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

REPLY BRIEF OF DEFENDANT-APPELLANT

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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. 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.

Miranda warnings 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." ***Miranda v. Arizona***, 384 U.S. 436, 478 (1966). The objective test asks whether a reasonable person in the defendant's situation would have felt she was in custody, ***State v. Pounds***, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993), or would not have felt free to terminate the interview and leave the scene. ***State v. Martin***, 2012 WI 96, ¶33, 343 Wis. 2d 278, 816 N.W.2d 270. The following factors are considered in deciding whether one is in custody for *Miranda* purposes: "the suspect's freedom to leave; the purpose, place, and length of the interrogation, and the degree of restraint." ***State v. Torkelson***, 2007 WI App 272, ¶17, 306 Wis. 2d 673, 743 N.W.2d 511. Ms. Ezell was escorted into an

interview room inside the prison, was confronted with evidence against her, was told the police were on their way and was questioned. She was never told she was free to leave. A reasonable person in her situation, questioned inside a prison, would feel she was in custody.

The state asserts that Ms. Ezell was not in custody because she voluntarily entered the prison knowing that there were restrictions associated with entering a secure facility. (State's Br. 10). It is true Ms. Ezell voluntarily entered the lobby of the prison, but she did not voluntarily subject herself to interrogation in an interview room inside the prison. She arrived in the lobby and was confronted by multiple officers who asked her if she would talk to them. (33:5). She was separated from her two companions and neither she nor her companions were told where she was going. (33:6, 11).

Wisconsin Administrative Code § 306.18(6) states that before inspection or search, DOC officers must inform a visitor orally or in writing that she need not permit the inspection or search and can alternatively choose to leave the institution. However, Ms. Ezell was not told that she was free to say no to the officers or to simply leave. In its brief, the state repeatedly referenced the fact that signs should have been up in the facility stating that a visitor need not submit to inspection or search and can alternatively leave (State's Br. 8, 17-18), however nothing in the record suggests that such signs were up at Oshkosh Correctional, were visible, or were seen by Ms. Ezell. As such, there is no indication Ms. Ezell knew she could decline to talk to the officers and simply leave.

The state argues that Ms. Ezell was only escorted out of the lobby because it would have been embarrassing for her to discuss having contraband in her vagina in the public

lobby. (State's Br. 16). However, after being moved to the interview room, Ms. Ezell was confronted with evidence against her and asked to confess. The interaction suggests she was moved to be interrogated, not merely as a courtesy. Further, if the officers were only being courteous, why didn't they allow her companions to join her or tell her or her companions where she was going? Why didn't they tell her she could decline? Additionally, why did three officers, rather than one, have to escort her into the prison and question her?

The degree of restraint is one consideration in making a custody determination. ***Torkelson***, 2007 WI App 272, ¶17. Factors to consider in evaluating the degree of restraint used 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***. The state asserts that Ms. Ezell was not in custody because she was not handcuffed, no weapons were drawn and she was not frisked. But no one restraint factor is dispositive and the question the factor analysis aims to answer is was the defendant subject to the compelling pressures of a custodial setting? ***Id***., ¶18. Ms. Ezell was subject to such pressures. She was confronted by two officers dressed in what appeared to be police officer uniforms complete with badges and handcuffs,[1] and was asked to accompany them. She was not told that she would be going into the prison or that she was

[1] The state argues that the uniforms were DOC uniforms rather than police uniforms and that the officers looked less intimidating because their handcuffs were in pouches. (State's Br. 8-9). However, to the average person a DOC uniform complete with a badge, a shoulder patch, a tactical belt and handcuffs (whether in a pouch or not) would appear to be a police uniform or the uniform of someone with authority similar to that of a police officer.

free to decline and leave. She was then escorted by not one but three officers, through a locked door into the prison and from there into an interior, windowless, room. In the room, one officer sat while the other two remained standing. (33:5-15). A reasonable person in Ms. Ezell's position would have felt she was in custody.

The state argues that Ms. Ezell was not in custody because the officers had no authority to detain her or make her accompany them. (State's Br. 17). But the test is an objective one and a reasonable person would believe that the officers did have such authority. The state also argues that she was not in custody because the door she was escorted through into the prison was not locked from the inside. (State's Br. 8, 11). Again, a reasonable person in Ms. Ezell's position would have believed the door was locked and she needed assistance to leave through it. Ms. Ezell and the officers had to be buzzed in to enter the locked door and an audible click could be heard as the door shut and apparently locked behind them. (33:6-7, 19). Ms. Ezell also knew she was inside a prison so presumably was under the impression the door would be locked so inmates could not simply walk out at any time. The circuit court's comments reflect the common assumption that a prison door would be locked from the inside: "[w]hen they meet with people they're brought into certain areas where they're free to leave but somebody has to push a button or unlock a door. The doors aren't open for obvious reasons…" (34:7).

The state asserts that the interview room was not intimidating because there were crafts on the table. (State's Br. 15). But the decorations in the room do not determine whether a reasonable person would feel she was in custody. The state's argument is the same as saying a person would not

be in custody in a police station interrogation room because there were pictures on the wall.

The state also asserts that the officers were not intimidating because the two officers that were standing in the room (in addition to the third who was seated) were not "standing over" Ms. Ezell. (State's Br. 15). But she was seated and they were standing so they were in fact "over" her. Additionally, their arrangement – one on each wall – would likely be interpreted as intimidating. (33:14-15).

Finally, the state argues that Ms. Ezell would not feel that she was in custody in the interview room because the door was not locked as evidenced by the fact that one of the officers went in and out during the interview. (State's Br. 16). Even if Ms. Ezell knew the door was unlocked, to end the encounter she would have had to (1) get up and walk past three uniformed officers out of the interview room, (2) walk into a prison hallway where she could potentially encounter inmates, and (3) as far as she knew, wait at the prison door for assistance in exiting. A person in her situation would not feel free to end the encounter.

The state suggests that this court should not interpret Police Officer Lehman's statement that Ms. Ezell was not free to leave after he entered the room and was "still being detained" (32:16) to mean that Officer Lehman considered Ms. Ezell to be in custody. (State's Br. 16). Instead, the state asserts that the comment meant that Officer Lehman considered this to be a *Terry*[2] stop and the comment is irrelevant because a person is not in *per se* custody when subject to a *Terry* stop. However, no testimony was ever provided that Officer Lehman considered this to be a *Terry*

[2] ***Terry v. Ohio***, 392 U.S. 1 (1968).

situation and the circuit court did not analyze the case that way. Thus, the state's assertion has no support.

The state says this case is like ***People v. Carter***, 117 Cal. App. 3d 546, 172 Cal. Rptr. 838 (1981), in which the court held that a visitor who tried to bring a gun into a sheriff's station was not in custody. (State's Br. 18). However, the facts of this case differ significantly from ***Carter***. In ***Carter***, an officer asked the defendant to step behind the lobby counter, asked her a few short questions, notified her she did not have to submit to a search, and then searched her after seeing the butt of a gun under her sweater. ***Id***. at 549. Unlike in Ms. Ezell's case, Ms. Carter was not separated from her companions, was not escorted into the sheriff's station without being told where she was going or why, was not told the police had been called, and was not confronted with evidence against her in an effort to obtain a confession.

The state cites ***Howes v. Fields***, 132 S. Ct. 1181 (2012) for the proposition that someone is not *per se* in custody when they are inside a prison. (State's Br. 11). However, ***Howes*** holds that an *inmate* is not *per se* in custody when questioned inside a prison, it says nothing about whether a visitor would feel she was in custody inside a prison.

The ***Howes*** court found Fields was not in custody because being questioned in the prison in which one lives involves less of a shock than arrest, which involves being separated from one's normal life and companions and whisked to a separate location for questioning. ***Id***. at 1190-91. The court also noted that whereas an inmate would unlikely be lured into speaking by a longing for a prompt release, a non-inmate might be. ***Id***. at 1191. Finally, the court discussed

the fact that isolating a non-inmate "may contribute to a coercive atmosphere by preventing family members, friends, and others who may be sympathetic from providing either advice or emotional support" but isolating an inmate from other inmates was different because other inmates are often not friends and do not necessarily provide a supportive atmosphere. ***Id***. The reasoning in ***Howes*** was specific to inmates and is not applicable to this case.

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

The officers started their interview by confronting Ms. Ezell with evidence against her, asking her to confess and telling her they called the police. (33:7-8). As discussed in Ms. Ezell's brief-in-chief, the interaction constituted interrogation. The state did not address the question of whether the officers' questioning of Ms. Ezell constituted interrogation in its brief and thus concedes that it did.

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

The state asserts that the officers were not state actors because their purpose in questioning Ms. Ezell was to ensure that she did not bring contraband into the prison and was not in furtherance of a criminal prosecution. (State's Br. 3, footnote 2). However, the officers did not testify that their only goal in questioning Ms. Ezell was to ensure that contraband did not enter the prison. If that was their only goal, they could have confronted her and/or searched her without calling the police. They also could have simply refused to let her into the prison and waited for the police to arrive to question her. Instead, the officers called the police before they even began talking to Ms. Ezell, illustrating that they clearly contemplated criminal prosecution. The officers

then told Ms. Ezell the police were coming, adding to any intimidation she was already feeling and indicating that she would be criminally charged. They also confronted Ms. Ezell with evidence against her multiple times to obtain a confession. Just as in ***Mathis v. United States***, 391 U.S. 1, 4 (1968), the officers knew that their questioning and investigation could end up being part of a criminal prosecution. In fact, the officers illustrated this was their intention by calling the police. Thus, as in ***Mathis***, the officers were required to notify Ms. Ezell of her *Miranda* rights.

Officers Norman and Kuster also met Police Officer Lehman in the hallway upon his arrival and reported what Ms. Ezell had told them about having contraband in her vagina before Officer Lehman had a chance to do any questioning of his own. Officer Lehman never questioned Ms. Ezell, rather he simply reported to her that he had heard she confessed and asked her to confirm that this was true, which she did. It was thus the confession the officers extracted from Ms. Ezell which actually formed the basis for the body cavity search and the criminal prosecution.

C. 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.

Because Ms. Ezell's confession to Officer Lehman was the product of the previous illegal custodial interrogation and because he never notified her of her *Miranda* rights, Ms. Ezell's statements to Officer Lehman must also be suppressed.

D. 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 state argues that the contraband found inside Ms. Ezell's vagina should not be suppressed because there was no intentional violation of Ms. Ezell's *Miranda* rights nor was there any actual coercion. (State's Br. 19-24). Ms. Ezell did not allege actual coercion in her brief-in-chief and does not allege it here. She does however; assert that the officers intentionally violated her *Miranda* rights.

As discussed in ***State v. Knapp***, 2005 WI 127, ¶77, 285 Wis. 2d 86, 700 N.W.2d 899, where nontestimonial evidence is as damning as the admissions from the defendant, law enforcement officers have to decide between (1) foregoing *Miranda* warnings with the knowledge that the confession may be suppressed but they can still discover admissible nontestimonial evidence, or (2) read the warnings and risk losing both the confession and the nontestimonial evidence. This creates an incentive to not give the warnings. The fact that Ms. Ezell was interrogated three different times by experienced correctional and police officers and yet was never informed of her *Miranda* rights indicates the decision not to notify her of her *Miranda* rights was intentional.

The state argues that experienced correctional officers would not know that they were required to read Ms. Ezell her *Miranda* warnings and the officers were only focused on keeping contraband out of the prison. (State's Br. 22). But, as discussed above, if that was the officers' only goal, why did they call the police? Why didn't they give Ms. Ezell the choice between leaving and being searched? Why did they

engage in extensive questioning themselves knowing that the answers Ms. Ezell gave would likely be used against her as part of a criminal prosecution? Why did they not just wait until the police arrived? The officers knew the answers they received from Ms. Ezell would likely result in a criminal prosecution as evidenced by the fact that they called the police as soon as Ms. Ezell arrived and thus knew they needed to notify Ms. Ezell of her *Miranda* rights. If the officers also knew that the drugs would be admissible even if the confessions weren't, they had an incentive to not read the *Miranda* warnings.

The state inaccurately suggests that Ms. Ezell is asking this court to find that correctional officers have to read *Miranda* warnings in order to search visitors for contraband. Ms. Ezell is not suggesting such a rule. Rather, Ms. Ezell asserts that correctional officers should notify visitors of their *Miranda* rights if they are going to separate them from their companions, escort them inside the prison through locked doors without telling them where they are going or that they are free to leave, put them in an interview room inside the prison, and question them and confront them with evidence against them in furtherance of a criminal prosecution.

CONCLUSION

For all the reasons stated in her brief-in-chief and 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 29th day of April, 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 2,940 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 29th day of April, 2014.

Signed:

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