STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2010AP2809-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW A. LONKOSKI,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
Entered in the Oneida County Circuit Court,
the Honorable Mark A. Mangerson, Presiding

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Lonkoski's Request for a Lawyer Invoked His ***Miranda*** Right to Counsel.

Mr. Lonkoski argued in his opening brief that he made an unambiguous request for counsel during his interrogation at the sheriff's station. (Appellant's Brief at 22-23). He further argued that he was undergoing custodial interrogation at the time of his request, or, in the alternative, that custodial interrogation was "imminent" or "impending" under ***State v. Hambly***, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48. (Appellant's Brief at 15-22). Under either circumstance, his request for an attorney was an effective invocation of his ***Miranda*** right to counsel, and therefore required the officers to cease their interrogation.

The state, by its silence on the issue, appears to concede that Mr. Lonkoski's request for the assistance of counsel was unambiguous. The state also makes no attempt to argue that custodial interrogation was not imminent at the time of the request. This state instead argues, first, that Mr. Lonkoski was not in custody at the instant he asked for an attorney, and second, that a person who is not in custody may not invoke the Fifth Amendment right to counsel, even where custodial interrogation is imminent. (Respondent's Brief at 5-14).

In order to show that the officers were entitled to disregard Mr. Lonkoski's unambiguous request for a lawyer, the state must be right on both points. It is right on neither. Mr. Lonkoski was in custody when he asked for a lawyer. The state's argument to the contrary misses the forest for the trees: its blinkered line-by-line reading of the unofficial

interrogation transcript is blind to much of the meaning of the conversation.

Further, even if one accepts the state's premise that custody began 20 or 30 seconds after Mr. Lonkoski asked for a lawyer, his request was still an effective invocation of his right to counsel. The state's claim that a person momentarily not in custody cannot invoke the ***Miranda*** counsel right – even for an imminent custodial interrogation – is not supported by the cases it cites, nor by any law or logic. ***Miranda*** protects the right to silence against the pressures of a "police-dominated atmosphere." ***Miranda v. Arizona,*** 384 U.S. 436, 456 (1966). Where a suspect like Mr. Lonkoski is under interrogation and clearly about to be arrested, such an atmosphere is plainly present. His invocation of his rights ought not to be ignored in a subsequent custodial interrogation.

A. Mr. Lonkoski was in custody when he asked for a lawyer.

As Mr. Lonkoski argued in his brief-in-chief, what was initially a voluntary interrogation took on a different character as the officers shifted tactics and began to accuse him of being responsible for the death of his daughter. (Appellant's Brief at 20-21). Though the officers had not yet physically restrained Mr. Lonkoski or told him that he was under arrest, it became clear that they would be doing so. As the cases Mr. Lonkoski has cited show, a person's knowledge that the police suspect him or her of an extremely serious crime – and that they claim to have strong proof of guilt – is a factor strongly suggesting custody. (Appellant's Brief at 20). This is because it is widely known that the police arrest people whom they can prove guilty of serious crimes.

Mr. Lonkoski's behavior perfectly illustrates the concept. Despite initially being told that he was there voluntarily, once Mr. Lonkoski realized that the officers suspected him in Peyton's death – and knew, via "doctors" and "technology," just what had happened – Mr. Lonkoski deduced that he was under arrest, which fact Lt. Wood confirmed. (Appellant's Brief at 5, 7).

The state makes two arguments that Mr. Lonkoski was not in custody. First, it identifies one or two factual distinctions between each of the cases Mr. Lonkoski cites and this one. (Respondent's Brief at 12-13). Of course, every case has different facts, and Mr. Lonkoski's argument is not that ***Jackson***, ***Ramirez***, ***Mansfield*** or ***Jacobs*** are identical. Each simply illustrates the logical significance to the custody determination of a person's knowledge that the police suspect, and have proof, of his commission of a serious crime.

The state's other approach is to construe away much of the meaning of the officers' statements to Mr. Lonkoski, in an attempt to show that Mr. Lonkoski would not have understood their accusations. (Respondent's Brief at 13). It is of course true that an officer's suspicions that are not communicated to the suspect do not bear on the custody inquiry. ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984). It is equally true, though, that "[a]n officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." ***Stansbury v. California***, 511 U.S. 318, 324 (1994).

The latter is the situation here – the officers' suspicions were clearly and effectively communicated. Mr. Lonkoski has already explained how the officers' questions and statements made clear their accusation that he had given his daughter morphine – which Mr. Lonkoski obviously

understood as such. (Appellant's Brief at 7). The state responds by considering each line of transcript individually and out of context. The state also points out that at one point, the officers claimed that they were "just asking," rather than accusing. (Respondent's Brief at 13).

The record that matters in this case is the video – not the unofficial transcript and certainly not isolated lines thereof.[1] Viewed in context, the officers' caginess should not deceive this court about the meaning of their questioning, any more than it did Mr. Lonkoski. He understood what the officers were saying – that they had proof that he had killed his daughter. He also knew that, for this reason, he would not be leaving the sheriff's station. He was in custody.

B. Even if Mr. Lonkoski's custody began seconds after he asked for a lawyer, custodial interrogation was imminent and his request therefore invoked his ***Miranda*** right to counsel.

As noted above, the state does not appear to dispute that custodial interrogation was impending or imminent at the moment Mr. Lonkoski asked for an attorney. (Respondent's Brief at 11 (custody "certain as of [Lt.] Wood's statement, 'You are now.'")). Instead, the state submits that it does not matter; it argues that the police may simply disregard a suspect's request for an attorney, even when custodial interrogation is imminent, if that person is not in custody at the instant the request is made.

The state cites several cases for this proposition, and while some contain general statements that ***Miranda*** rights

[1] Because this case hinges entirely on the events depicted in the interrogation video, counsel is filing a supplemental appendix containing a copy of the video with this brief.

apply only to custodial interrogations, none address the doctrine of "imminent or impending interrogation" discussed in ***Hambly***. ***State v. Kramer*** concerned a suspect's request for a lawyer during a lengthy armed standoff with police that took place on the suspect's property. 2006 WI App 133, ¶¶5, 10, 294 Wis. 2d 780, 720 N.W.2d 459 (Respondent's Brief at 5). Custody did not commence until approximately 4 ½ hours after the request, and custodial interrogation began at the police station about 10 hours later. Appellant's Brief at 7-8, 9-10, ***Kramer***, 294 Wis. 2d 780 (2005AP105-CR), *available at* http://libcd.law.wisc.edu/~wb/will0113/48778410.pdf. While the state seizes on the ***Kramer*** court's general statement that "unless a defendant is in custody, he or she may not invoke the right to counsel under ***Miranda***" it ignores the subsequent qualification:

> Our holding here, however, is not meant to suggest that there are no exceptions to the general rule that a defendant may not anticipatorily invoke ***Miranda***. For example, there might be situations where a request for counsel at the conclusion of a standoff situation is so intertwined with imminent interrogation that the invocation should be honored. That did not occur here.

Id., ¶¶9, 15. In the present case, where interrogation was actually ongoing at the time that Mr. Lonkoski requested an attorney, his request for counsel was clearly "intertwined with interrogation" such that it had to be honored.

State v. Hassell, on which the state also relies, is similarly distinguishable. 2005 WI App 80, 280 Wis. 2d 637, 696 N.W.2d 270; (*See* Respondent's Brief at 5). There, the defendant's claimed assertion of his right to silence occurred in his own home, the day before the interrogation that he sought to suppress. ***Id.***, ¶¶2-3, 8-10.

In any case, both ***Hassell*** and ***Kramer*** were decided before ***Hambly***, in which the supreme court first addressed the effectiveness of a request for counsel for an "imminent or impending" interrogation. The state is flatly wrong when it states that "[w]hether a person who is in custody can assert her ***Miranda*** right to counsel before interrogation begins, is an open question in Wisconsin." (Respondents' Brief at 7). In fact, ***Hambly*** directly answers that question in the affirmative. (*See* Appellant's Brief at 18).

It is true that neither ***Hambly***, nor any other case of which Mr. Lonkoski is aware, presents the precise facts of this case – that is, ongoing interrogation and imminent custody. All authority appears to spring from the inverse factual situation – that is, a person who is presently in *custody* but is facing imminent *interrogation*. Though the state allows that the "concept of imminent interrogation makes sense," in those cases, (Respondent's Brief at 7), it provides no legal or logical reason why it does not also make sense in this one.

In fact, the reasoning of the doctrine of imminent custodial interrogation applies with equal force whether it is custody or interrogation that is looming bu not yet present. All of ***Miranda***'s prescriptions, including the right to counsel, are designed to protect the citizen not from police compulsion in general, but specifically from the compulsion *to speak*. ***Miranda***, 384 U.S. at 461. The two elements that give rise to that compulsion are custody, which puts the citizen in the control of the police, and interrogation, by which the police may use that control to obtain the information that they seek. ***Id.*** Where, as here, a citizen is being interrogated by the police, and becomes aware that he is about to be in custody (if he is not already), the compulsion to speak that ***Miranda***

guards against is present. Accordingly, the citizen ought to be able to invoke the protections that ***Miranda*** provides.[2]

At the moment he asked for an attorney, Mr. Lonkoski was plainly inside the "'context' of custodial interrogation" and further, was clearly requesting the assistance of counsel "in dealing with custodial interrogation." ***Hambly***, 307 Wis. 2d 98, ¶¶3, 19. The state is asking this court to disregard Mr. Lonkoski's unambiguous request for counsel on the grounds that his custody commenced only seconds later. Pursuant to ***Hambly***, this court should reject the state's argument and give effect to Mr. Lonkoski's clear request for an attorney.

C. Mr. Lonkoski did not initiate further discussion with the officers; his agreement to speak to them was in response to their continued interrogation.

As with its custody argument, the state's "re-initiation" argument depends on a stilted reading of the crucial exchange that ignores its plain implications. Lt. Wood quite clearly conveyed to Mr. Lonkoski that he was under arrest *because* he had requested an attorney and thereby cut off questioning. (*See* Appellant's Brief at 24). It is obvious that telling a person that he or she is under arrest *because* he has asserted a ***Miranda*** right has a tendency to convince that person to

[2] The state's view of the law would also provide the police with a powerful weapon to overcome a citizen's assertion of rights. An officer having an ostensibly consensual discussion with a suspect could respond to any request for the assistance of an attorney by immediately arresting the person (as happened here) and then simply continuing the interrogation. Of what use would reading the ***Miranda*** rights be at this point, where the person has just requested an attorney and had the request denied?

relinquish that right and continue talking. It is therefore "reasonably likely to elicit an incriminating response" from the person – as it did here – and is the "functional equivalent" of express questioning. *See* ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980).

The state does not dispute that Lt. Wood's "[y]ou are now" would tend to elicit an incriminating response. Instead, the state characterizes the comment as one "normally attendant to arrest and custody." *See* ***id.*** at 301. (Respondent's Brief at 17). The state completely ignores the case law clarifying that this phrase refers to "routine booking questions" – that is, questions aimed at obtaining "data required as part of the processing" of an arrestee. ***United States v. Kane***, 726 F.2d 344, 349 (7th Cir. 1984). "[The routine booking question exception is limited to routine questions asked to assist in the gathering of background biographical data." ***State v. Bryant***, 2001 WI App 41, ¶14, 241 Wis. 2d 554, 624 N.W.2d 865. "Routine booking questions are allowed because, to an objective observer, the questions are not designed to elicit an incriminating response. Where the police should know that a question is likely to elicit an incriminating response, that question cannot be asked absent ***Miranda*** warnings." ***United States v. Monzon***, 869 F.2d 338, 342 (7th Cir. 1989) (citation and internal quotation marks omitted). Lt. Wood's statement obviously had nothing to do with obtaining biographical data. As such, it does not fall within the "routine booking questions" exception. It was interrogation.

The fact that the police conveyed to Mr. Lonkoski that he was under arrest *because* he had asked for an attorney places this case in a different category from those cited in the state's brief – none of which involved a suspect being placed under arrest in response to the assertion of a ***Miranda*** right.

(Respondent's Brief at 17-19). Mr. Lonkoski's case is, instead, like ***Collazo*** and ***Gomez***, in which agents pressured the suspects to talk by intimating that insisting on the right to counsel, or failing to "cooperate," would have negative consequences. ***Collazo v. Estelle***, 940 F.2d 411, 414, 416-17, (9th Cir. 1991); ***United States v. Gomez***, 927 F.2d 1530, 1536-38 (11th Cir. 1991). The state's only attempt to distinguish these cases is to baldly assert that this case does not involve, inter alia, "coercion." (Respondent's Brief at 23). If being arrested in response to a request for an attorney is not "coercion" to withdraw the request, what is?

Because the sheriff's officers did not cease their interrogation of Mr. Lonkoski after he requested an attorney, and instead pressured him to drop his request, the state's argument that Mr. Lonkoski reinitiated the interrogation fails. Because reinitiation by the defendant is one of the two requirements for admissibility under ***Edwards v. Arizona***, it is immaterial whether, as the state argues, Mr. Lonkoski's later waiver of his ***Miranda*** rights was voluntary in and of itself. ***Edwards***, 451 U.S. 477, 483-85 (1981) (Respondent's Brief at 19-23). The failure to follow ***Edwards*** requires suppression.

CONCLUSION

Because the sheriff's officers engaged in a custodial interrogation of Mr. Lonkoski after he invoked his ***Miranda*** right to counsel, Mr. Lonkoski respectfully requests that this court vacate his conviction and sentence and remand to the circuit court with directions that his statements during this and subsequent interrogations, as well as all evidence derived therefrom, be suppressed.

Dated this 27th day of June, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,544 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of June, 2011.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of June, 2011.

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