STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2011AP2916-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANDREW M. EDLER,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

THE SUPPRESSION ORDER SHOULD BE REVERSED.

In respondent's brief, Edler shifts the focus from an analysis of the clarity of his request for counsel to a claim that he was still entitled to the *Edwards*[1] prophylactic protections during his April 20 questioning, based on his

[1] *Edwards v. Arizona*, 451 U.S. 477 (1981).

assertion of his *Miranda* right to counsel on March 30. Edler supports this contention by arguing that *Maryland v. Shatzer*, __ U.S. __, 130 S. Ct. 1213 (2010), did not establish a bright-line rule that 14 continuous days after release from custody terminates the applicability of the *Edwards* rule, and asserting that even if it is a bright-line rule it should be rejected by this court as violative of the Wisconsin Constitution. Instead, Edler promotes a totality of the circumstances test to determine whether a break in custody was sufficient to extinguish *Edwards* protections. The state submits that Edler's contentions miss the mark on several fronts. First, *Shatzer* clearly is articulating a bright-line rule, willingly trading arbitrariness for clarity. Second, the *Edwards* rule is not a constitutional mandate but rather a judicially created prophylactic measure, embraced by Wisconsin courts. As such, any expansion of the rule by its original creator, such as occurred in *Shatzer*, should be endorsed by this court. Finally, Edler's proposed totality of circumstance test to determine when the *Edwards* rule is applicable after a break in custody would be unwieldy and extremely difficult for law enforcement to implement. It is this type of approach that the *Shatzer* majority clearly rejected when it concluded its opinion in defending its 14-day standard by writing "Failure to say where the line falls short of 2 ½ years, and leaving that for future case-by-case determination, is certainly less helpful, but not at all less arbitrary." *Id.* at 1226.

Eventually, Edler arrives at what the state contends is the dispositive issue in this case; whether or not his statement, "Can my attorney be present for this?," made fifteen minutes before he was even present in the interrogation room, was sufficiently unequivocal so as to trigger the *Edwards* rule. Edler argues first that if his statement was ambiguous it required police clarification since it was made pre-*Miranda* waiver, and second he argues that his statement was a clear and unequivocal assertion of his *Miranda* right to counsel. The state counters that the police were under no obligation to clarify Edler's intentions, as the comment was made way in

advance of the interrogation and away from the interrogation cite, and asserts that the police did not ignore Edler's question but answered it quickly and correctly. Finally, the state argues that an informational question about the scope of a right is not a clear and unequivocal assertion of the right.

A. *Maryland v. Shatzer* creates a bright-line rule that a continuous 14-day break in custody, after a subject asserts the *Miranda* right to counsel, extinguishes the *Edwards* rule, therefore permitting the police to reinitiate contact with the subject.

The *Shatzer* Court does not shy away from the notion that they are articulating a bright-line rule. Recognizing the somewhat arbitrary nature of a 14-day standard, the Court defends its efforts by noting, "It is impractical to leave the answer to that question [how long is a sufficient break in custody to end *Edwards* protections] for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful." *Shatzer*, 130 S. Ct. at 1222-23. The *Shatzer* Court opined that the time period should be 14 days as that time frame provides enough time for a suspect to get reacclimated to normal life, to consult with friends and counsel, and to shake off the residual coercive effects of prior custody. *Id.* at 1223. The *Shatzer* Court wanted to give the police clear direction as to when the *Edwards* protections run out; a break in custody for 14 continuous days. Just as clearly, the *Shatzer* Court rejected the case-by-case approach to analyzing *Edwards* applicability that Edler now asks for. The state submits that this court should do the same.

B. This court should accept the *Shatzer* 14-day rule as an expansion of the *Edwards* rule which had been accepted in Wisconsin, and is a prophylactic measure and not a constitutional mandate.

Edler argues that this court should reject the *Shatzer* 14-day rule as it violates the Wisconsin Constitution. This request makes little sense, in this context. The *Edwards* rule has been endorsed by Wisconsin. *State v. Long*, 190 Wis. 2d 386, 526 N.W.2d 826 (Ct. App. 1994). While the *Edwards* rule originally only specified a defendant reinitiating contact as a basis for terminating *Edwards* protections, it soon became universally accepted that a break in custody also permitted the police to re-approach the subject. *See Shatzer*, 130 S. Ct. at 1220; *Clark v. State* 140 Md. App. 540, 589, 781 A.2d 913 (2001); *United States v. Harris*, 221 F.3d 1048, 1052-53 (8th Cir. 2000); *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125-26 (7th Cir. 1987). Consequently, prior to *Shatzer*, Wisconsin embraced a rule whose applicability terminated when a subject was released from custody. Now, after the United States Supreme Court expanded the previously accepted *Edwards* rule to extend for 14 days after release from custody, Edler argues that 14 days is too restrictive and incompatible with Wisconsin constitutional protections. In effect, Edler is arguing that an accepted rule which terminated upon a defendant's release from custody is now at odds with the Wisconsin Constitution when it is expanded for two extra weeks. Edler then supports this seemingly illogical contention with a proposal for a totality of circumstance test in lieu of a 14-day rule. The state contends that the benefits, if any, to Wisconsin citizens, for abandoning an expansion to a previously embraced United States Supreme Court prophylactic rule, pales to the havoc it would cause by creating no guidance

to law enforcement as to when they can or cannot properly approach a subject for questioning.

The state contends that the *Shatzer* 14-day rule, expanding the *Edwards* rule, is a bright-line rule and compatible with the Wisconsin Constitution. This court has accepted the *Edwards* rule. The state asks it to now accept the *Shatzer* rule. It is undisputed that the challenged interrogation occurred after Edler had been released from custody for 19 continuous days. Therefore, under *Shatzer*, the police were permitted to attempt to interrogate Edler.

C. Edler's question, "Can my attorney be present for this?," asked fifteen minutes before the interrogation process began is a question about the scope of a right and not an unequivocal assertion of his *Miranda* right to counsel.

The state submits that Edler's query to the police during transport is analogous to what occurred in *Commonwealth of Virginia v. Redmond*, 264 Va. 321, 568 S.E.2d 695 (2002), where the Virginia Supreme Court held that statements made by a defendant during an ongoing custodial interrogation: "Can I speak to my lawyer? I can't even talk to [a] lawyer before I make any kind of comments or anything?" were a desire by a defendant to obtain information about the scope of his rights and not an assertion of them. *See id.* at 330. In this case, all parties knew Edler had a lawyer representing him on a different charge and therefore his asking if this lawyer could attend an interrogation about a new matter is a predictable question. It is a question about what options were available to him; not an assertion of a particular one. Moreover, the police answered the question quickly and accurately by advising Edler in the affirmative.

Edler relies heavily on *Taylor v. State*, 274 Ga. 269, 272, 553 S.E.2d 598 (2001), for support of his position that his statement "Can my attorney be present for this?" is a clear assertion of his *Miranda* right to counsel. In *Taylor,* the defendant said "Can I have a lawyer present when I do that" in response to the interrogating officer requesting that Taylor tell her side of the story. However, *Taylor* is distinguishable from our case because Taylor made the comment after being Mirandized and questioning had begun, and not fifteen minutes before an interrogation was even initiated. Also, the *Taylor* court was motivated in large part about what they perceived to be poor police conduct in handling Taylor's challenged statement, accusing the police of trying to steer Taylor away from obtaining counsel. *See id.* at 273. In our case, the police answered Edler's question about his lawyer quickly and accurately. Similarly, Edler's reliance on *United States v. Lee*, 413 F.3d 622 (7th Cir. 2005), is misplaced. In *Lee,* the defendant during an ongoing custody interrogation said, "Can I have a lawyer?," and this statement was interpreted as a clear invocation of the *Miranda* right to counsel. Again, *Lee's* context is different than ours as the interrogation was already underway; Lee did not have an attorney at that point; and the police responded to his question with several statements designed to discourage Lee from seeking counsel. *Id.* at 624.

Edler knew how to assert his right to counsel. He had done so on March 30 and the police had scrupulously honored his invocation. He did not do so here. Moreover, the discussion between Edler and Detective Urban during the actual reading of the *Miranda* warning exposes the ambiguities of Edler's challenged statement made in the police squad. When formally advised of his rights, Edler interrupted Urban and said "Now if I . . . request a lawyer, does that mean you still have to bring me into custody and I have to go sit in the jail?" (Exhibit 3, minute 16:51:20). This exchange shows that Edler is concerned about his rights and what they might entitle him to, but is not

concerned about asserting a desire to have a lawyer assist him in handling questions.

The state respectfully submits that Edler's question about whether his lawyer could attend a questioning, made fifteen minutes before he arrived at the interrogation site, was a request for information about the scope of his rights and not an assertion of them. The trial court was in error when it held that such a question, in such a context, was a clear enough assertion of Edler's right to counsel so as to trigger the *Edwards* protections.

D. Detective Urban was not required to clarify Edler's desire to counsel when Edler asked if his lawyer could attend a questioning, 15 minutes before Edler even arrived at the interrogation site.

The United States Supreme Court has held that the police are under no constitutional obligation to clarify a defendant's intent when a defendant makes an ambiguous reference to counsel during a custodial interrogation. *Davis v. United States*, 512 U.S. 452 (1994). This *Davis* holding was endorsed by our courts in *State v. Jennings*, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 2d 142. Edler correctly notes that the *Davis* holding was about a post-*Miranda* waiver ambiguous statement and left unanswered whether the police are obligated to clarify when the comment is made in a pre-waiver context. Edler cites a battery of cases that seemingly support his proposition that *Davis* cannot be extended to a pre-waiver context. Setting aside the fact that there are also many cases that do extend the *Davis* rule to pre-waiver ambiguous references to counsel: *In re Christopher K.*, 217 Ill. 2d 348, 378-81, 841 N.E.2d 945 (2005); *United States v. Brown*, 287 F.3d 965, 971-73 (10th Cir. 2002); *United States v. Muhammad*, 120 F.3d 688, 697-98 (7th Cir. 1997); *Moore v. State*,

321 Ark. 249, 257, 903 S.W.2d 154 (1995),[2] it is important to note that in the cases Edler cites the challenged comments were made immediately before, during or after the reading of the *Miranda* warning, albeit in a pre-waiver context. Our case is very different as the ambiguous reference to counsel was not made in the interrogation context, was not made immediately before, during, or immediately after the reading of the *Miranda* warning. It was made at least 15 minutes before the interrogation process even began. In such a context there was an obligation for the police to answer Edler's question correctly. The police did so. There was no obligation to clarify as to whether or not Edler was asserting his *Miranda* right to counsel as not only had the warning not been read, its reading was not imminent. Indeed, the ultimate clarification as to Edler's position on counsel did take place when he was formally advised of his rights some fifteen minutes after his making the challenged comment.

In this case, Edler made one reference to an attorney during transport to the sheriff's department. The statement was not a clear request for counsel to assist him in handling questions or even a demand for the attorney's presence at an upcoming interrogation. Edler's question as to the scope of his rights should not trigger the *Edwards* rule. This is especially so, since Edler would be using the rule as protection from the protective measure of being read his rights, rather than protection to stop an ongoing interrogation. The state respectfully submits that the trial court improperly implemented the *Edwards* rule to bar the police questioning of Edler and improperly suppressed

[2] Also, the United States Supreme Court, by implication, held that the *Davis* rule could be extended to a pre-waiver situation. *See Berghuis v. Thompkins,* __ U.S. __, 130 S. Ct. 2250 (2010). In *Thompkins,* the Supreme Court extended the *Davis* clear articulation rule to invocations of the *Miranda* right to silence. Significantly, in *Thompkins,* the ambiguous conduct occurred prior to any waiver and the Court did not obligate the police to clarify Thompkins' intentions before proceeding to the questioning.

Edler's statements made to Detective Urban after Edler knowingly waived his Fifth Amendment rights.

CONCLUSION

The state submits that the state's brief in chief and this reply refute all claims made by Edler. Respectfully, the order granting Edler's motion to suppress should be reversed.

Dated this 18th day of June, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,260 words.

Dated this 18th day of June, 2012.

_____
DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 18th day of June, 2012.

_____
DAVID H. PERLMAN
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