrogation admissible for impeachment purposes?

Answered by the Appellate Court: Yes.

2. After invoking his Fifth Amendment right to counsel, did the defendant waive that right during his continued custodial interrogation?

Not addressed, nor answered by the Appellate Court.

3. After invoking his Fifth Amendment right to counsel, did the defendant voluntarily give statements to the police during his custodial interrogation?

Answered by the Appellate Court. Yes

4. Did the defendant show that he had a fair and just reason to withdraw his plea before sentencing?

Answered by the Appellate Court. No.

STATEMENT OF CRITERIA

The issue of whether the defendant's statements made while in custody, after invoking his Fifth Amendment right to an attorney, can be used for impeachment purposes has not been answered by this court, nor the United States Supreme Court. It is an issue of both state and federal constitutional importance.

A decision by the Wisconsin Supreme Court as to all these issues will help develop, clarify and harmonize the law.

Lastly, the Court of Appeals decision is in conflict with State v. Harris, 199 Wis. 2d 227, 544 N.W. 2d 545.

STATEMENT OF THE CASE

The basic facts are set out in the first three pages in the Appellate Court's opinion (A-Ap. p. 101-110). The defendant just celebrated his eighteenth birthday shortly before his arrest. At the time the defendant was arrested, and before he was interrogated, he told the arresting officer he wanted a lawyer before any questioning. The arresting officer so informed interrogating officers of the defendant's request for counsel. Although the defendant repeatedly requested a lawyer, the investigating detectives continued to interrogate him for the primary purpose of identifying the shooter. They did so under the advice of the prosecuting attorney, who told them that although they were violating the defendant's right to remain silent, the information obtained would not be used in the case in chief but only for purposes of impeachment. (1902/R-112, p. 76).

When the defendant again requested a lawyer the investigating detectives instead brought him the assistant district attorney. This assistant district attorney and the two investigating officers continued to urge and prompted the defendant to cooperate with them to obtain the name and location of the shooter. This is the same assistant district attorney who ultimately prosecuted the defendant.

After about an hour and a half the defendant finally gave a statement to the police identifying the shooter and accompanying the police to point out the residence of the shooter. The defendant also gave other evidence to the police, including naming other witnesses.

The investigating officers testified that they did not give the defendant his Miranda warnings, because he had already requested a lawyer. (1902/R-111, p. 85).

At the hearing on the defendant's motion to withdraw his plea the defendant's trial counsel testified that for about a week prior to entering the plea, up to the very night the plea agreement was entered into the defendant had been making efforts trying to discharge him. (1902/R-119, A-Ap. p. 111-117). At the conclusion of the hearing to withdraw, defendant's counsel argued that the defendant was trying to discharge his attorney before, and at the time the attorney was negotiating for the plea. (1902/R-119, p. 142-150).

During the Suppression hearing the State did not introduce any evidence, nor argue that the defendant waived his right to counsel.

The defendant appealed from the Judgment of Convictions and from the circuit court orders denying his motion to suppress evidence and withdraw his pleas. The Court of Appeals affirmed the judgment and orders by Decision filed May 20, 1999. The defendant now petitions for a review of that Appellate Court decision.

ARGUMENTS

I. THE DEFENDANT'S STATEMENTS MADE AFTER HE INVOKED HIS FIFTH AMENDMENT RIGHT TO COUNSEL, ARE INADMISSIBLE FOR IMPEACHMENT PURPOSES.

This issue is one of first impression. It has not been presented to this court or the United States Supreme Court for consideration. The issue of the use of such statements and evidence for impeachment purposes where a defendant has invoked a Sixth Amendment right to counsel and statements made in violation of his Miranda rights have been addressed and decided by the Wisconsin Supreme Court in State v. Moats, 156 Wis. 2d 74, 457 N.W.2d 299; and State v. Camacho, 170 Wis. 2d 53, 487 N.W.2d 67. In these cases this court has ruled that statements obtained in violation of these rights may be used for impeachment purposes.

The issue of whether a defendant's statements made in violation of his Fifth Amendment right to counsel was for the first time presented to the Wisconsin Supreme Court in State v. Harris, 199 Wis. 2d 227, 544 N.W. 2d 545. The issue in Harris was whether or not such evidence could be used in the State's case in chief. The court in Harris noted that as of that time the United States Supreme Court had not addressed that issued. Id. at 236.

In rendering its decision the Harris court relied on Edwards v. Arizona, 451 U.S. 477 (1981). Justice Geske writing for the court said:

We find that there is a critical difference between a mere defect in the administration of Miranda warnings "without more" and police-initiated interrogation conducted after a suspect unambiguously invokes the right to have counsel present during questioning. The latter is a violation of a constitutional right. As such, an Edwards violation triggers the fruit of the poisonous tree doctrine requiring the suppression of the fruits of that constitutional violation. Harris, at 248

The Harris court went on and concluded that the circuit court erred by allowing the prosecution to use the physical evidence obtained in violation of Edwards. The issue of whether statements obtained could be used for impeachment purposes was not an issue in Harris.

The Court of Appeals in this case held that relying on Harris, this court by implication would rule that statements obtained in violation of a suspect's Fifth Amendment rights could be used for impeachment purposes. The Court of Appeals reasoned that Fifth Amendment violations should be treated no differently than Miranda violations, and that statements voluntarily made following invocation of the right to counsel can be used for impeachment purposes.

We respectfully submit that the determination of ones constitutional right to counsel under the Fifth Amendment cannot be based upon implication or speculation. For this reason, if for no other, this court should review the appellate court's decision.

II. FOLLOWING INVOCATION OF HIS FIFTH AMENDMENT RIGHT, THE ISSUE IS WHETHER THE DEFENDANT WAIVED THIS RIGHT BEFORE GIVING HIS STATEMENTS, AND NOT WHETHER HE VOLUNTARILY GAVE HIS STATEMENTS.

Both the trial court and court of appeals resolved the issue of the admissibility of the defendant's invocation of counsel statements by concluding his statements were given voluntarily. Neither the trial court nor the court of appeals addressed the issue of whether or not the defendant waived his right to counsel after he invoked that right, notwithstanding the argument of defense counsel. By so doing the trial court and court of appeals ignored the Wisconsin Supreme Court ruling in Harris.

The Harris court specifically held that once a criminal suspect invokes their right to counsel judicial inquiry into voluntariness, that is whether subsequent statements were actually coerced, is beside the point. The voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are separate and discrete inquiries.

The Harris court went on to hold that following invocation, the key issue becomes whether the right to counsel was effectively waived. That even suspect initiated conversation does not constitute in itself a proof of waiver. The court went on to state, that a valid waiver of an asserted right cannot be established by showing only that the suspect

responded to police initiated custodial interrogation even if he has been advised of his rights.

The Harris court further concluded that if the authorities reinitiate contact it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect. Harris at 249-251.

Assuming for purposes of argument, that the issue of voluntariness is appropriate, the Court of Appeals analysis is still fatal, because the court failed to weigh the following facts against the determination of voluntariness; 1) That the defendant was in custody; 2) the two interrogating officers and prosecuting attorney overmastered the suspect, who just turned eighteen at the time of his arrest; 3) Miranda warnings were not given prior to the interrogation; and 4) the defendant was not told he had a right to remain silent. State v. Kiekhefer, 212 Wis. 2d 460, 569 N.W.2d 316 (1997).

These factors certainly weigh heavily against the conclusion that the defendant's statements were voluntarily made.

**III. THE DEFENDANT HAD A JUST AND FAIR
REASON TO WITHDRAW HIS PLEA PRIOR TO
SENTENCING.**

The Court of Appeals at page 8 of this decision noted that the defendant claimed that the trial court erroneously

exercised its discretion for failing to address three issues in its decision denying his plea-withdrawal motion: 1) the trial counsel's failure to investigate certain alibi witnesses; 2) his desire to discharge his attorney before entering his pleas; and 3) the assistant district attorney's involvement in the investigatory phase of the case.

The appellate court concluded that the defendant never raised the second and third points in the circuit court and therefore, waived any right to pursue them on appeal. (A-Ap. p. 108-109).

Contrary to the court's decision, the record as to the second point shows that the issue of the attorney's failure to investigate was raised, was argued and was considered briefly by the trial court in its decision.

The trial attorney testified during the evidentiary hearing on the motion to withdraw his plea, that prior to entering into the plea agreement, the defendant sent inquiries and requests to the Public Defender's Office for another lawyer. He also testified that he discussed his continued representation with the defendant even on the evening prior to the plea hearing. He further testified that the assistant district attorney was present and also encouraged the defendant to continue his representation. (1902/R-119, A-Ap.p. 114-117).

At the conclusion of that hearing the defendant's attorney argued the point that her client was trying to

discharge his attorney two weeks prior to the plea. (1902/R-119, p. 142-150).

The trial court in its oral decision from the bench commented on these facts, but reached no conclusion. (1902/R-119, A-Ap. p. 142-143).

Admittedly, the defendant's counsel did not argue at the hearing to withdraw the plea that the assistant district attorney's involvement was a factor in the decision to withdraw the plea. However, the record shows that the assistant district attorney was actively involved in questioning the defendant, and was the same assistant district attorney who advised the defendant to continue his trial attorney's representation on the night the plea agreement was entered into.

The record shows that the assistant district attorney advised the investigating detectives to continue to interrogate the defendant in order to get the name of the shooter because the interest of the State outweighed the defendant's Fifth Amendment right to counsel. The assistant district attorney pursued this conduct notwithstanding SCR 20:3.8, which requires him to make reasonable effort to make sure the defendant has been advised of his right to counsel and been given a reasonable opportunity to get counsel.

Prior to the execution of the plea agreement, the defendant made it known he was not interested in entering a

plea. Again, before the plea agreement he made it known he wanted to discharge his lawyer and get another attorney.

After the third and final draft of the plea agreement, the defendant, his counsel, and assistant district attorney met for the purpose of executing that agreement. Again, the defendant expressed his desire to get another lawyer. At that time the assistant district attorney spoke to the defendant telling him he had a good lawyer and should keep him. (1902/R-119, A-Ap. p. 114). It is little wonder then, that the defendant, who had just turned eighteen, logically concluded that the assistant district attorney was in control of his destiny, had complete control over the case, and as a consequence the defendant had to continue with his attorney and sign the plea agreement.

The Wisconsin Supreme Court in Jackson v. Benson, 218 Wis. 2d 835, 901, 578 N.W.2d 602, wrote that it is an often repeated rule in this state that issues not considered by the circuit court will not be considered for the first time on appeal. That the rule is not absolute, however, and exceptions are made. In the Jackson case the issues raised were legal questions which could be disposed of based upon consideration of the record. Therefore, in an exercise of judicial economy the court exercised its discretion to decide the issues that were raised for the first time.

As in Jackson the issues in this case are of constitutional significance and can be resolved based upon the

record. Therefore, we respectfully requests that if the court grants our petition to review, that it exercise its discretion to consider the conduct of the assistant district attorney as being one of the basis supporting withdrawal of the plea.

The Court of Appeals wrote that it was satisfied that the trial court did not erroneously exercise its discretion in holding that the defendant's trial attorney failure to interview certain witnesses was not a factor that was a fair and reasonable basis for the withdrawal of his plea. The record shows however, that there were other deficient acts of trial counsel that would constitute a fair and just reason to withdraw the plea.

Specifically, the record shows that the trial attorney did not conduct any investigation at all. (1902/R-119, A-Ap. p. 111). Trial counsel did have a working arrangement with the attorney for the co-defendant to exchange investigative information. However, prior to the plea the trial attorney received no such information, except for one witness. (1902/R-119, A-Ap. p. 112).

Without conducting an investigation, how could trial counsel possibly advise his client on the strength and weaknesses of the case, or advise on the merits of entering a plea? The record shows the co-defendant was acquitted of the same charge, even though he was the so called shooter. Had trial counsel investigated the case, he too may have discovered the evidence and witnesses used in the co-

defendant's case which convinced the jury to return a verdict of not guilty.

The failure to investigate in criminal cases clearly is a basis for overturning verdicts and granting motions to withdraw pleas, on the constitutional grounds of ineffective assistance of counsel.

A person charged with a crime has a right to effective assistance of counsel guaranteed by the Sixth Amendment of the United State Constitution, Article I, section 7 of the Wisconsin Constitution. State v. Johnson, 125 Wis. 2d 8, 10, 374 N.W.2d 637.

A trial counsel's failure to interview witnesses and investigate the case for purposes of the case in chief or impeachment of other witnesses is a basis for termination for violation of a Sixth Amendment right. State v. Marty, 137 Wis. 2d 352, 404 N.W.2d 120; State v. Delgado, 194 Wis. 2d 737, 535 N.W.2d 450.

Under these sets of facts it is no wonder that the defendant, who had just turned eighteen, could have concluded at the time of the plea negotiations that he had no chance to prevail, that the cards were stacked against him, and he therefore, had no choice but to enter into this plea agreement. These factors, certainly qualify as being more than a mere showing of an adequate reason for the defendant's change of heart and a basis for withdrawal of his plea.

We respectfully submit that the Court of Appeals failure to consider this factor was an erroneous exercise of discretion. We further submit that this court, upon review, should consider the lack of investigation was a factor influencing the defendant to plea and later move to withdraw his plea.

CONCLUSION

For the reasons stated herein, the defendant-appellant respectfully requests the Supreme Court review the decision of the Appellate Court, District IV, Case Nos. 98-2420-CR and 98-2421-CR dated and filed in Madison, May 20, 1999.

Dated this 5th day of June, 1999.



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