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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013AP1108 CR

Brown County Case No. 11-CF-453

JESSE J. DELEBREAU,

Defendant-Petitioner.

Brief of Jesse J. Delebreau Concerning the Judgment of Conviction Entered By Brown County Circuit Court, The Honorable Thomas J. Walsh

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STATEMENT OF ISSUES

Did the Trial Court err in concluding law enforcement legally obtained incriminating statements from Mr. Delebreau during interviews conducted on April 15, 2011 and April 18, 2011?

Answer: Answered by Trial Court - No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As the facts of the case are straight forward and well documented, and given the law applicable to the issues at hand is long-standing and unambiguous, appellant does not believe oral argument is necessary.

Mr. Delebreau does expect the Appellate Court's ruling will require explanation, modification, or rejection of existing law or policy, and therefore, he does believe the Appellate Court's ruling merits publication.

STATEMENT OF CASE

This case involves a criminal conviction for party to the crime of Delivery of Heroin, entered by the Trial Court after a jury found Mr. Delebreau guilty of the charge.

A chronology of events relevant to this appeal are as follows.

On March 31, 2011, Mr. Delebreau was taken into custody by the police and confined to the Brown County Jail on a probation hold.

At this time, there was an ongoing investigation being conducted by the Brown County Drug Task Force involving Mr. Delebreau and a number of other persons. Brown County Sheriff's Department Deputy Aronstein was involved in this investigation (111, Pages 20-22).

Several days later, sometime between April 7-9, 2011, Mr. Delebreau submitted a slip to the Brown County Jail staff requesting to speak to someone from the Brown County Drug Task Force (BCDTF). The Brown County Jail staff forwarded the request to the BCDTF and the request was reviewed by Deputy Aronstein (111, Pages 9-11).

On April 14, 2011, the State filed a criminal complaint in Brown County, charging Mr. Delebreau with Delivery of Heroin (1). This charge was based on a referral previously made by Deputy Aronstein to the Brown County District Attorney's Office. Mr. Delebreau was assessed by a member of the State Public Defender (SPD) Green Bay office to determine his eligibility for SPD representation. Assistant

Public Defender William Fitzgerald was initially assigned to represent Mr. Delebreau and appeared with Mr. Delebreau at a bond hearing before Court Commissioner Lawrence Gazeley held the day the Complaint was filed (104). Because of a conflict of interest with other SPD staff clients, Attorney Fitzgerald was unable to continue representation of Mr. Delebreau but remained counsel of record on CCAP. The SPD began searching for a private bar attorney who could represent Mr. Delebreau. On April 19, 2011, Genelle Johnson was appointed to represent Mr. Delebreau (4).

Meanwhile, Deputy Aronstein responded to Mr. Delebreau's interview request and met with him in the Brown County Jail on April 15, 2011 and April 18, 2011. (111, Pages 12-19).

The April 15, 2011 interview began with Deputy Aronstein providing Mr. Delebreau with **Miranda** warnings. Based on the notes taken by Deputy Aronstein during the interview, the Deputy prepared a written statement for Mr. Delebreau. A second interview occurred on April 18, 2011 for the purpose of having Mr. Delebreau review and sign a written statement prepared by Deputy Aronstein. (111, Pages 12-19). At the beginning of this interview, the usual **Miranda** warnings were read to Mr. Delebreau.

At the April 15th interview, there was no inquiry by Deputy Aronstein as to whether or not Mr. Delebreau had been charged by the Brown County District Attorney's office (based on the Deputy's referral) or, if Mr. Delebreau had retained an attorney or been appointed counsel. And there was no dialogue between the Deputy and Mr. Delebreau about the disadvantages of proceeding without counsel. At the second

interview on April 18th, no questions were asked as to the status of counsel, if new changes had been filed, or if Mr. Delebreau was aware of the disadvantages of proceeding without counsel. And, importantly, at no time prior to either interview had Deputy Aronstein checked with the Brown County District Attorney's office or CCAP to determine the status of his earlier referral to the Brown County District Attorney regarding Mr. Delebreau.

Mr. Delebreau subsequently filed a motion to suppress the written statement and video recorded statement obtained from him by Deputy Aronstein (20). On October 17, 2011, the Trial Court held a hearing on the motion at which the motion was denied (111, Pages 34-56). On January 9, 2012, the court entered a written order denying the motion to suppress (34) and Appendix – 1.

Mr. Delebreau filed with the Court of Appeals a Petition for Leave to Appeal (35). The petition was denied (36).

The matter proceeded to trial. At trial, Mr. Delebreau was found guilty of the charge of party to the crime of Delivery of Heroin. Appendix – 2.

Mr. Delebreau appeals his conviction, and challenges again the statement (both written and audio/video) obtained from him.

ARGUMENT

A. THE STATEMENTS MADE BY MR. DELEBREAU WITHOUT HIS ATTORNEY PRESENT WERE OBTAINED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The Sixth Amendment right to counsel attaches after the commencement of adversary judicial proceedings, that is upon the filing of a criminal complaint or the issuance of an arrest warrant. **State v. Dagnall**, 2000 WI 82, 236 Wis. 2d 339, 612 N.W. 2d 680 and **Rothgery v. Gillespie County**, 5540 U.S. 191 (2008). Thus, once adversarial proceedings are commenced, the Sixth Amendment protection goes into effect. **State v. Dagnall**, supra. This right guarantees the assistance of counsel during all in-court proceedings, and critically, post arraignment interviews with law enforcement officers. **Patterson v. Illinois**, 487 U.S. 285, 290 (1988).

The Wisconsin Supreme Court has held this same right to counsel applies in state criminal cases by operation of Article I, Sec. 7 of the Wisconsin Constitution. **State v. Harris**, 199 Wis. 2d 227, 544 N. W. 2d 545 (1996).

In this case, Mr. Delebreau's right to counsel was invoked on April 14, 2011after a criminal complaint was filed and he appeared in court along with appointed counsel.

Under Wisconsin law, for some time, once the Sixth Amendment right to counsel attached, a police-initiated custodial interview of an accused without counsel was categorically inadmissible. **State v. Dagnall**, 2000 WI 82, 236 Wis. 2d 339, 612 N.W. 2d 680. In other words, after an

attorney represents (by appointment or private retainer) a defendant on particular charges, the defendant may not be questioned about the crimes charged in the absence of his/her attorney, and any waiver of the right to counsel was invalid as a matter of law. **State v. Dagnall**, supra.

Because of the significance of this Sixth Amendment right to the overall criminal justice system, the State was prohibited from initiating any contact or interrogation concerning the charged crime, and any subsequent uncounseled waivers by a defendant during police-initiated contact or interrogation were deemed invalid. **State v. Hornung**, 229 Wis. 2d 469, 476, 600 N.W. 2d 264 (Ct. App. 1999).

This tenent of law was modified somewhat by **Montejo v. Louisiana**, 556 U.S. 778 (2009) and **State v. Forbush**, 2010 WI App 11, 323 Wis. 2d 258, 779 N.W. 2d 476.

Under **Montejo** and **Forbush**, police initiated interrogation of an accused after charges have been filed are not per se invalid under the Sixth Amendment. According to **Montejo** and **Forbush**, an accused may waive the right to counsel.

A defendant's waiver of the right to counsel must be "knowing and intelligent". If a defendant "knowingly and intelligently" decides to face the State's officers during questioning without the aid of counsel, then the uncounseled statements the defendant makes can be admitted at trial. If the waiver is invalid, however, any uncounseled statements elicited from the accused after the right to counsel has

attached violate the accused's Sixth Amendment rights and cannot be admitted at trial. **State v. Anson**, 2002 WI App 270, 258 Wis. 2d 433, 654 N.W. 2d 48.

The State has the burden to show a proper waiver of the right to counsel. **State v. Hambly**, 2008 WI 10, 307 Wis. 2d 98, 745 N.W. 2d 48.

In **Patterson v. Illinois**, 487 U.S. 285, 292 (1988), the United States Supreme Court observed that a waiver of a Sixth Amendment right to counsel is valid only when it reflects "an intentional relinquishment or abandonment of a known right or privilege." The Court held that since Patterson had been given the standard Fifth Amendment **Miranda** warnings and chose to speak with the police, he waived his Sixth Amendment right to counsel. **Id,** 487 US at 296.

In **Faretta v. California**, 422 U.S. 806 (1975), the United States Supreme Court also addressed the issue of the Sixth Amendment waiver of the right to counsel. In the **Faretta** case, as part of the intentional and knowing waiver of the right to counsel, the Supreme Court states the accused must be informed of the dangers and disadvantages of waiving the assistance of counsel. Because there are significant benefits to the assistance of counsel, a knowing and intelligent waiver must include an awareness on the part of the accused of the benefits being relinquished and the potential pitfalls of proceeding without counsel. Consequently, a waiver of counsel cannot be sufficient without such an inquiry. See also **State v. Imani**, 2010 WI 66, 786 N.W. 2d 40.

As to an interview initiated by the accused after he or she has been charged, the United States Supreme Court has recognized an accused may initiate the interview, and a statement obtained may be used against the accused, provided however the accused makes a knowing and voluntary waiver of his/her Sixth Amendment right to counsel. See **Michigan v. Harvey**, 494 U.S. 344 (1990).

It is Mr. Delebreau's position there is discord as to what constitutes an adequate waiver of the Sixth Amendment right to counsel. **Patterson** suggests **Miranda** warnings are sufficient to secure a valid waiver. The **Faretta** case requires a more probative inquiry. Mr. Delebreau asserts the heightened standard described in **Faretta** is the appropriate standard.

The Sixth Amendment right to counsel is one specifically identified in the amendment. Time and again, appellate courts have reiterated this right is a cornerstone to ensuring a fair adversarial process, as counsel aids the lay person in effectively responding to the State's charges, provides experience and expertise the accused likely does not possess, and can act as a medium between the accused and the State. Consequently, once charges have been filed, the right to counsel applies to all subsequent stages. **United States v. Gouveia**, 467 U.S. 180 (1984), **Michigan v. Jackson**, 475 U.S. 625 (1986).

On the other hand, the Fifth Amendment right to counsel is limited in its scope and function. This right is actually a procedural safeguard established to protect against self incrimination, **Miranda v. Arizona**, 384 U.S. 436 (1966), often occurring before charges have been issued and

the full prosecutional weight of the State has been brought to bear against a person.

Given the more significant role the Sixth Amendment right to counsel plays in our jurisprudence, Mr. Delebreau contends the more exhaustive inquiry of **Faretta** is warranted. In other words, the standard **Miranda** warnings described in **Patterson** are not sufficient to assure a full, knowledgeable and voluntary waiver. For a Sixth Amendment waiver to be complete, not only must the warnings of **Miranda** be provided, but there must be a specific inquiry into the disadvantages of proceeding without counsel must be addressed.

In this case, Mr. Delebreau had been formally charged with a crime. Moreover, Mr. Delebreau had applied for and been found eligible for counsel by the Green Bay SPD. And finally, Mr. Delebreau had appeared in court with counsel. There can be no doubt Mr. Delebreau's Sixth Amendment right had attached in this case.

At the motion hearing to suppress Mr. Delebreau's statement, Deputy Aronstein testified concerning the dialogue he had with Mr. Delebreau about waiving counsel before providing a statement. The dialogue was as follows for the April 15, 2011 interview:

Q Okay. So at the time that you then met with Mr. Delebreau, was there – or did you read him his Miranda warnings at that time?

A I did.

Q And again, based upon your training and experience, is that something that you typically do when you conduct these interviews?

A Any time I speak with somebody that's in custody and I'm questioning them reference something that – a violation that they might have committed, I always read them their rights.

Q And at any time – and I'm not going to get into any voluminous discussion that isn't the exact challenge here, but with respect to reading the Miranda warnings at that time, did Mr. Delebreau indicate at any time that he wanted the assistance of an attorney during this interview?

A No, he did not.

Q And at the time that you were interviewing him on this April 15th date, at any time did he indicate to you that he was being represented by an attorney?

A He did not. I'd like to mention that –

THE COURT: No, there's no question pending. Go ahead, Ms. Lemkuil.

MS. LEMKUIL: Thank you, Your Honor.

Q At any time during that April 15, 2011 interview, was there then any discussion with – by Mr. Delebreau about having an attorney?

A I don't recall Mr. Delbreau mentioning an attorney. The only time the conversation of an attorney came up, that I recall, it was during the Miranda rights portion.

Q And that was in the April 15th interview?

A That is correct.

Q And what did he indicate?

A He indicated that he understood his rights; that he wished to waive those rights and speak with me without an attorney present because he wanted to resolve this matter.

Q In fact, did he make some kind of inference about attorneys costing too much?

A That was, I believe, in the second interview.

Q Okay. But as far as this first interview then, there was no inquiry regarding Mr. Delebreau having met with an attorney, having an attorney or wanting an attorney.

A Not that I recall, no. (111, pages 15-17)

And the dialogue between Deputy Aronstein and Mr. Delebreau during the April 18, 2011 interview was as follows:

Q Now, you're indicating and you're referring to a second interview; is that correct?

A That is correct.

Q And when did that interview occur?

A It was on the 18th of April.

Q Okay. And again that's 2011.

A That is correct.

Q So that would have been three days after the initial one?

A That is correct.

Q Now, what was the purpose now of there being a second interview?

A Mr. Delebreau provided me a wealth of information during the first interview, not only regarding him but numerous drug associates of his. I agreed to compile a typed statement based on the information that he provided t me and conduct some follow-up review and check some information and return on a separate date in order to review that statement with – for accuracy with him. That was the purpose of the second interview.

Q Just so the record's clear then, on that April 18th, 2011, where did you meet with Mr. Delebreau?

A Same place.

Q So it's at the Brown County Jail?

A That is correct.

Q Was anyone else present?

A There was not.

Q At the time that you met with him on the 15th, did you indicate that you'd be returning on a later date?

A At the end of the interview, we agreed that we would meet at a later date.

Q Now, with respect to the second interview, at that time on April 18th, did you also read Mr. Delebreau his rights?

A I did.

Q And when I'm talking about his rights, I'm taking about his Miranda warnings.

A That is correct.

Q And with respect to having reviewed those Miranda warnings with Mr. Delbreau, at any point did he ask to have an attorney or counsel present?

A He did not.

Q Did he refer to you or indicate to you whether or not he had retained counsel at all?

A He did not.

Q And now you made a reference in your earlier testimony about him talking about or I brought up the fact that there was a reference to not wanting to pay for an attorney by Mr. Delebreau. Did that occur in this interview?

A It did.

Q And what was that?

A Upon reviewing the audio recording of the interview, I noted that approximately half hour into the interview, Mr. Delebreau indicated that he wasn't going to be able to beat these charges and that with an attorney and that it was going to cost him $10,000, and he was going to end up going to prison anyway so he might as well just cooperate with law enforcement.

Q And so – again so it's clear for this record, at no time did Mr. Delebreau indicate to you that he had met with an attorney regarding this.

A That is correct. That statement actually made me – it made me believe that no meeting with an attorney occurred, thus he had no intentions of doing so (111, Pages 17-20).

Importantly, at no point during either dialogue was there any discussion of the benefits of having the assistance of legal counsel or the potential pitfalls of going it alone.

Mr. Delebreau contends this omission from the dialogue renders his waiver ineffective. For the reasons stated above, he believes **Miranda** warnings alone are not sufficient for a full and knowing waiver of his Sixth Amendment right to counsel.

It may be argued that the waiver rule in **Patterson** is different from the rule in **Faretta** because the former case deals with waiver of counsel during a post-charge police interview and the latter case deals with waiver of counsel during in-court proceedings. In response, Mr. Delebreau argues the Sixth Amendment does not warrant such a distinction. The right to counsel applies to all critical stages in the prosecution of a criminal case – be they in or out of court. The right is intended to level the playing field at all times in the criminal process, in or out of court. Therefore, for a waiver to be effective the standard should be the same, regardless of the location or particulars of the proceedings.

It may also be argued that if Mr. Delebreau's waiver is found to be inadequate, the error of admitting his statements at trial is harmless. Mr. Delebreau respectfully disagrees.

During closing arguments, ADA Liegeois underscored some of the admissions Mr. Delebreau made durng the April 15th and 18th interviews. ADA Liegoeois reminded the jury Mr. Delebreau stated: "… I knew what was going on … I was guilty of something…", "… apparently I did it [delivered heroin to the confidential informant] … I guess I am guilty …", and "I'm guilty. I must have sold heroin to the CI …" (122, Page 195, Lines 17-24 and Page 196, Lines 3-4).

For an error to be harmless, the State must prove beyond reasonable doubt that a rational jury would have found Mr. Delebreau guilty absent the error. **State v. Jorgensen,** 2008 WI 60, 310 Wis. 2d 138, 754 N. W. 2d 77. There are several factors to consider, including: (1) the frequency of the error, (2) the importance of the erroneously admitted evidence, (3) the presence or absence of corroborating evidence, (4) whether the evidence is duplicative, (5) the nature of the defense, and (6) the nature and strength of the State's case. **Jorgensen**, supra.

It is Mr. Delebreau's position that the admission of these incriminating statements was overwhelmingly prejudicial. No reasonable jury would be able to ignore these confessions. Given the simple, direct and unequivocal nature of these confessions, Mr. Delebreau's guilt was most assured. Mr. Delebreau believes it is not possible to strike these admissions from the record and conclude with confidence that the jury would have nonetheless found Mr. Delebreau guilty. The nature and extent of the admissions are simply too prejudicial and damaging. Once the jury had learned of these incriminating statements, there was irreversible prejudice to his case.

CONCLUSION

Based on the errors alleged above, Mr. Delebreau believes he did not receive a fair trial. He believes the admission of the statements he made on April 15 and 18, 2011 is reversible error. He should be granted a new trial.

Dated this _____ day of August, 2013.

_____

Attorney Daniel R. Goggin II
SPD Appointed Appellate Counsel
For Jesse J. Delebreau

APPENDIX

APPENDIX CERTIFICATION

I hereby certify that with this brief, either as a separate document or as part of this brief, is an Appendix that complies with Section 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 this ____ day of August, 2013.

_____

Attorney Daniel R. Goggin II
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum 60 characters per full line of body text. The length of this brief is 4,135 words.

Dated this _____ day of August, 2013.

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Attorney Daniel R. Goggin II
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For Jesse J. Delebreau

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 _____ day of August, 2013.

_____
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