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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2012AP520-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ADREAN L. SMITH,

Defendant-Appellant.

On Appeal From a Judgment of Conviction Entered in the
Milwaukee County Circuit Court, the Honorable Thomas P.
Donegan, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

During custodial interrogation, did police violate Adrean Smith's right to remain silent under the Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution by continuing to question him after he said "I don't know nothing about this stuff, so I don't want to talk about this"?

The circuit court ruled that Mr. Smith did not unambiguously assert his right to remain silent.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Smith requests neither oral argument, nor publication. This case requires the application of well-settled law to uncontested facts. Further, the issues should be addressed adequately in briefing.

STATEMENT OF FACTS

While investigating a series of armed robberies, Detective Travis Guy conducted a custodial interrogation of Adrean Smith. (32). At the outset of the interrogation, the detective advised Mr. Smith of his rights under *Miranda v. Arizona*,¹ and Mr. Smith waived those rights. (32 – WS115944 00:20).²

¹ 384 U.S. 436, 467 (1966).

² On June 1, 2012, this Court granted Mr. Smith's motion to supplement the record with recordings of the interrogations. (31). The interrogations relevant to this appeal are located on CD-21, which was admitted as Exhibit 5 in the circuit court. That disc contains three

During the interrogation, the detective questioned Mr. Smith about a stolen van and a number of armed robberies. Mr. Smith eventually told the detective: “I don’t know nothing about this stuff, so I don’t want to talk about this.” (32 – 04:50). The detective refused to honor this request to remain silent and said: “I got a right to ask you about it.” (32 – 04:50). Mr. Smith subsequently made incriminating statements during seven interrogations that followed his invocation of the right to remain silent. He admitted to his involvement in a series of robberies, burglaries, and shootings.

After the interrogation, the State charged Mr. Smith with seven counts of armed robbery, two counts of attempted armed robbery, three counts of delinquent in possession of a firearm, two counts of burglary while using a dangerous weapon, two counts of false imprisonment while using a dangerous weapon, one count of first degree reckless injury while using a dangerous weapon, and one count of operating a motor vehicle without owner’s consent, contrary to Wis. Stat. §§ 939.32, 939.63(1)(b), 940.23(1)(a), 940.30, 941.29(2)(b), 943.10(2)(e), 943.23(3), 943.32(2). (2). The criminal complaint alleged that Mr. Smith and three other men stole a van and robbed a number of individuals, oftentimes while the victims were getting out of a car. They also broke into two occupied residences to steal property. (2).

Mr. Smith filed a motion to suppress the statements made during custodial interrogation. (6, 9). Because the

separate audio files. The file labeled WS115944 contains Mr. Smith’s waiver of his rights under *Miranda*. (32 – 00:20). Mr. Smith’s statements that are the primary subject of this appeal are included in the audio file labeled WS115945. The record citations to the recording in this brief refer to the minutes and seconds of the recording labeled WS115945, unless otherwise indicated.

contents of the recording were unambiguous, the court ruled on the motion without any testimony. (27; App. 104-17).

Trial counsel argued that Mr. Smith unambiguously asserted his right to silence when he told the detective: “I don’t want to talk about this.” (9:3; 27:3; App. 106). Counsel argued that Detective Guy persisted, and even more alarmingly, told Mr. Smith that he had a right as an officer of the State to continue asking questions. (27:3; App. 106).

The State argued that Mr. Smith’s invocation of the right to remain silent was ineffective because he only declined to speak about the robberies, not about the stolen van. (10:1-2).

The circuit court ruled that Mr. Smith “did not clearly assert his right to remain silent.” (27:11; App. 114). The court concluded that Mr. Smith said “I’ll talk about this but I’ll not talk about that,” and generally engaged in a conversation with the detective without ever unambiguously asserting his right of silence. (27:11; App. 114). Therefore, the court denied the suppression motion. (27:12-13; App. 115-16).

Mr. Smith subsequently pled guilty to three counts of armed robbery and one count of first degree reckless injury while using a dangerous weapon. (28:18). Pursuant to a plea agreement, the remaining counts were dismissed and read in and the parties would be free to argue at sentencing. (28:3). The court sentenced Mr. Smith to a total sentence of twenty-five years in confinement, followed by ten years of extended supervision. (28:59-62).

Mr. Smith appeals. The sole issue on appeal is suppression, which is reviewable despite Mr. Smith’s plea. Wis. Stat. § 971.31(10).

ARGUMENT

I. Mr. Smith Unambiguously Invoked His Right to Silence, and All Interrogation Should Have Ceased, When He Said “I Don’t Want to Talk About This.”

During custodial interrogation, Mr. Smith told the detective: “I don’t want to talk about this.” (32 – 04:50). This unambiguous assertion of the right to remain silent advised any reasonable police officer that Mr. Smith desired to cut off questioning. Although Mr. Smith had previously answered questions about a stolen van, he ultimately decided that he was done speaking with police and invoked his right of silence. Police ignored that request, told him that they had a right to continue questioning, then continued the interrogation in violation of his constitutional right of silence. This court should reverse and suppress all of Mr. Smith’s statements made after the detective insisted that he had a right to keep asking about the van and robberies, even after Mr. Smith said he was done talking.

A. After a suspect invokes the right to remain silent, police must “scrupulously honor” that right before any further interrogation is permitted.

At the outset of custodial interrogation, police must “notify the [suspect] of his right of silence.” *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). “The critical safeguard of the right to silence is the right to terminate questioning by invocation of the right to silence.” *State v. Hartwig*, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985). “Through the exercise of a suspect’s option to terminate questioning he or she can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.” *State v. Ross*, 203 Wis. 2d 66, 74, 552 N.W.2d 428 (Ct. App. 1996).

If a suspect invokes his right to remain silent, that right must be “scrupulously honored.” *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). “Once the right to remain silent or right to counsel is invoked, all police questioning must cease” *Ross*, 203 Wis. 2d at 74.

The issue in the present case is whether Mr. Smith’s statements were sufficient to invoke his right to remain silent. To invoke the right to remain silent, the suspect must unambiguously request to remain silent. *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2260 (2010). “A suspect need not speak with the discrimination of an Oxford don, but must articulate his or her desire to remain silent or cut off questioning sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent.” *Ross*, 203 Wis. 2d at 78 (quoting *Davis v. United States*, 512 U.S. 452, 459 (1994)) (internal quotations omitted).

On appeal, this Court independently reviews whether Mr. Smith invoked his right to remain silent. *Id.* at 79. The circuit court’s findings of historical fact are reviewed for clear error. *Id.*

B. The court of appeals should independently review the circuit court’s ruling.

An appellate court applies a two-part standard when determining whether a defendant’s words sufficiently invoked his right to remain silent. This Court reviews the circuit court’s findings of fact for clear error. *Ross*, 203 Wis. 2d at 79. The court reviews independently whether those facts constitute a violation of the defendant’s constitutional rights. *Id.*; *State v. Wiegand*, No. 2011AP939, unpublished slip op., ¶ 10 (WI App Feb. 7, 2012).

In this case, the circuit court ruled:

This is a very human interaction. Defendant sometimes is saying “I’ll talk about this but I’ll not talk about that,” or “I did some things, I am willing to do that but” – He’s asking “What are you all talking about? He is engaging in a conversation. He is never clearly saying “I’m done talking, I do not want to speak to you,” nor is he saying “I won’t speak to you unless I have a lawyer.”

And I think that’s the test now, whether there is an unambiguous assertion or not, and my finding is there was not that unambiguous assertion of his right.

(27:11; App. 114).

To the extent that the phrases quoted above are considered “findings of fact,” they are clearly erroneous. The recording is clear that Mr. Smith never said “I’ll talk about this but I’ll not talk about that,” “I did some things, I am willing to that but,” or “what are you all talking about.” (27:11; App. 114).

The parties did not present testimony to the circuit court regarding the precise words Mr. Smith used to invoke his right to remain silent. The State conceded that Mr. Smith said “I don’t want to talk about this.” (10:1). Furthermore, the recording was sufficiently clear for the court to use when ruling on the motion. Consequently, the court of appeals should independently decide whether the words Mr. Smith used were sufficient to invoke his right to silence. *State v. Jennings*, 2002 WI 44, ¶ 21, 252 Wis. 2d 228, 647 N.W.2d 142 (quoting *State v. McMorris*, 213 Wis. 2d 156, 165-66, 570 N.W.2d 384 (1997)).

C. Mr. Smith unambiguously invoked his right to silence when he told his interrogator: “I don’t want to talk about this.”

After Mr. Smith made a number of statements about a stolen van, police turned the interrogation to a series of robberies. These are the precise words Mr. Smith used to invoke his right to remain silent:

Mr. Smith: See, I don’t want to talk about, I don’t want to talk about this. I don’t know nothing about this.

Detective: Okay.

Mr. Smith: 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?

Detective: Okay.

Mr. Smith: 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.

Detective: I got a right to ask you about it.

(32 – 04:24-04:55). Mr. Smith’s statement that he did not want to talk about this anymore made it “sufficiently clear” that he wanted to remain silent and the interrogation needed to stop. *Ross*, 203 Wis. 2d at 78.

In *Berghuis v. Thompkins*, the Supreme Court held that a suspect unambiguously invokes his right to remain silent by saying that he “[does] not want to talk with the police” or that he “[wants] to remain silent.” 130 S.Ct. at

2260. Nothing more is necessary. Mr. Smith did exactly what *Berghuis* instructs. He told police “I don’t want to talk about this.” (32 – 04:50). Even if he had been willing to answer questions previously, he clearly asserted his “right to cut off questioning” by saying that he did not want to talk anymore. *Id.*

This Court recently held that a suspect unambiguously invoked his right to remain silent when he told officers, “I don’t want to say anything more.” *State v. Wiegand*, 2011AP939, slip op. at ¶ 8 (Ct. App. Feb. 7, 2012) (unpublished). The court held: “This is a straightforward case. . . . We discern no ambiguity in the meaning of [the suspect’s] statement.” *Id.* Nevertheless, rather than terminating the interrogation and “scrupulously honoring” the defendant’s request to remain silent, the detective continued the questioning. *Id.* at ¶ 9. Ultimately, this Court ordered that the defendant’s statements must be suppressed because “the State failed to immediately cut off its interrogation upon Wiegand’s unambiguous invocation of his right to remain silent.” *Id.* at ¶ 12.

Mr. Smith’s statement that “I don’t want to talk about this” is clearly akin to Wiegand’s statement “I don’t want to say anything more.” Both statements satisfy *Berghuis* by indicating a clear desire to stop talking with police. Mr. Smith’s statement passes the test that he merely needs to assert his desire to remain silent “sufficiently clearly that a reasonable police officer” would understand the statement to be a request to remain silent. *See Id.* at 2260; *Davis*, 512 U.S. at 459. “I don’t want to talk about this” should be sufficiently clear to any reasonable police officer that Mr. Smith did not want to continue questioning.

The cases cited by the circuit court are easily distinguished from Mr. Smith's case. The circuit court cited to *State v. Hassel* to suggest that Mr. Smith had not invoked his right to silence. 2005 WI App 80, 280 Wis. 2d 637, 696 N.W.2d 270; (27:11; App. 114). In that case, during custodial interrogation, the defendant said "*I don't know* if I should speak to you." *Id.* at ¶ 17 (emphasis added). This Court held that Hassel's statement was not a clear invocation of the right to remain silent. *Id.* at ¶ 19. Hassell's statement conveyed that he had not yet decided whether to speak. In contrast, Mr. Smith conveyed his decision: "I don't want to talk about this." (32 – 04:50).

Mr. Smith's statements are also distinguishable from those in *State v. Wright*, where the court of appeals held that a suspect cannot selectively assert his right to silence only to particular questions. 196 Wis. 2d 149, 157-58, 537 N.W.2d 134 (Ct. App. 1995). In *Wright*, the defendant responded to interrogation by saying, "I'm going to do what that guy told me and plead the Fifth *on that one*." *Id.* at 156 (emphasis added). This Court held that "refusals to answer specific questions do not assert an overall right to remain silent." *Id.* at 157. The defendant in *Wright* had only refused to answer a specific question because he only pled the Fifth "on that one." *Id.* at 157-58.

In contrast, Mr. Smith's invocation of the right to silence was not question-specific. He asserted a broader desire to stop talking with police. (32 – 04:50). Police had been interrogating Mr. Smith regarding the van and the robberies, he then decided that he was done answering questions about both and said "I don't want to talk about this." (32 – 04:50). Mr. Smith had already suggested that he was done talking about the van when he said "I don't know nothing about no van." (32 – 04:31). Mr. Smith then

attempted to cut off all questioning by saying “I don’t want to talk about this.” (32 – 04:50). Consequently, *Wright* does not govern this case and this Court should reverse the decision of the circuit court because police failed to cut off all questioning after Mr. Smith asserted his constitutional right to remain silent. *Berghuis*, 130 S.Ct. at 2273-74.

CONCLUSION

For the reasons discussed above, Mr. Smith requests that this Court reverse the decision of the circuit court and suppress all statements, and fruits of those statements, made subsequent to the invocation of his right to silence.

Dated June 25, 2012.

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 2,432 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 June 25, 2012.

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APPENDIX

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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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 June 25, 2012.

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