STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2013AP1108-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE J. DELEBREAU,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. WALSH, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. Neither is warranted. The issue presented is fully addressed in the parties' briefs, and can be resolved by application of well-established law to the undisputed facts.

STATEMENT OF THE CASE

Delebreau's statement of the case is adequate to frame the issue on appeal. As respondent, the State exercises its option not to include a separate statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Any necessary information will be included where appropriate in the State's argument.

ARGUMENT

I. DELEBREAU VALIDLY WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL BEFORE HIS CUSTODIAL INTERVIEWS, AND THEREFORE THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS.

A. Introduction

On appeal, Delebreau contends that the trial court erred in admitting statements he made to police while in custody on April 15 and 18, 2011, when he was represented by appointed counsel. Delebreau does not dispute that he was read his *Miranda*[1] rights prior to both interviews, and that he waived those rights (111:15-19; R-Ap. 116-20). Rather, he contends that, because he was represented by counsel at the time, waivers of *Miranda* rights alone were insufficient to relinquish his Sixth Amendment right to counsel (Delebreau's br. at 6-7).

Delebreau is mistaken. As developed below, the waiver of *Miranda* warnings constitutes a valid waiver of the Sixth Amendment right to counsel for purposes of custodial questioning, and the fact that Delebreau was represented by counsel does not render his waiver invalid. *Montejo v. Louisiana*, 556 U.S. 778, 786-87, 794-95 (2009). Accordingly, Delebreau's challenge to the order

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

denying his motion to suppress evidence lacks merit, and the order and judgment of conviction must be upheld on review.

B. Applicable Legal Principles.

1. Standard of Review.

On an order denying a motion to suppress, the circuit court's findings of evidentiary or historical fact must be upheld unless they are clearly erroneous. *See State v. Hambly*, 2008 WI 10, ¶ 49, 307 Wis. 2d 98, 745 N.W.2d 48. However, the court's application of the facts to the relevant legal standard is reviewed *de novo*. *See State v. Douglas*, 2013 WI App 52, ¶ 13, 347 Wis. 2d 407, 830 N.W.2d 126.

Whether an accused validly waived his or her Sixth Amendment right to counsel after the reading of *Miranda* warnings is an issue of constitutional fact. *See State v. Santiago*, 206 Wis. 2d 3, 18, 556 N.W.2d 687 (1996). The appellate court reviews the ultimate issue of waiver *de novo*, but will not set aside the circuit court's findings of historical or evidentiary fact unless they are clearly erroneous. *See State v. Rockette*, 2005 WI App 205, ¶ 22, 287 Wis. 2d 257, 704 N.W.2d 382.

2. Custodial Interrogation and the Right to Counsel.

"'Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings,'" including interrogation by the State. *State v. Stevens*, 2012 WI 97, ¶ 66, 343 Wis. 2d 157, 822 N.W.2d 79 (quoting *Montejo*, 556 U.S. at 786). "[D]efendants can waive the Sixth Amendment right to counsel, even if already represented, without speaking to counsel about the waiver." *Stevens*, 343 Wis. 2d 157, ¶ 56 (citing *Michigan v. Harvey*, 494 U.S. 344, 353 (1990), and *Montejo*, 556 U.S. at 786).

Under the rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), once an accused invokes his right to counsel during a custodial interview, questioning must cease until counsel has been made available to the accused. *See also Minnick v. Mississippi*, 498 U.S. 146, 153 (1990). This rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Harvey*, 494 U.S. at 350.

A defendant's waiver of his *Miranda* rights generally amounts to a valid waiver of his Sixth Amendment right to counsel, as well as his implied right to counsel under the Fifth Amendment. *See Montejo*, 556 U.S. at 786-87; *Patterson v. Illinois*, 487 U.S. 285, 296 (1988).

a. The Pre-*Montejo* Rule: *Jackson* and *Dagnall*.

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Supreme Court extended *Edwards* by holding that an invocation of the Sixth Amendment right to counsel at an arraignment or other preliminary proceeding must be treated as an invocation of the right at all subsequent stages of the prosecution, including interrogations. Thus, under *Jackson*, once the right to counsel had been asserted at an arraignment, any uncounseled waiver of the right during a custodial interview was invalid. *Id.* at 635. Further, police were not required to have personal knowledge of the accused's invocation of the right at the court proceeding; the prosecutor's knowledge would be imputed to the police. *Id.* at 634.

Adhering to the *Jackson* court's interpretation of the Sixth Amendment, the Wisconsin Supreme Court in *State v. Dagnall*, 2000 WI 82, ¶ 53, 236 Wis. 2d 339, 612 N.W.2d 680, declared that "[a]fter an attorney represents the defendant on particular charges, the accused may not be questioned about the crimes charged in the absence of an attorney." *See also State v. Hornung*, 229 Wis. 2d 469,

476, 600 N.W.2d 264 (Ct. App. 1999) ("[A] criminal defendant's assertion of th[e] right [to counsel at a preliminary court proceeding], prohibits the government from initiating any contact or interrogation concerning the charged crime, and any subsequent waivers by a defendant during police-initiated contact or interrogation are deemed invalid.").

b. *Montejo* and *Forbush.*

In 2009, the Supreme Court in *Montejo*, 556 U.S. at 797, expressly overruled *Jackson*. The *Montejo* court held that an accused's representation by counsel at a preliminary court proceeding does not render presumptively invalid any subsequent waiver of the right to counsel at a police-initiated custodial interview. *See id.* at 792-97. The court concluded that the *Miranda* regime already provided sufficient protection against police badgering for a waiver of *Miranda* rights to constitute a valid waiver of the Sixth Amendment right to counsel:

> [W]ithout *Jackson*, how many [involuntary waivers] would be [induced by badgering]? The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. 384 U.S., at 474 []. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. 451 U.S., at 484 []. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney." 498 U.S., at 153 [].
>
> These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel

> present need only say as much when he is first approached and given the *Miranda* warnings.

Id. at 794-95.

In *State v. Forbush*, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741, a majority of the justices on the Wisconsin Supreme Court acknowledged that *Montejo* overruled *Dagnall*. The Chief Justice and Justice Bradley in a concurrence stated that the United States "Supreme Court's interpretation of the Sixth Amendment in *Montejo* supersedes our interpretation of the Sixth Amendment in *Dagnall*," *Forbush*, 332 Wis. 2d 620, ¶ 64 (Abrahamson, C.J.), and a three-justice dissent authored by Justice Crooks declared that "*Montejo*'s clear and emphatic rejection of the *Jackson* rule [prohibiting custodial interrogations after the defendant was represented by counsel in court proceedings] effectively overrules *Dagnall*, as the court of appeals appropriately concluded." *Id.* ¶ 120 (Crooks, J., dissenting).[2]

Only Justice Roggensack's opinion in *Forbush*, which appears as the first opinion but was not joined by any other justice, asserted that *Dagnall* survived *Montejo*. *Id.* ¶¶ 27, 35, 40 (Roggensack, J.). Applying *Dagnall*, Justice Roggensack stated her view that police violated Forbush's Sixth Amendment right to counsel by interrogating him after Forbush was represented by counsel at a prior proceeding. *Id.* ¶ 55. As the Chief Justice pointed out in her concurrence, Justice Roggensack's opinion has no precedential value:

> Because Justice Roggensack's opinion appears as the first opinion in print and electronic publications . . . it is important to clarify the precedential value of Justice Roggensack's opinion. It has none. *See*

[2] In a concurring opinion, Justice Prosser also observed that "[i]n overruling *Jackson*, the Court undercut many of the major underpinnings of *Dagnall*, which relied heavily on *Jackson*'s reasoning." *State v. Forbush*, 2011 WI 25, ¶ 96, 332 Wis. 2d 620, 796 N.W.2d 741.

> Justice Roggensack's op., ¶ 2, n. 3 (explaining that four justices agree to reverse the decision of the court of appeals, although they do not agree on the rationale).

Id. ¶ 57 (Abrahamson, C.J., concurring).

C. Delebreau's custodial statements were admissible under *Montejo*.

1. Facts.

Delebreau was in jail on a probation hold when, sometime between April 7-9, 2011, he submitted a hand-written note to jail staff requesting to speak with someone in the county drug task force unit (111:9-10, 27; R-Ap. 110-11, 128). On April 14, 2011, Delebreau was charged in a criminal complaint with delivery of heroin (1:1). That day, Delebreau was assigned a public defender who represented Delebreau at an initial appearance (104).[3]

On April 15, 2011, a deputy with the drug task force responded to Delebreau's note, and met with Delebreau at the county jail (111:9-10, 12-13; R-Ap. 110-11, 113-14). The deputy testified he had previously referred some charges on Delebreau to the district attorney's office, but he was unaware of the status of those charges (111:14; R-Ap. 115). The deputy believed Delebreau was being held on a probation hold (111:11-12; R-Ap. 112-13). The deputy returned on April 18, 2011, for a follow-up interview (111:17; R-Ap. 118). Each interview began with the deputy reading Delebreau his *Miranda* warnings (23:1, 6; 111:15, 18-19; R-Ap. 116,

[3] Delebreau notes that his first attorney, William Fitzgerald, had a conflict of interest, and that a new attorney, Genelle Johnson, was appointed to represent him on April 19, 2011 (Delebreau's br. at 2). For purposes of this appeal, the State does not dispute that Delebreau was represented by counsel when he was interviewed on April 15 and 18.

119-20). The substance of Delebreau's interview statements are discussed in the next section of this brief.

On September 8, 2011, Delebreau filed a motion to suppress his statements made in the April 15 and 18 interviews (22). Delebreau argued that his circumstances were like those of the defendant in *Forbush*, relying heavily on the analysis of Justice Roggensack's lone opinion (22:4-6). Following an October 17, 2011 hearing, the circuit court denied the motion based in part on the facts that (1) Delebreau did not request counsel after he was read his *Miranda* rights before the interviews; and (2) Delebreau asked to talk to investigators (111:43-45).[4] Delebreau filed a petition for leave to appeal the order denying the suppression motion, which this court summarily denied upon concluding that Delebreau had failed to meet the criteria for interlocutory review (35; 36).

Delebreau went to trial, and video recordings of portions of the April 15 and 18 interviews were played to the jury (71:Exs. 6, 7; 122:144). The evidence presented at trial is discussed in the next section of this brief.

2. Analysis.

On appeal, Delebreau does *not* argue, as he did to the circuit court, that *Dagnall* survived *Montejo*, and that, therefore, his waivers of his right to counsel were invalid

[4] In its oral ruling, the court first concluded that Delebreau waived his implied Fifth Amendment right to counsel by agreeing to talk to the deputy after being read the *Miranda* warnings, and by initiating the interview himself (111:43-45; R-Ap. 144-46). The court then (unnecessarily) engaged in a separate Sixth Amendment analysis, concluding that his right to counsel under this provision was not violated because the deputy did not know that Delebreau was represented, and the prosecutor's knowledge of this fact could not be imputed to the deputy (111:46-48, 51; R-Ap. 147-49, 152). However, as explained later, Delebreau's waiver of *Miranda* rights before the April 15 and 18 interviews was sufficient to validly waive both his Sixth Amendment right to counsel and his Fifth Amendment rights, *Patterson v. Illinois*, 487 U.S. 285, 296 (1988), and *Montejo v. Louisiana,* 556 U.S. 778, 786-87 (2009).

under *Dagnall*'s rule that police may not interview represented defendants without counsel present (22:4-6). Rather, he appears to argue that, while it would have been possible for him to have validly waived his Sixth Amendment right to counsel under the new rule of *Montejo* and *Forbush*, his waiver was insufficient because it was merely a waiver of his *Miranda* rights (Delebreau's br. at 6-8, 13-14). Delebreau argues that *Miranda* waivers are *per se* insufficient, and that, to guarantee that a represented defendant's waiver of the Sixth Amendment right counsel is knowing, intelligent and voluntary, the officer must conduct a "more probative inquiry" with the defendant, Delebreau's br. at 6-8, 13-14—one similar to that which courts conduct under *Faretta* (or *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997)), with defendants seeking to proceed *pro se* at trial. *Faretta v. California*, 422 U.S. 806, 835 (1975) (defendants seeking to proceed *pro se* "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." (citations and quotation marks omitted)).

Delebreau offers no support for this assertion, making only a general claim that the Sixth Amendment right to counsel plays a "more significant role . . . in our jurisprudence" (Delebreau's br. at 8). By this, Delebreau appears to suggest that, while an accused's consent to be interviewed after *Miranda* warnings have been read is sufficient to validly waive the *Fifth* Amendment's implied right to counsel, such warnings are insufficient to waive the express right contained in the *Sixth* Amendment. But, as *Montejo* and *Patterson* hold, waiver of *Miranda* rights typically waives the *Sixth* Amendment right to counsel as well:

> when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment:

> "As a general matter . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." *Patterson,* [487 U.S.] at 296 [].

Montejo, 556 U.S. at 786-87.

Delebreau's position is directly contrary to *Montejo.* The point of *Montejo*'s rejection of the *Jackson* rule was that *Miranda* warnings *are* sufficient to protect against involuntary waivers of the Sixth Amendment right to counsel, and that an additional layer of protection is unnecessary. *Montejo*, 556 U.S. at 794-95. *Montejo* endorsed the usual *Miranda* procedure for obtaining valid waivers of the Sixth Amendment right to counsel. *Id.* It did not import from *Faretta* the additional prophylactic of an inquiry with the defendant. Though it could have done so, the *Montejo* court did not graft onto the *Miranda* regime a *Klessig*-like requirement that, when a defendant is already represented, the interviewing officer must also ascertain that the defendant has made a deliberate choice to be interviewed without counsel present, is aware of the difficulties and disadvantages of being interviewed without counsel, is aware of the seriousness of the charge or charges against him, and is aware of the general range of penalties that could be imposed on him.

Montejo thus disposes of Delebreau's argument on appeal.

Additionally, it is undisputed that the round of custodial interviews in this case were not initiated by law enforcement, but by Delebreau himself (111:9-10, 27; R-Ap. 110-11, 128). Delebreau decided to cooperate with law enforcement and volunteer information to them. *See Edwards*, 451 U.S. at 485 (a person may volunteer information to police without consulting his or her attorney). Delebreau points to no authority demonstrating

that the issuance of criminal charges and appointment of counsel on April 14 somehow negated his request to talk to investigators. Had Delebreau decided that he no longer wanted to talk once he was charged and appointed counsel, he could have told the deputy that he was no longer interested. Instead, Delebreau greeted the deputy at the April 15 interview by saying he "wished to resolve the matter at hand and kn[ew] that he [was] guilty of something" (23:1).

For these reasons, Delebreau validly waived his Sixth Amendment right to counsel prior to the April 15 and 18 interviews, and thus the circuit court properly denied his motion to suppress his interview statements.

II. EVEN IF THE COURT ERRED IN ADMITTING DELEBREAU'S STATEMENTS, THE ERROR WAS HARMLESS.

Assuming, for the sake of argument only, that the court erred in admitting his interview statements at trial, this error was harmless, for the reasons discussed below. *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189 (an error is harmless "if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" (citation omitted)).

First, the case against Delebreau was based primarily on a video recording of a drug transaction between a confidential informant buyer and sellers Delebreau and Chris Woodliff, as well as the testimonies of the confidential informant and Woodliff. The informant wore a video recording device on his person, and the video recording shows Woodliff and Delebreau discussing a drug sale, and exchanging money with the informant (71:Ex. 5). The video was played for the jury during the testimonies of the informant and Woodliff (71:Ex. 5; 122:61-62, 118). The informant told Woodliff he wanted to buy two bags of heroin and two bags of

cocaine, and gave Woodliff a stack of marked bills (122:54, 116-17, 134). Woodliff then asked Delebreau if he had any bindles left, a reference to heroin (71:Ex. 5; 122:54-55, 119). Shortly thereafter, Woodliff gave Delebreau a portion of the bills ($80), and Delebreau is seen carrying the stack, and then leaving the room (71:Exs. 5, 10; 122:51). While the video—which is sometimes shaky and frequently misdirected at the ceiling and walls—admittedly does not show Delebreau handing the heroin to the informant (71:Ex. 5), the video evidence and testimony demonstrates Delebreau's guilt as a party-to-the-crime.

Second, the prosecution's case was not hampered by common problems of proof often associated with drug prosecutions. On cross-examination of the prosecution's witnesses, the defense was unable to raise issues related to chain-of-custody (122:112-13) or chemical composition of the contraband (122:100-02).

Finally, Delebreau's confession was not as probative as those in many other cases because Delebreau had no recollection of the charged event itself (122:204-05). The April 15 and 18 interviews were recorded, and were edited down to approximately five-minutes of video that was played for the jury (71:Exs. 6, 7; 122:144). In the April 15 recording, Delebreau admitted generally to having sold drugs (71:Ex. 6). However, Delebreau also stated he could not remember anything about the charged incident, even after being shown the video of the transaction (71:Ex. 6). In the April 18 recording, the deputy read a statement he prepared for Delebreau, which Delebreau signed (71:Ex. 7). The statement asserts that he (Delebreau) is the person shown in the video, and that he "must have" sold the heroin to the confidential informant based on the video of the transaction, but that he has no recollection of the incident (71:Ex. 7).

For these reasons, any alleged error in admitting Delebreau's custodial statements was harmless.

CONCLUSION

Based on the forgoing, this court should affirm the circuit court's order denying Delebreau's motion to suppress, and his judgment of conviction.

Dated this 7th day of October, 2013.

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 3,318 words.

Dated this 7th day of October, 2013.

_____
Jacob J. Wittwer
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 7th day of October, 2013.

_____
Jacob J. Wittwer
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