STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP002178-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIE A. EZELL,

Defendant-Appellant.

On Appeal from the Judgment of Conviction
Entered in the Circuit Court, Winnebago County,
the Honorable Daniel J. Bissett, presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Were Ms. Ezell's Fifth Amendment rights violated when, after arriving as a visitor at the prison, prison officers, and later a police officer, escorted her to a room inside the prison, confronted her with evidence against her, questioned her and obtained a confession from her, without first informing her of her *Miranda*[1] rights?

The trial court answered "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is unwarranted because the issues can be decided by applying established legal principles to the facts of this case. Ms. Ezell anticipates that the issues will be fully presented in the briefs, but would welcome oral argument if the court would find it helpful to resolving the case.

STATEMENT OF THE CASE

On October 15, 2012, the state filed a complaint charging Marie A. Ezell with one count of possession of THC with intent to deliver, in violation of Wis. Stat. § 961.41(1m)(h)1, and one count of delivery of illegal articles to an inmate, in violation of Wis. Stat. § 302.095(2). (2). An information charging the same counts was filed on October 25, 2012. (5). Ms. Ezell filed a suppression motion on January 16, 2013. (12). The court held hearings on the motion on January 24, 2013, January 25, 2013, and April 8,

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

2013. (32; 33; 34). The court denied the suppression motion in part. (34:4-11; App. 104-11). On May 23, 2013, Marie A. Ezell entered no contest pleas to both charges, the Honorable Daniel J. Bissett presiding. (35:2-6). The court withheld sentence and imposed 30 months of probation for each count and ordered that Ms. Ezell serve 45 days of condition time for each count, to be served consecutively. (25; App. 101-03; 35:14-15). Ms. Ezell's condition time was stayed pending appeal. (35:15-16).

STATEMENT OF FACTS

In October 2012, Oshkosh Correctional Institution (OCI) Lieutenant Eric Norman listened to three phones calls OCI inmate Chaz Moseby made to Ms. Ezell. (16:21). During one of the calls, Ms. Ezell said she would bring Mr. Moseby "six outfits and two bullshit" when she visited him on October 13, 2012. (16:21). Lieutenant Norman suspected these were code words and that Ms. Ezell intended to smuggle contraband into OCI. (16:21).

On October 13, 2012, Marie Ezell arrived at OCI with her mother and another individual. (33:4-5). A prison officer notified the Oshkosh Police Department upon her arrival. (32:4-5; 33:8). Lieutenant Eric Norman and another DOC supervising officer, Lieutenant Kuster, approached Ms. Ezell after she arrived at OCI, while she was in the lobby, which is open to the public. (33:5). Both Lieutenants were wearing standard DOC uniforms with white shirts, indicating the high rank of Lieutenant. (33:13, 17). On the left breast pocket of a Lieutenant's uniform is a badge that has the individual's name and is marked "Wisconsin Department of Corrections." (33:20). The uniform also has a patch on the left shoulder marked "Wisconsin Department of Corrections." (33:20). Both Lieutenants were also wearing tactical belts with a silver

badge visible on the front of the belt, and handcuffs in a pouch also visible on the belt. (33:13-14).

Upon approaching Ms. Ezell, Lieutenant Norman asked her, "Ma'am, would you come and talk with us?" (33:5). Ms. Ezell then began handing her personal items to her companions. (33:6). At this point, Lieutenant Norman told her she could keep her things and then led her through the prison door, separating her from her companions. (33:6). Neither Lieutenant told Ms. Ezell or her companions where they were taking Ms. Ezell before escorting her away. (33: 6, 11).

Lieutenant Norman, Lieutenant Kuster, and another correctional officer, also dressed in uniform, Jennifer Todd, walked Ms. Ezell through a locked lobby door to a separate, private room. (33:6-7, 17). In order for the four to move through the door, a fourth correctional officer had to remotely unlock the door. (33:6). The door buzzed when it unlocked and then it closed behind them with an audible click. (33:19). After passing through the locked door, the two Lieutenants and Officer Todd escorted Ms. Ezell down the hall to an interior, windowless, room. (32:15; 33:14). The Lieutenants and Officer Todd closed the door after Ms. Ezell entered the room. (32:6; 33:16). Lieutenant Norman then told Ms. Ezell to have a seat. (33:14).

After moving into the room, Lieutenant Norman sat down with Ms. Ezell but Lieutenant Kuster and Officer Todd remained standing. (33:15). The officers then began questioning Ms. Ezell. (33:7-9). Lieutenant Norman identified himself, Lieutenant Kuster and Officer Todd by name and rank. (33:7). Norman then told Ms. Ezell he had been monitoring prison phone calls between Ms. Ezell and inmate Moseby for some time, and knew that she had contraband

with her to bring to Mr. Moseby. (33:7). Ms. Ezell denied having contraband. (33:8). Lieutenant Norman confronted her again, saying he knew she had something with her. (33:8). Lieutenant Norman told Ms. Ezell that he had contacted the Oshkosh Police Department and police officers were on their way to OCI. (33:8-9, 15). Lieutenant Kuster told Ms. Ezell that with her mother and other companion being at OCI, it would be easier for everyone if she was just honest and cooperated. (33:8, 16). Ms. Ezell then admitted to having balloons of K2[2] with her. (33:8, 16).

Lieutenant Norman asked Ms. Ezell where the K2 was located, and Ms. Ezell indicated that it was inside her. (16:21). Lieutenant Norman continued to question Ms. Ezell asking about the words she had used on the phone to identify the drugs. (16:21). Ms. Ezell told him the "outfits" referred to pouches of marijuana and "bullshit" referred to pouches of K2. (16:21). Ms. Ezell also admitted that she had brought contraband into OCI on two prior occasions. (33:9-10). None of the officers read Ms. Ezell her *Miranda* warnings at any point during the questioning. (33:21).

Oshkosh Police Officer Mark Lehman responded to the call from OCI regarding Ms. Ezell. Lieutenant Norman and Lieutenant Kuster met Officer Lehman in the hallway outside the room in which Ms. Ezell was being interrogated and told him that Ms. Ezell had admitted to having contraband with her. (32:13; 33:16-17). After their conversation in the hallway, Officer Lehman and the two Lieutenants entered the room and Officer Lehman asked Ms. Ezell if it was true that she had narcotics on her. (32:7). Ms. Ezell admitted that it was true. (32:7). Officer Lehman then asked additional questions about what type of

[2] K2 is synthetic cannabis.

contraband Ms. Ezell was carrying, to which she responded two pouches of K2. (32:7). At that point, Officer Lehman placed Ms. Ezell under arrest. (32:7). At no point did Officer Lehman advise Ms. Ezell of her *Miranda* rights. (32:14).

After placing Ms. Ezell under arrest, Officer Lehman placed her in his squad car and took her to Aurora Medical Center. (32:9). Officer Lehman waited in the hallway while medical staff removed contraband from Ms. Ezell's vagina. (32:9). Medical staff turned over to Officer Lehman a bag that contained six pouches. (32:10). Officer Lehman was expecting two rather than six pouches based on Ms. Ezell's earlier statements so he entered Ms. Ezell's room and confronted her with the inconsistency, pointing out that he saw she was lying. (32:10-11, 17). In response, Ms. Ezell admitted that the other four pouches contained marijuana. (32:11). Officer Lehman then further interrogated Ms. Ezell asking about the pouches and why she had them. (32:11). In response to Officer Lehman's questions, Ms. Ezell disclosed information about her boyfriend, Chaz Moseby, who was currently incarcerated at OCI, and admitted that she had smuggled contraband into OCI twice in the past. (32:12). At no point during this interaction, did Officer Lehman notify Ms. Ezell of her *Miranda* rights. (32:11-12, 18).

Before pleading no contest, Ms. Ezell filed a suppression motion in which she argued that all the statements she made to the prison officers and Officer Lehman should be suppressed because she was not properly notified of her *Miranda* rights before she was interrogated. (12; 15). She also argued that drugs recovered during the body cavity search should be suppressed as fruit of the officers' intentional *Miranda* violations. (15:15-16). The court found that Ms. Ezell was in custody at the hospital and

suppressed statements Ms. Ezell made to Officer Lehman there. The court did not suppress statements Ms. Ezell made at the prison and did not suppress the drugs that were recovered during the body cavity search. (34:10-11; App. 110-11). The court found that Ms. Ezell was not in custody when she was questioned at the prison. (34:9; App. 109). The court examined the factors set out in ***State v. Torkelson***, 2007 WI App 272, ¶17, 306 Wis. 2d 673, 743 N.W.2d 511, and reasoned that Ms. Ezell voluntarily chose to go to the prison to visit her friend and therefore voluntarily entered the restrictive environment. (34:5-7; App. 105-07). The court recognized that she was taken to a separate room, separated from her companions and that no one ever told her she was free to leave the room, but ultimately decided Ms. Ezell was not in custody. (34:8-9; App. 108-09). The court reasoned as follows:

> "The length of the interrogation in this case was brief. The degree of restraint; it doesn't appear she was handcuffed or escorted – physically escorted to that room. She was asked to accompany the officers to that room. As to various factors in regards to the degree of restraint, whether she was handcuffed, she was not. There were no weapons drawn. There was not a frisk performed. The manner in which she was restrained was a voluntary request to accompany. She was moved to a different location. The questioning did not take place in a vehicle. There were a number of correctional personnel present and ultimately law enforcement present.

(34:9; App. 109).

In this appeal, Ms. Ezell challenges the trial court's order denying suppression of her statements made at the prison and the drugs recovered during the body cavity search.

ARGUMENT

Ms. Ezell's Fifth Amendment Rights Were Violated when, After Arriving as a Visitor at the Prison, Prison Officers, and Later a Police Officer, Escorted Her Into a Room Inside the Prison, Confronted Her with Evidence Against Her, Questioned Her and Obtained a Confession from Her, Without First Informing Her of Her *Miranda* Rights.

A. Introduction, basic legal principles and standard of review.

Ms. Ezell's confession was the product of intentional *Miranda* violations.

Ms. Ezell was subject to custodial interrogation when prison officers separated her from her companions and escorted her through a secure door, which had to be opened remotely by another officer. When the door closed behind Ms. Ezell, it made an audible click, demonstrating to Ms. Ezell that she was locked inside the facility. After being led through the threshold, Ms. Ezell was escorted to a windowless, interior room inside the prison where three prison officers, two of whom remained standing, confronted her with evidence against her, questioned her regarding smuggling drugs into the prison and told her they had called the police. The officers, who never notified Ms. Ezell of her *Miranda* rights, were able to obtain a confession from Ms. Ezell. Police officer Lehman then arrived on the scene and, without first notifying Ms. Ezell of her *Miranda* rights, asked Ms. Ezell to confirm that she had smuggled drugs into the prison. Ms. Ezell confirmed.

All the statements Ms. Ezell made to the prison officers should be suppressed because she was not notified of her *Miranda* rights. Her confession to Officer Lehman should also be suppressed because it was the product of the illegal custodial interrogation conducted by the prison officers and because Officer Lehman never notified Ms. Ezell of her *Miranda* rights. The drugs recovered from the body cavity search that ensued should also be suppressed as they were fruit of the officers' intentional *Miranda* violations.

The Fifth Amendment of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution provide for a privilege against self-incrimination. As the Wisconsin Supreme Court has observed, "[t]he essence of the fifth amendment privilege against self-incrimination is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" ***State v. Heffran***, 129 Wis. 2d 156, 164, 384 N.W.2d 351 (1986) *quoting* ***Culombe v. Connecticut***, 367 U.S. 568, 581-82 (1961).

To ensure that the tenets of the Fifth Amendment and Article I, Section 8 of the Wisconsin Constitution are safeguarded, the Supreme Court has held that "the accused must be adequately and effectively apprised of his rights…" ***Miranda v. Arizona***, 384 U.S. 436, 467 (1966). Warnings prior to police interrogation are "indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the [Fifth Amendment] privilege at that point in time." ***Id***. at 469.

Miranda warnings, including telling an individual that she has the right to remain silent, any statements she makes

can be used against her, and she has the right to an attorney, are required "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning." ***Id***. at 444, 478. And "[t]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." ***State v. Pounds***, 176 Wis. 2d 315, 320-21, 500 N.W.2d 373 (Ct. App. 1993) *quoting* ***Miranda***, 384 U.S. at 444. In this case, Ms. Ezell made incriminating statements while she was in custody and interrogated by non-police actors and a police officer, who were required to, but failed to, notify Ms. Ezell of her *Miranda* rights. As a result, Ms. Ezell's statements should be suppressed.

Further, because officers intentionally failed to advise Ms. Ezell of her *Miranda* rights, physical evidence derived from the violation of her Fifth Amendment rights should also be suppressed. ***State v. Knapp***, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

Whether evidence should be suppressed is a question of constitutional fact. ***Id***., ¶19. In reviewing a question of constitutional fact, an appellate court upholds the circuit court's factual findings unless clearly erroneous but independently determines whether the facts meet constitutional standards. ***Id***.

B. Ms. Ezell was in custody and interrogated when prison officers escorted her into a room inside the prison, confronted her with evidence against her and questioned her.

1. Ms. Ezell was in custody when prison officers escorted her into a room inside the prison.

The Supreme Court's holding in ***Miranda*** requires warnings to be given prior to custodial interrogation. Custodial interrogation is questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom of action in a significant way. ***Miranda***, 384 U.S. at 444. Thus, the threshold inquiry in this case is whether Ms. Ezell was in custody.

Miranda protections are required "as soon as a suspect's freedom is curtailed 'to the degree associated with formal arrest.'" ***Pounds***, 176 Wis. 2d at 321 *quoting* ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984). To determine if a person is in custody, courts look to "whether a reasonable person in the defendant's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances." ***Id***. (Internal quotation omitted). Consideration must be given to the totality of the circumstances, including such factors as: "the suspect's freedom to leave; the purpose, place, and length of the interrogation, and the degree of restraint." ***Torkelson***, 2007 WI App 272, ¶ 17 *citing* ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23. A number of factors have been considered to evaluate the degree of restraint. Factors include "whether the suspect is handcuffed, whether a weapon is drawn, whether a frisk was performed, the manner in which the suspect was restrained, whether the

suspect was moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." ***Id***.

A reasonable person in Ms. Ezell's position would have believed she was in custody and not free to leave. While in the public lobby of OCI, Ms. Ezell was approached by two DOC Lieutenants dressed in full uniform complete with badges, official state patches, and handcuffs. After approaching Ms. Ezell, the Lieutenants asked Ms. Ezell to come with them and escorted her into the prison, separating her from her two companions. An officer remotely opened the prison door and Ms. Ezell went through, hearing an audible click as the door closed behind her. She was escorted down a hallway to an interior room. Three prison officers interrogated her, two of whom stood during the interrogation. They told her they had called the police. A reasonable person in Ms. Ezell's position would not have felt free to leave. Even if she got out of the room she was interrogated in, she would have been alone inside a prison, a situation most people would be frightened to be in, and she had no reason to believe she could exit the prison without assistance from the officer who controlled the lock for the door. Further, she had been told the police were coming, presumably to question or arrest her.

The purpose, place and length of the encounter and the degree of restraint also indicate that Ms. Ezell was in custody. The questioning took place inside OCI, a medium security prison, which exists solely for the purpose of confining people. Upon entering the interrogation room, Lieutenant Norman said he had been monitoring her calls with inmate Moseby and knew she had contraband with her to bring to him, making it immediately clear that the officers suspected Ms. Ezell had smuggled drugs into the prison and

that the purpose of the interrogation was to obtain a confession. (33:7). Ms. Ezell was restrained during the interrogation. She was not handcuffed or frisked and none of the officers drew their weapons, but she was moved from a public lobby where she had the ability to leave, to a room inside the prison. She was questioned by not one, but three prison officers and later by a police officer as well. She was told the police had been called and was never told she was free to leave. As far as she knew, there was no way for her to exit the prison without assistance from a prison officer. Officer Lehman also testified that when he arrived, Ms. Ezell "was *still* being detained." (Emphasis added) (32:16). Officer Lehman's testimony indicates the prison officers were holding Ms. Ezell until he arrived. If Officer Lehman believed Ms. Ezell was detained, surely Ms. Ezell, with no specialized legal or law enforcement training, would have felt she was in custody.

The fact that the interrogation took place inside a prison weighs in favor of a finding that Ms. Ezell was in custody. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 355, 588 N.W.2d 606 (1999) (prison inmates considered in custody for *Miranda* purposes). Ms. Ezell's separation from her companions also indicates that she was in custody. The Supreme Court observed in ***Miranda*** that the presence of friends or family members can lend moral support to an individual when faced with the pressures of interrogation. ***Miranda***, 384 U.S. at 449-50. The court noted that separation from family or friends is often a deliberate ploy used by officers to obtain a confession. ***Id***. Cases since ***Miranda*** have considered whether the suspect was moved or separated from companions in deciding whether she was in custody. *See* ***U.S. v. Smith***, 3 F.3d 1088, 1098 (7th Cir. 1993) (defendant's separation from his associates was one factor weighing in favor of a determination that he was in custody).

The fact that Ms. Ezell was separated from her companions and led to a separate area inside the prison weighs in favor of a finding that she was in custody.

In finding that Ms. Ezell was not in custody at the prison, the circuit court focused on the fact that Ms. Ezell went to the prison voluntarily. However, even if she went to the prison voluntarily, Ms. Ezell did not accompany the officers to the room inside the prison voluntarily. This case is like ***McDougal v. State***, 277 Ga. 493, 591 S.E.2d 788 (Ga. 2004), in which the court held that while the defendant may have initially accompanied the officers voluntarily, he was in custody after he was led through two locked doors into a secure interview room. Here, Ms. Ezell agreed to talk to the officers but she did not know she would be escorted inside the prison to do so. The officers did not tell her or her companions where she would be going or why they wanted to talk to her before they led her into a private room inside the prison.

Miranda warned about situations in which a suspect is cut off from the outside world and surrounded by antagonistic forces in a police-dominated atmosphere. Ms. Ezell was separated from her companions, led into a windowless, interior room where three OCI officers confronted her and told her they had evidence against her. Two of the officers stood over her while she was interrogated and she was questioned until she confessed. The situation she faced is exactly the type of situation the court in ***Miranda*** was concerned about.

2. Prison officers' questioning of Ms. Ezell constituted interrogation.

The Wisconsin Supreme Court has observed that "whether an individual has been accused of a crime and

whether the police officers know or have reason to believe that a crime has been committed, are facts relevant to determining the absence or presence of 'custodial interrogation.'" ***Mikulovsky v. State***, 54 Wis. 2d 699, 719-20, 196 N.W.2d 748 (1972). The Supreme Court in ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980), held that interrogation takes place when police take action that is likely to elicit an incriminating response, like confronting a suspect with evidence against her.

Here Lieutenants Norman and Kuster and Officer Todd interrogated Ms. Ezell. It was clear from the very beginning of the interaction that the officers believed Ms. Ezell had committed a crime, that they were questioning her as a suspect and that they were holding her until the police arrived. Lieutenant Norman confronted Ms. Ezell with evidence immediately after sitting her down, saying he had been monitoring her calls with inmate Moseby and knew she had contraband with her to bring to him. (33:7). He then immediately asked Ms. Ezell if she had in fact brought contraband into the prison. (33:7-8). He also informed her that they had contacted the Oshkosh Police Department. (33:8). The officers' questioning was antagonistic, rather than friendly, another factor weighing in favor of a finding that interrogation took place. ***U.S. v. Beraun-Panez***, 812 F.2d 578, 580 (9th Cir. 1987).

Ms. Ezell's case is unlike ***State v. Gruen***, 218 Wis. 2d 581, 597-98, 582 N.W.2d 728 (Ct. App. 1998), where the officers asked general, non-accusatorial investigatory questions like "What happened?" Here the officers confronted Ms. Ezell and asked questions to elicit an admission in contemplation of criminal prosecution. As such, Ms. Ezell was interrogated by the prison officers.

C. Prison officers were non-police actors who had a duty to notify Ms. Ezell of her *Miranda* rights.

Lieutenant Norman, Lieutenant Kuster and Officer Todd were non-police actors who were required to inform Ms. Ezell of her *Miranda* rights prior to questioning her.

The United States Supreme Court has evaluated whether non-police actors are required to notify individuals of their *Miranda* rights in certain situations. In ***Estelle v. Smith***, 451 U.S. 454 (1981), the Supreme Court found that a psychiatrist was required to give *Miranda* warnings before questioning a prisoner in preparation for a capital trial. The court held that the fact that the actor was not a police officer, governmental informant or prosecuting attorney, was immaterial because the substance of the respondent's disclosures to the psychiatrist were used as evidence against him. ***Id***. at 465.

In ***Mathis v. United States***, 391 U.S. 1 (1968), the Supreme Court again found that a non-police actor was required to comply with the requirements of ***Miranda***. There, the Supreme Court found that an IRS agent was required to give *Miranda* warnings prior to questioning. ***Id***. at 5. The Supreme Court's reasoning turned on the fact that there was "the possibility during [the agent's] investigation that his work would end up in a criminal prosecution." ***Id***. at 4.

In ***U.S. v. D.F***., 63 F.3d 671 (7th Cir. 1995), *vacated and remanded by* ***U.S. v. D.F.***, 116 S.Ct. 1872 (1996), the Seventh Circuit dealt with a case involving a non-police actor. In that case, the court concluded that "it is not the particular job title that determines whether the government employee's questioning implicates the Fifth Amendment, but whether the prosecution of the

defendant being questioned is among the purposes, definite or contingent, for which the information is elicited." ***Id***. at 682-83. "Therefore, although a government employee need not be a law enforcement official for his questioning to implicate the strictures of the Fifth Amendment, his questioning must be of a nature that reasonably contemplates the possibility of criminal prosecution." ***Id***. at 683. The Seventh Circuit reaffirmed this reasoning in ***U.S. v. D.F***., 115 F.3d 413, 421 (7th Cir. 1997).

Courts have found that other non-police actors are also required to comply with the requirements of ***Miranda***. *See* ***State v. Deases***, 518 N.W.2d 784, 790 (Iowa 1994) (*Miranda* requirements applicable to corrections officer investigating prison homicide); ***Commonwealth v. Chacko***, 500 Pa. 571, 459 A.2d 311, 315 n.3 (Pa. 1983) (Prison staffer who performed custodial interrogation was required to give *Miranda* warnings); ***Welch v. Commonwealth***, 149 S.W.3d 407, 410-11 (Ky. 2004) (*Miranda* requirements applicable to counselors where their interrogation was likely to result in discovery of information which would lead to facts that would form the basis for prosecution).

Lieutenants Norman and Kuster and Officer Todd acted as non-police actors similar to those in ***Estelle***, ***Mathis*** and ***D.F.*** As in ***Estelle***, ***Mathis*** and ***D.F.***, they asked questions to ascertain whether a crime had been committed and did so in contemplation of criminal prosecution. The officers confronted Ms. Ezell with evidence against her and questioned her in order to obtain a confession. Lieutenant Norman told Ms. Ezell that the police had been called, indicating he suspected a crime had been committed and that he contemplated that Ms. Ezell would be criminally prosecuted.

The prison officers in this case could also be considered law enforcement surrogates as the mental health employees were in ***D.F. U.S. v. D.F.***, 63 F.3d at 684. The OCI officers had often worked with the Oshkosh Police Department in the past, as evidenced by Officer Lehman's testimony about "standard procedure" when responding to a call from OCI. (32:7). The officers were also dressed like law enforcement officers, as they each wore a uniform similar to those worn by police officers with badges and handcuffs visible. (33:13-14, 20).

Further, evidence in the record indicates that the Oshkosh Police Department may have deliberately used the prison officers to obtain a confession while avoiding the obligation to notify Ms. Ezell of her *Miranda* rights. At the suppression hearing, Officer Lehman testified that if Ms. Ezell had not responded to his questioning, he would not have continued to question her but would have redirected the DOC officers "to doublecheck the facts that they had been given and what specifically she had said to them." (32:16). Perhaps Officer Lehman wanted the police officers to question Ms. Ezell because he knew if he did it, he would be obligated to notify Ms. Ezell of her *Miranda* rights.

Because the officers could be considered surrogates and, more importantly, because the substance of Ms. Ezell's disclosures were used in the criminal prosecution against her, the prison officers had a duty to notify Ms. Ezell of her *Miranda* rights before interrogating her.

D. Statements Ms. Ezell made to Officer Lehman should be suppressed because they were the product of a previous illegal custodial interrogation and because Officer Lehman failed to read her *Miranda* warnings.

Ms. Ezell was in the midst of custodial interrogation when Officer Lehman arrived on the scene, as discussed above. Upon arriving he was told by Lieutenants Norman and Kuster that Ms. Ezell had confessed to smuggling drugs into the prison. Officer Lehman then confronted Ms. Ezell with this statement and she confessed to him. Officer Lehman never notified Ms. Ezell of her *Miranda* rights. Because Ms. Ezell's confession to Officer Lehman was the product of the previous illegal custodial interrogation conducted by prison officers and because Officer Lehman never read Ms. Ezell her *Miranda* rights, Ms. Ezell's statements to Officer Lehman should be suppressed.

E. Because officers intentionally violated Ms. Ezell's Fifth Amendment rights by failing to read her *Miranda* warnings, the physical evidence derived from the *Miranda* violations should also be suppressed.

The Wisconsin Supreme Court has concluded that "physical evidence obtained as a direct result of an intentional violation of *Miranda* is inadmissible under Article I, Section 8 of the Wisconsin Constitution." ***State v. Knapp***, 2005 WI 127, ¶ 83. The court in ***Knapp*** pointed out that in a case where the nontestimonial evidence is as damning as the admissions from the defendant, law enforcement officers are faced with two choices:

> "(1) forego the warnings and the suspect's confession, but with the understanding that the confession can be used to discover admissible nontestimonial evidence; or (2) read the warnings and risk losing both the confession and the resultant nontestimonial evidence if the suspect exercises his right to remain silent. Given the potential benefits of the first option, the police will have a significant incentive to ignore the *Miranda* warnings."

Id. at ¶ 77 *quoting* David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?* 53 Ohio St. L.J. 805, 843 (1992). The court in ***Knapp*** found that if physical evidence obtained as a result of a *Miranda* violation could not be suppressed, it would "extend 'an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained.'" ***Id***. at ¶78 *quoting* ***U.S. v. Patane***, 542 U.S. 630, 647 (2004) (Souter, J., dissenting).

Miranda warnings were never given in this case despite the fact that there were multiple custodial interrogations. Lieutenants Norman and Kuster and Officer Todd interrogated Ms. Ezell without notifying her of her *Miranda* rights. As a result of that interrogation, Ms. Ezell confessed to bringing contraband into the prison. That confession, obtained in violation of ***Miranda***, was then reported to Officer Lehman. Officer Lehman who, without first notifying her of her *Miranda* rights, asked Ms. Ezell to confirm her statement that she had brought contraband into the prison. Ms. Ezell confirmed. Officer Lehman then took Ms. Ezell to the Aurora Medical Center where he again interrogated her without first notifying her of her *Miranda* rights. The fact that there were three separate interrogations and yet no one notified Ms. Ezell of her *Miranda* rights indicates the failure to notify was intentional. Ms. Ezell was in custody and she was interrogated. She was escorted into an interior room inside the prison and three prison officers

confronted her with evidence against her and questioned her. She was then questioned and confronted with evidence by Officer Lehman while still in the interior room. It is unlikely that veteran correction officers and police officers like Norman, Kuster, Todd and Lehman, would be unaware that *Miranda* warnings were required in this situation. Rather the facts suggest a deliberate choice was made to not notify Ms. Ezell of her Fifth Amendment rights.

One possible explanation is that the officers knew that the physical evidence would be enough to make the case and therefore it would not harm the prosecution if the admissions were to be suppressed. Ms. Ezell's case involves the exact type of scenario ***Knapp*** sought to protect against. Ms. Ezell's unwarned admission was used as the basis for her arrest and subsequent cavity search. After the police recovered the contraband from her person, her admissions became inconsequential. As such, law enforcement officers were able to obtain evidence to convict without ever having to notify Ms. Ezell of her Fifth Amendment rights.

As discussed above, Officer Lehman's testimony also indicates an intentional failure to notify Ms. Ezell of her *Miranda* rights. Officer Lehman testified that if when he questioned Ms. Ezell she had not responded to his questioning, he would not have continued questioning her but rather would have redirected the prison officers to double check the facts and what specifically she had said to them. (32:16). Officer Lehman may have preferred having the prison officers confirm the statement because he knew he would be obligated to read Ms. Ezell her *Miranda* rights before engaging in such questioning himself.

As the court in ***Knapp*** stated, "[w]hen law enforcement is encouraged to intentionally take unwarranted

investigatory shortcuts to obtain convictions, the judicial process is systemically corrupted." ***Id***. at ¶81. It is for this reason – and to comport with Article I, Section 8 of the Wisconsin Constitution- that the physical evidence derived from the multiple violations of Ms. Ezell's *Miranda* rights must be suppressed. ***Id***. at ¶83.

CONCLUSION

For the reasons stated above, this court should vacate the judgment of conviction and order that all of Ms. Ezell's statements and the drugs recovered from the body cavity search, be suppressed.

Dated this 13th day of January, 2014.

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 5,471 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 this 13th day of January, 2014.

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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 s. 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.

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