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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP2809-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW A. LONKOSKI,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction
Entered in the Oneida County Circuit Court,
the Honorable Mark. A. Mangerson, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. Mr. Lonkoski's Clear Request for a Lawyer While Either Undergoing Custodial Interrogation or Facing Imminent Custodial Interrogation Was a Valid Invocation of His ***Miranda*** Right to Counsel.

A. Mr. Lonkoski was in custody when he asked for an attorney.

The state does not dispute that Mr. Lonkoski clearly requested an attorney while under interrogation. It argues only that he was not in custody until 30 seconds after his request, so the officers were free to ignore it.

The state enumerates factors which, it argues, militate against custody. Respondent's Brief at 24-28.[1] While identifying preconceived factors may be useful in analyzing custody, the question "cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly"; overreliance on such factors may cause one "to lose sight of the forest for the trees." ***United States v. Czichray***, 378 F.3d 822, 827-28 (8th Cir. 2004).

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[1] Two of the state's factual claims are erroneous. The detectives told Mr. Lonkoski he was not under arrest one time, at the beginning of the interview, not "several times" as the state asserts (and as the trial court mistakenly found). Respondent's Brief at 27, 23; (71:00:1:18). The record also does not show that Mr. Lonkoski knew he could exit the sheriff's station on his own. Respondent's Brief at 26, 28; (26:15-16) (Det. Gardner "assumed" he knew because at some unspecified time in the past he had opened the door, but admitted she had no way of knowing what he knew on the day in question).

Thus, while it is true that the officers did not move Mr. Lonkoski from place to place, nor handcuff him, nor point guns at him, Respondent's Brief at 27-28, none of these absent factors are particularly significant here. No such action would be necessary to convince a person in Mr. Lonkoski's position – one whose interrogators claim that they know, and can prove, that he caused the death of an infant[2] –that he is not going to be allowed to go free.

Mr. Lonkoski previously cited several cases for the proposition that such accusations on the part of the police are a factor suggesting ***Miranda*** custody. Opening Brief at 17. The state responds by claiming that "[t]he fact that police confront a suspect with evidence of his/her guilt has no bearing on the custody inquiry," citing ***Oregon v. Mathiason***, 429 U.S. 492 (1977). Respondent's Brief at 29. In ***Mathiason***, the interviewing officer falsely told the defendant his fingerprints had been found at the scene of a burglary. ***Id.*** at 493. The Court stated that "[w]hatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the ***Miranda*** rule." ***Id.*** at 495-96.

The Court decided ***Mathiason*** before it adopted the reasonable-person test for ***Miranda*** custody in ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984). *See* ***Quartararo v. Mantello***, 715 F. Supp. 449, 457 n.4 (E.D.N.Y. 1989), *aff'd*,

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[2] The state disputes that this was the meaning of Lt. Wood's questioning, but does not elaborate or offer any other plausible interpretation. Respondent's Brief at 26. The implications of the conversation could hardly be plainer. Opening Brief at 4-7, 16. As to the officers' claims that they were "just asking" Mr. Lonkoski whether he had caused his daughter's death, rather than "accusing" him, they are laughable, both in light of the obvious accusations that preceded them and the formal arrest that immediately followed.

888 F.2d 126 (2d Cir. 1989). The above-quoted statement is clearly inconsistent with this test, and as such, "is often not followed by lower courts." ***Id.***, 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §6.6(d) at 734 n.49 (3rd ed. 2007). In fact, the Court has since stated that an officer's communication of his or her suspicions to someone under interrogation is a factor for ***Miranda*** custody. ***Stansbury v. California***, 511 U.S. 318, 325 (1994).

B. Mr. Lonkoski's request for an attorney was a valid invocation of his ***Miranda*** right to counsel even if custody commenced seconds later.

Mr. Lonkoski argued in his opening brief that even if he was not in custody at the very instant he requested counsel, custodial interrogation was imminent and his request was unequivocally for "the assistance of an attorney in dealing with custodial interrogation." ***State v. Hambly***, 2008 WI 10, ¶21, 307 Wis. 2d 98, 745 N.W.2d 48. Opening Brief at 18-22.

The state responds first by citing a number of United States Supreme Court cases that, in its estimation, "preclude an imminent custody rule." Respondent's Brief at 11.

They do no such thing. Most consider whether ***Miranda*** *warnings* were required before the interrogations at issue, not whether government agents had to honor a suspect's invocation of the ***Miranda*** *rights*.[3] The distinction is fundamental. There is no question that ***Miranda*** warnings are not required unless and until custodial interrogation

[3] *See* ***Beckwith v. United States***, 425 U.S. 341, 341-42 (1976); ***Oregon v. Mathiason***, 429 U.S. 492, 492 (1977); ***California v. Beheler***, 463 U.S. 1121, 1121 (1983); ***Stansbury v. California***, 511 U.S. 318; 319 (1994).

begins. Because the warnings are designed to prevent the uninformed surrender of rights *during* custodial interrogation, it would be nonsensical to require that they be given at some other time. ***Miranda v. Arizona***, 384 U.S. 436, 467-69 (1966). In contrast, there is no reason that a citizen's assertion of the right to be *free* of custodial interrogation should be disregarded until the interrogation has already begun.

Both the United States Supreme Court and this one have recognized that a ***Miranda*** right may be invoked before custodial interrogation. In ***Miranda*** itself, the Court stated that while a suspect was not *required* to make a "pre-interrogation request for a lawyer … such request affirmatively secures his right to have one." ***Miranda v. Arizona***, 384 U.S. 436, 470 (1966). In ***Smith v. Illinois***, the Court described as "plainly wrong" the notion that a suspect's invocation before or during the warnings would not be effective, and rejected the theory that the invocation was for naught because "interrogation had not begun." 469 U.S. 91, 98 n.6 (1984) ("[A] request for counsel coming 'at any stage of the process' requires that questioning cease," *citing* ***Miranda***, 384 U.S. at 444-45). In ***State v. Hambly***, this court held that the police had to honor a suspect's request to speak to an attorney, even though that request came when no interrogation had begun and before the ***Miranda*** rights had been read. 307 Wis. 2d 98, ¶¶9, 44. Thus the fact that ***Miranda*** warnings are not yet required at a particular juncture cannot mean that a suspect's invocation of a ***Miranda*** right is ineffective.

Montejo v. Louisiana and ***Maryland v. Shatzer*** are still further off point. 556 U.S. 778 (2009); __ U.S. __, 130 S. Ct. 1213 (2010). ***Montejo*** deals with the Sixth Amendment, ***Shatzer*** with whether ***Edwards***' "re-initiation"

rule applies when a suspect has been released from custody. 556 U.S. at 786-87; 130 S. Ct. at 1223. The quotations the state relies on describe only briefly the parameters of the ***Miranda*** regime. Like any other legal writer, the Court does not lay out the intricacies of each doctrine to which it refers in passing. It is absurd to suggest that the Court's shorthand descriptions of ***Edwards*** and ***Miranda*** resolve a question it expressly left open in ***McNeil v. Wisconsin***, 501 U.S. 171, 182 n.3 (1991).

Nor do the Wisconsin cases cited by the state decide the issue. In ***State v. Hassell***, the defendant sought to suppress incriminating statements made during a custodial interrogation at the jail. 2005 WI App 80, ¶¶3, 5, 280 Wis. 2d 637, 696 N.W.2d 270. He claimed to have asserted his right to silence during a non-custodial discussion in his own home on the previous day. ***Id.***, ¶¶2, 5. The court of appeals rejected the claim. ***Id.***, ¶¶9, 10, 15. It did not, however, consider or discuss whether a suspect facing imminent or impending custodial interrogation might invoke a ***Miranda*** right; ***Hambly*** was still three years off.

State v. Kramer concerned a suspect's request for a lawyer during an armed standoff on his own property. 2006 WI App 133, ¶¶5, 10, 294 Wis. 2d 780, 720 N.W.2d 459. Custody did not commence until 4 ½ hours after the request, and interrogation began at the police station 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_web/will0113/48778410.pdf. While the court stated generally that "unless a defendant is in custody, he or she may not invoke the right to counsel under ***Miranda***" it made the following 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.

Id., ¶15.

The ***Hambly*** court described ***Hassell*** and ***Kramer*** as "stand[ing] for the rule that a person who is not in custody cannot anticipatorily invoke a Fifth Amendment ***Miranda*** right to counsel or right to remain silent," but distinguished them by noting that ***Hambly***'s "request for counsel was an expression of a desire 'for the assistance of an attorney *in dealing with custodial interrogation by the police*.'" ***Hambly***, 307 Wis. 2d 98, ¶41 (emphasis in original). Mr. Lonkoski, who requested counsel while actually undergoing interrogation at the sheriff's station, was just as plainly seeking a lawyer's assistance in dealing with custodial interrogation – and the state has not suggested otherwise.

The state next provides citations to numerous foreign cases which, it contends, support its position. Most involve radically different facts from those here.[4] To the extent that any of them hold that a suspect may not invoke the ***Miranda*** rights until the very instant custodial interrogation begins,

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[4] *See, e.g.*, ***United States v. Wyatt***, 179 F.3d 532, 533-34 (7th Cir. 1999) (defendant stated "I think I should see a lawyer" while standing outside a bar; was interrogated the following day in jail); ***United States v. Bautista***, 145 F.3d 1140, 1143-44 (10th Cir. 1998) (defendant asked for lawyer during non-custodial interview at police station; defendant left after interview; sought suppression of statements made after arrest six days later); ***Alston v. Redman***, 34 F.3d 1237, 1240-41 (3d Cir. 1994) (during meeting at jail with public defender employee defendant signed form letter requesting not to speak with police without an attorney; was interrogated three days later at police station).

they are simply in error. Such a view can only be derived from a radical overreading of ***McNeil***. The relevant footnote in that case, again, was:

> We have in fact never held that a person can invoke his ***Miranda*** rights anticipatorily, in a context other than "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve. If the ***Miranda*** right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the ***Miranda*** right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

McNeil, 501 U.S. at 182 n.3 (citations omitted).

The ***McNeil*** footnote contains no holding. It expresses doubt as to whether a defendant can invoke ***Miranda*** at a court hearing or by letter. Such invocations are clearly, as the court says, "anticipatory," since they address themselves to purely hypothetical interrogations; that is, they are made "outside the context of custodial interrogation." The footnote comes nowhere near stating that a defendant must wait until custodial interrogation has *actually begun* before invoking ***Miranda***. In fact, as noted above, the Court has said just the opposite, in ***Smith*** and in ***Miranda*** itself.

Further, such a rule would run contrary to the purpose of the ***Miranda*** rights. As the state notes, ***Miranda*** seeks to protect the citizen's right to silence from the compulsion inherent in custodial interrogation. Respondent's Brief at 19.

But in the state's view, if a citizen attempts to invoke his rights when custodial interrogation is about to begin, the police may simply ignore that invocation, and then bring that "inherent pressure" to bear. If the purpose of ***Miranda*** is to *prevent* compulsion, how can it be that the only valid invocation of the ***Miranda*** rights is one *made under* compulsion?

Nor is there any question of what standard to apply, contrary to the state's suggestion. In ***Hambly***, this court adopted an objective "reasonable person" standard to determine whether interrogation is imminent or impending. ***Hambly***, 307 Wis. 2d 98, ¶28 n.27. In any case, because the state apparently concedes that custodial interrogation was imminent here, there is no need to determine a standard.

Finally, though the state worries that custody is "easily manipulated by police," it is the state's rule that invites manipulation. Respondent's Brief at 20. As Mr. Lonkoski suggested in his opening brief, under the state's view of the law, police interrogating a suspect may respond to a request for an attorney by denying the request, arresting the person, and continuing the interrogation. Opening Brief at 22. The state has not responded and apparently agrees.

It is thus the state, not Mr. Lonkoski, that is proposing a rule "untether[ed] from [***Miranda***]'s theoretical basis." Respondent's Brief at 19. The state's position, if adopted, would allow the police to ignore a person's request for counsel "in dealing with custodial interrogation" and would invite them to manipulate what the circuit court correctly deemed a "technicality" to overcome a citizen's stated desire to deal with the police only through counsel. (61:11). This court has already rejected a similar position, in ***Hambly***, and should do the same here.

II. Mr. Lonkoski's Request to Continue Talking With the Detectives Was a Product of Their Post-Request Interrogation, and Hence Not a Valid "Initiation" Under ***Edwards***.

The state argues extensively against the notion that ***Edwards v. Arizona*** requires a break in time between a citizen's assertion of the right to counsel and the initiation of further conversation. 451 U.S. 477 (1981); Respondent's Brief at 31-34.

Despite the state's claim, this is not Mr. Lonkoski's position. He contends that after he invoked his ***Miranda*** right to an attorney, he did not "initiate[] further communication, exchanges, or conversations with the police," as ***Edwards*** requires. ***Id.*** at 484-85. He argues that the officers' response to his request for an attorney – telling him he was under arrest and implying that this was because he had asked for a lawyer – was the functional equivalent of interrogation under ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980). Opening Brief at 25. He further argues that it was this action by the officers that reinitiated the conversation. Opening Brief at 27.

In its discussion of ***Innis***, the state again devotes most of its attention to rebutting arguments that Mr. Lonkoski has not made. Respondent's Brief at 36-39. He has never asserted that "I didn't accuse you," "We were asking" or "I have to stop talking to you …" were the functional equivalent of interrogation. Respondent's Brief at 36. He has always maintained that Lt. Wood's informing him that he was "now" (having asked for an attorney) under arrest was objectively likely to "elicit an incriminating response," and hence was interrogation. ***Id.*** at 301.

The state claims that Lt. Wood's statement falls into a category exempted from ***Innis***'s "incriminating response"

test: words or actions that are "normally attendant to arrest and custody." ***Id.*** at 301; Respondent's Brief at 37. Numerous cases clarify 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). "[T]he 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. Lt. Wood's statement obviously had nothing to do with obtaining biographical data, so it cannot fall within the "routine booking questions" exception. The state makes no argument that the statement was not likely to elicit an incriminating response; as such it was interrogation.

Further, even if Lt. Wood's "You are now" were not interrogation, this does not mean that the state has satisfied ***Edwards***. That case requires the state to show that Mr. Lonkoski "initiated" the conversation after he asked for an attorney. ***Edwards***, 451 U.S. at 484-85. If Lt. Wood's statement convinced Mr. Lonkoski to continue speaking with the officers, then it was Lt. Wood, rather than Mr. Lonkoski, who initiated the subsequent conversation. *See* ***Collazo v. Estelle***, 940 F.2d 411, 423 (9th Cir. 1991). The trial court found that Lt. Wood's statement did in fact prompt Mr. Lonkoski's change of heart:

> There was a question by the defendant whether he was under arrest. When he was formally arrested and told you are now, he then immediately says he wants to talk without a lawyer obviously impressed by the fact that he is now going to be detained. He said I'll talk to you without a lawyer.

(60:6).

The court was correct. After Mr. Lonkoski asked for a lawyer, Lt. Wood persuaded him to change his mind. Lt. Wood, not Mr. Lonkoski, initiated the subsequent conversation.

CONCLUSION

Because the sheriff's officers engaged in 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 9th day of January, 2013.

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 3,000 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 9th day of January, 2013.

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