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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.

APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT FOR MILWAUKEE COUNTY,
THOMAS P. DONNEGAN, JUDGE

BRIEF FOR PLAINTIFF-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this case involves only the application of settled law to the facts of this case.

ARGUMENT

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

The state does not dispute the accuracy of the quoted statements in the Brief for Defendant-Appellant, Adrean L. Smith, where he told the interrogating officers “I don’t want to talk about this. I don’t know nothing about this,” “I don’t know nothing,” and “I don’t know nothing about this stuff. So I don’t want to talk about this.” Brief for Defendant-Appellant at 7 (quoting audio recording of interrogation). What is in dispute is whether these statements amounted to an unequivocal invocation of Smith’s right to silence which would have required the police to end the interrogation.

The police are not required to stop questioning a suspect unless the suspect unequivocally invokes his right to silence. *State v. Markwardt*, 2007 WI App 242, ¶ 26, 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 are inherently ambiguous. With one breath he said that he did not want to talk about this, but with another breath he in fact talked about it by asserting that he did not know anything about it.

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.

This court considered statements similar to the ones made by Smith in *State v. Goetsch*, 186 Wis. 2d 1, 519 N.W.2d 634 (Ct. App. 1994).

In that case the defendant said, “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.

This court said that in the context of the entire interrogation, it was apparent that Goetsch did not consent to continued questioning, *Goetsch*, 186 Wis. 2d at 8, and that Goetsch's statements were an unequivocal invocation of his right to remain silent. *Markwardt*, 306 Wis. 2d 420, ¶ 28 n.8.

Although both Goetsch and Smith said they did not want to talk about this, taken in context Goetsch's statements are significantly 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 had been talking and wanted to stop talking. Similarly, Goetsch's statement that he had already told the police everything shows there was nothing more he wanted to tell them.

Goetsch's statement that he just wanted to get out of there clearly shows he wanted the interrogation to end. He made clear that being asked questions by the police

was contrary to what he wanted. He did not even want to be in the same place with his interrogators. He would rather be in jail.

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.

There is none of this patent exasperation in Smith's statements. There is no hint that Smith had enough and wanted the interrogation to be over and done with.

Smith's statements seem to be aimed more at the convenience of the police. He seems to be saying that since he claimed not to know anything there was no point in the police asking him anything.

Goetsch did not say anything about not knowing anything, the additional assertion that made Smith's statements ambiguous.

After correctly quoting the statements on the audio recording of Smith's interrogation, Smith's brief then incorrectly paraphrases them by asserting that he said "he did not want to talk about this anymore." Brief for Defendant-Appellant at 7-8.

Had Smith used the word "anymore," his statements would have been more like Goetsch's. But the recording does not indicate that Smith ever used that word.

Smith's reliance on *State v. Wiegand*, 2012 WI App 40, 2012 WL 371972 (Feb. 7, 2012) (A-Ap.118-124), is misplaced.

Like Goetsch, Wiegand told the police he did not want to say "anything more," *Wiegand*, slip op. at 3 (A-Ap. 120), indicating he wanted to stop what he had been doing, i.e. talking to the police.

Wiegand also incanted the magic word “lawyer,”” *Wiegand*, slip op. at 3 (A-Ap. 120), indicating he not only wanted to stop talking but wanted an attorney before he would start talking again.

Moreover, Wiegand did not say anything about not knowing anything, the additional assertion that made Smith’s statements ambiguous.

Courts in other jurisdictions have come to different conclusions about the ambiguity of statements similar to those made by Smith.

For example, the court in *Miles v. State*, 60 So. 3d 447, 452 (Fla. Dist. Ct. App. 2011), 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.

But the court in *People v. Musselwhite*, 954 P.2d 475, 488-89 (Cal. 1998), found the 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 to be an unequivocal invocation of the right to silence.

In another case, *People v. Silva*, 754 P.2d 1070, 1083 (Cal. 1988), the same court sitting in bank found the statements, “I don’t know, I really don’t want to talk about that,” not to be an unequivocal invocation of the right to silence.

The state has found only a handful of such comparable cases, mostly unpublished, which are not enough to say there is a consensus one way or the other about whether statements like those made by Smith are equivocal or unequivocal. However, the very fact that there is a lack of agreement about such statements means they could reasonably be understood to be a request to

remain silent but could also be reasonably understood to be something else, so they are not an unequivocal invocation of the right to silence. *See Markwardt*, 306 Wis. 2d 420, ¶ 36.

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 admissible in evidence against him.

CONCLUSION

It is therefore respectfully submitted that the judgment convicting Smith of armed robbery and reckless injury after his motion to suppress his statements was denied should be affirmed.

Dated: August 6th, 2012.

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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 1,253 words.

Dated this 6th day of August, 2012.

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 6th day of August, 2012.

Thomas J. Balistreri
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