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STATE OF WISCONSIN

S U P R E M E C O U R T

Case No. 2012AP520-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADREAN L. SMITH,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT I,
AFFIRMING A JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
THOMAS P. DONEGAN, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

The supreme court ordinarily hears oral arguments and publishes its decisions.

ARGUMENT

SMITH DID NOT UNEQUIVOCALLY INVOKE HIS RIGHT TO REMAIN SILENT AFTER INITIALLY WAIVING THAT RIGHT AND AGREEING TO SPEAK TO THE POLICE.

After initially waiving his *Miranda* rights and agreeing to speak to the police, the Defendant-Appellant-Petitioner, Adrean L. Smith, subsequently said to the interrogating officers,

> "See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this. . . . I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no van. What's the other thing? What was the other thing that this is about? . . . I don't even want to talk about – I don't know nothing about this, see. I'm talking about this van. This stolen van. I don't know nothing about this stuff. So, I don't want to talk about this."

Brief for Defendant-Appellant-Petitioner at 2 (quoting audio recording of interrogation).

The police did not end their interrogation after these statements, but continued questioning Smith who continued speaking to them.

The police are not required to stop questioning a suspect unless the suspect unequivocally invokes his right to silence. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010); *State v. Markwardt*, 2007 WI App 242, ¶¶ 26-28, 306 Wis. 2d 420, 742 N.W.2d 546. The suspect must articulate his desire to remain silent with sufficient clarity that a reasonable police officer would necessarily understand the suspect's oral or written assertion or nonverbal conduct to be an invocation of his right to

silence under the circumstances. *Markwardt*, 306 Wis. 2d 420, ¶ 28. If a statement could reasonably be understood to be a request to remain silent but could also be reasonably understood to be something else, it is not an unequivocal invocation of the right to silence. *Markwardt*, 306 Wis. 2d 420, ¶ 36.

Smith's statements did not amount to an unequivocal invocation of Smith's right to silence which would have required the police to end the interrogation.

Smith's statements are inherently ambiguous. With one breath he said that he did not want to talk about the crime, but with another breath he in fact talked about it by asserting that he did not know anything about it. And Smith kept breathing in and out, I don't want to say anything, I want to say I don't know anything, I don't want to say anything, I want to say I don't know anything.

So did Smith want to say nothing about doing it, or did he want to say something about not doing it? It is not clear.

It is as easy to interpret Smith's statements as assertions that he *could not* talk about it because he knew nothing about it as to interpret those statements as assertions that he *would not* talk about it because he did not want to say what he knew.

Indeed, one reasonable view of Smith's statements is that he was just fencing with the police by saying that he did not want to talk about the crime to try to convince them to believe his contention that he did not know anything about the crime. Smith's statements can reasonably be construed to be telling the police, in effect, the fact that I'm telling you I don't even want to talk about this shows that I really don't know anything about this.

That was the conclusion reached in *Markwardt*, 306 Wis. 2d 420, ¶¶ 35-36, where the court held that the defendant's statement that she did not want to sit there

anymore and wanted to get out because she had been through enough that day was equivocal because she could have been fencing with the police who kept catching her making inconsistent statements.

In a factually closer case, the court held that a suspect's dual statements that he did not know the victim and did not want to talk about the crimes committed against her were not an unambiguous invocation of the suspect's right to silence, but an expression of the suspect's frustration about the failure of the police to accept his repeated insistence that he had not encountered the victim on the night of the crimes. *People v. Williams*, 233 P.3d 1000, 1023 (Cal. 2010).

In another case where the defendant made dual statements that he had nothing to say and didn't know what happened, the court held that by adding the second statement the defendant was conveying the idea, not that he did not want to talk, but that he had nothing to say because he did not know what happened, and therefore was not unequivocally invoking his right to silence. *Joe v. State*, 66 So. 3d 423, 426-27 (Fla. Dist. Ct. App. 2011).

In a similar case where the defendant was denying his involvement in the criminal episode, the court held that his further statement that he didn't want to tell the police anything about it was best understood as saying, not that he wanted to exercise his right to silence, but rather that he refused to talk about what he would only know if he was involved. *West v. Johnson*, 92 F.3d 1385, 1403 (5th Cir. 1996).

In *Alvarez v. State*, 15 So. 3d 738 (Fla. Dist. Ct. App. 2009), the defendant repeatedly denied knowing anything about the crimes, and when asked if he did not want to talk to the police responded that he really did not have anything to say. *Alvarez*, 15 So. 3d at 742. The court held that this statement was ambiguous at best because it could mean that the defendant had nothing to say because he did not know anything about the crimes rather than

because he was refusing to talk. *Alvarez*, 15 So. 3d at 745-46.

In additional cases, statements in which defendants coupled similar comments to an assertion that they did not want to talk were found to be ambiguous. *People v. Musselwhite*, 954 P.2d 475, 488-89 (Cal. 1998) (statements "'I don't know what you, *I don't want to talk about this.* You all are getting me confused. (inaudible) I don't even know what you're all talking about. You're getting[,] you're making me nervous here telling me I done something I ain't done'" not unequivocal invocation of right to silence); *People v. Silva*, 754 P.2d 1070, 1083 (Cal. 1988) (statements "'I don't know. I really don't want to talk about that'" not unequivocal invocation of right to silence); *Kupferer v. State*, 408 S.W.3d 485, 490-91 (Tex. App. 2013) (statement "I really don't want to talk about it, but I mean" indicated ambivalence about waiving right to silence); *Hargrove v. State*, 162 S.W.3d 313, 319 (Tex. App. 2005) (statement that defendant wanted to terminate interview because he would just be spinning his wheels was ambiguous); *Pena v. State*, 2004 WY 115, ¶ 12, 98 P.3d 857 (statements that defendant did not really want to talk and had nothing to tell officers were ambiguous).

Besides the uncertainty in Smith's words about not knowing and not talking, he asked the officers questions, which indicates an intent to continue the conversation.

Moreover, Smith's statement that he was talking about the stolen van when he said he did not know anything suggests that, if he wanted to stop talking at all, he may have only wanted to stop talking about the van, and was perfectly willing to continue talking to the police about "the other thing." Any refusal to answer specific questions would not have been an assertion of Smith's overall right to remain silent. *State v. Wright*, 196 Wis. 2d 149, 157, 537 N.W.2d 134 (Ct. App. 1995).

These additional ambiguities make Smith's statements all the more unclear and equivocal.

The fact that Smith repeatedly waffled between saying he did not want to talk about the crime and then talking about the crime by saying he did not know anything about it makes this case significantly different from *State v. Goetsch*, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994), on which Smith principally relies.

In that case the defendant said, "'I don't know, I don't know, *I don't want to talk about this anymore. I've told you, I've told you everything I can tell you*. You just ask me any questions and I just want to get out of here. Throw me in jail, I don't want to think about this.'" *Goetsch*, 186 Wis. 2d at 7 (emphasis in opinion).

The court of appeals said that in context it was apparent that Goetsch did not consent to continued questioning. *Goetsch*, 186 Wis. 2d at 8. *See also Markwardt*, 306 Wis. 2d 420, ¶ 28 n.8 (Goetsch's statements were unequivocal invocation of right to remain silent).

Although both Goetsch and Smith said they did not want to talk, taken in context Goetsch's statements are different from Smith's statements in several respects.

Goetsch's statement that he did not want to talk "anymore" shows that he wanted to end what he had been doing. He wanted no more of talking. He had been talking and now wanted to stop talking.

Goetsch's statement that he had already told the police everything he could tell them suggests that he was not just using an assertion that he did not want to talk anymore as a ploy to convince the police that he did not know anything about the crime. He had already told the police what he knew about the crime.

Goetsch's statement that although the police kept asking him questions he just wanted to get out of there, even if that meant going to jail, made his intent pellucid. He did not even want to be in the same room with the

police where they could ask him questions, much less answer them. He wanted to sit in jail rather than answer any more questions.

Goetsch's statement that he did not want to even think about this anymore shows he did not want any further discussion of any kind.

The sum of Goetsch's statements is larger than these parts.

In contrast to Smith's statements, there is no contradiction in anything Goetsch said. Instead of saying he did not want to say anything about the crime but then saying something about the crime, all of Goetsch's statements uniformly evince a desire to end the interrogation and to stop talking.

Furthermore, Goetsch's statements unequivocally exhibit emotional exhaustion. Goetsch, who had just shot and killed his mother with a bow and arrow, and who had been interrogated about the incident for some time, had reached the end of his endurance. In contrast to Smith's situation, there is nothing to suggest that Goetsch was merely fencing with the police rather than being genuinely unable to engage in any further dialogue.

Everything about Goetsch's patently exasperated exclamations shows he did not want to continue talking and wanted to stop.

Smith's reliance on *State v. Wiegand*, 2012 WI App 40, 2012 WL 371972 (Feb. 7, 2012) (P-Ap.122-28), is similarly misplaced.

Like Goetsch, Wiegand told the police he did not want to say "'anything more,'" *Wiegand*, 2012 WL 371972, ¶ 4 (P-Ap.123-25), indicating he wanted to stop what he had been doing, i.e. talking to the police.

Unlike Smith, Wiegand did not add any comment which would have injected ambiguity or confusion into the statement that he wanted to stop talking.

To the contrary, Wiegand's only additional comment incanted the magic word "'lawyer,'" *Wiegand*, 2012 WL 371972, ¶ 4 (P-Ap.123-25), confirming that he not only wanted to stop talking then but wanted an attorney before he would start talking again.

Smith also relies on a habeas case from the federal court in Wisconsin which is no more relevant than the two Wisconsin state cases he cites.

In *Saeger v. Avila*, 930 F. Supp. 2d 1009, 1015 (E.D. Wis. 2013), the court found there was no ambiguity in the words "'I got nothin[g] more to say to you. I'm done. This is over.'"

But again, those words are not comparable to the words spoken by Smith which included an additional comment that made Smith's statement about not talking ambiguous.

Moreover, the Wisconsin Court of Appeals reached a different conclusion than the federal court about the ambiguity of Saeger's statements by more properly considering his statements in full in the immediate context in which they were made. As the United States Supreme Court said in *Davis v. United States*, 512 U.S. 452, 459 (1994), the seminal case on the subject, whether an invocation of *Miranda* rights is unequivocal must be determined by assessing how a reasonable police officer would understand the defendant's statement "in the circumstances." *Accord Markwardt*, 306 Wis. 2d 420, ¶ 28.

As the court of appeals correctly noted, the statements in question were made while Saeger was arguing with the police about whether he could be charged federally. *State v. Saeger*, 2010 WI App 135, ¶ 3, 2010

WL 3155264 (Aug. 11, 2010) (authored unpublished opinion) (R-Ap.101-02).

In the midst of this argument Saeger said, "'You . . . ain't listening to what I'm telling you. You don't want to hear what I'm saying. You want me to admit something I didn't . . . do . . . and I got nothin[g] more to say to you. I'm done. This is over.'" *Saeger*, 2010 WL 3155264, ¶ 3 (R-Ap.102) (curses omitted in opinion).

Immediately after these comments, more negotiating took place, which culminated in an agreement that the police would not seek federal charges against Saeger or his girlfriend. *Saeger*, 2010 WL 3155264, ¶ 3 (R-Ap.101-02).

The court of appeals held that "[t]aken in context, it was reasonable for the detectives to conclude that [Saeger's] statement was merely a fencing mechanism to get a better deal – one that would free him of exposure to federal charges." *Saeger*, 2010 WL 3155264, ¶ 11 (R-Ap.103).

The opinion of the court of appeals is more persuasive than the opinion of the district court, not only because it is the opinion of three judges instead of one, but because it makes more sense.

Words derive meaning from the context in which they are used. *See State v. Conner*, 2011 WI 8, ¶ 39, 331 Wis. 2d 352, 795 N.W.2d 750; *State v. Nelson*, 2006 WI App 124, ¶ 18, 294 Wis. 2d 578, 718 N.W.2d 168. To wrench a few words out of the context in which they are uttered and consider them in artificial isolation distorts their meaning.

The police did not hear just the brief comments which the federal court excerpted, but the entire exchange with Saeger. Reasonable people in their position would not ignore everything else Saeger said when ascertaining what those comments meant. At the very least, reasonable

people would consider the statements Saeger made immediately preceding, and in connection with, his statement that he had nothing more to say. *See Goetsch*, 186 Wis. 2d at 8.

Taken together, Saeger's statements that the police were not listening to him and that he had nothing more to say could reasonably be taken to mean that he had nothing more to say unless the police started listening to what he had to say. Thus, the statement that he had nothing more to say was not an unequivocal invocation of the right to silence.

The more persuasive opinion of the court of appeals in the *Saeger* case further supports the position of the state in this case.

The other cases from other jurisdictions cited by Smith where the defendants stated only they did not want to talk and did not add any other comments which would have made these statements ambiguous are equally inapposite given the significantly different situation in this case.

The only exception is *Miles v. State*, 60 So. 3d 447, 452 (Fla. Dist. Ct. App. 2011), where the court found the statement "'[a]ctually I don't know nothing about this, so I'm not fixing to say nothing about this'" to be an unequivocal invocation of the right to silence.

However, that case is plainly wrong because, like the district court in *Saeger*, it perfunctorily considered the second sentence in isolation without considering whether the first sentence made the entire statement ambiguous. *Miles*, 60 So. 3d at 452.

Including the circuit court judge (27:11, P-Ap.119), four Wisconsin judges have found that Smith did not unequivocally invoke his right to silence. Even if some members of this court might think that Smith's invocation was unequivocal, when four presumptively reasonable

judges and the interrogating officers all believed that Smith's statements could be understood in more ways than one, it would seem that those statements are ambiguous as a matter of definition. *See generally State v. Grunke*, 2008 WI 82, ¶ 22, 311 Wis. 2d 439, 752 N.W.2d 769 (matter ambiguous if could be understood by reasonable people in different ways).

Looked at logically and in light of relevant precedent, Smith's ambiguous statements were not an unequivocal invocation of his right to silence. The police were not required to stop interrogating Smith after he made them. So other statements made by Smith after he made these equivocal references to not talking were properly admissible in evidence against him.

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals affirming the judgment of the circuit court should be affirmed.

Dated: January 28, 2014.

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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 2,865 words.

Dated this 28th day of January, 2014.

_____
Thomas J. Balistreri
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 28th day of January, 2014.

_____
Thomas J. Balistreri
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