RECEIVED
02-04-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2238-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MASTELLA L. JACKSON,

Defendant-Respondent.

On Notice of Appeal from an Order Entered in the
Circuit Court for Outagamie County,
the Honorable Mark J. McGinnis, Presiding

BRIEF OF DEFENDANT-RESPONDENT

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Respondent

TABLE OF CONTENTS

CASES CITED

ISSUE PRESENTED

The police intentionally violated Mastella Jackson's ***Miranda*** rights for several hours and thereby extracted involuntary statements. The police used certain of these statements to obtain a search warrant for her home and other statements to locate specific evidence within the home. Should this evidence, obtained as a direct result of intentional constitutional violations, nevertheless be admitted under the inevitable discovery exception even though the state did not show either that it would have obtained the evidence "but for" the violations or that it was pursuing independent leads at the time of the violations?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As the briefing can fully present the issues for decision Ms. Jackson does not request oral argument, though she would welcome it should the court deem it desirable. The case can be decided by applying the well-established test for inevitable discovery, and thus may not merit publication. If the court chooses to address whether the inevitable discovery doctrine is applicable to intentional violations, publication may be warranted.

ARGUMENT

I. The circuit court properly suppressed the physical evidence derived from Ms. Jackson's involuntary statements and resulting from the intentional violation of her ***Miranda*** rights.

A. *Summary of argument*

The state concedes that the police subjected Mastella Jackson to custodial interrogation for more than five hours before informing her of her ***Miranda*** rights. It further concedes that this violation was intentional, and that the statements Ms. Jackson ultimately made were taken involuntarily in violation of her Fifth Amendment rights.

These concessions are apt. As the circuit court noted, the record reveals that the officers persisted in questioning Ms. Jackson despite her repeated requests to leave and to stop talking, and in spite of her obvious mental distress and physical pain. The officers also assisted Ms. Jackson in retrieving and ingesting prescription narcotics during the interrogation. The inherent implausibility of the officers' testimony, as well as its inconsistency with the video recording of the interview, led the court to doubt their credibility.

The state also concedes that the physical evidence at issue here was discovered by exploitation of Ms. Jackson's involuntary statements, as she directed the police to the location of the items. The state asks this court, however, to overturn the trial court's exclusion of this evidence, positing that the search warrant officers were executing at Ms. Jackson's house satisfies the "inevitable discovery" exception to the rule of suppression.

The state has not met the requirements of that doctrine. The first of its three prongs requires the state to show that the evidence would have been discovered by lawful means (here the warranted search) "but for" the illegal conduct (the interrogation). This requires that the lawful means must have been independent of the constitutional violations; if the illegal interrogation instead led to the putatively lawful search, that search is itself a fruit of the illegality and cannot purge it.

Here, while the state argues that the warrant was *valid* despite the illegally-obtained statements, it makes no showing that it was in any sense *independent* of the illegal interrogation. The testimony at the hearings establishes that the officer preparing the warrant application was in communication with the interrogating officers, and the affidavit itself contained statements taken from the unlawful interrogation. The state, which bears the burden of proof, introduced *no* evidence to show that despite these connections, the decision to seek a warrant was not influenced by the confession that the officers had extracted from Ms. Jackson. It thereby failed to meet the first prong of the inevitable discovery test.

It also failed to satisfy the third prong, which required a showing that the police were "actively pursuing some alternate line of investigation" *prior to* the misconduct. The officer who prepared the warrant application could not recall when the decision had been made to seek the warrant; the state thus could not establish that the pursuit of a warrant began before the illegal interrogation.

The state is thus asking this court to admit evidence obtained through a coercive interrogation because of a warrant that may *itself* have been a product of the same coercive interrogation. Rather than placing the prosecution in

the same position that it would be absent the violations, this court would be rewarding the illegal tactics of the police. The rules of the inevitable discovery doctrine are designed to prevent such results, and they are not satisfied here.

In fact, because of concerns about the incentives created by the doctrine—concerns identical to those voiced by our supreme court in ***State v. Knapp***—several jurisdictions have held that it should not be applied, even where its basic elements are met, in cases involving intentional constitutional violations. 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899; ***Smith v. State***, 948 P.2d 473, 481 (Alaska 1997); ***Com. v. Sbordone***, 678 N.E.2d 1184, 1190 (Mass. 1997); ***State v. Holly***, 833 N.W.2d 15, 33 (N.D. 2013). This is such a case, as the state concedes, providing a second and independent reason for this court to affirm the circuit court.

B. *Burden of proof and standard of review*

It is the state's burden to show each element of inevitable discovery by a preponderance of the evidence. ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992). In reviewing constitutional questions, this court defers to the trial court's findings of historical fact unless they are clearly erroneous, but independently applies the legal standard to the facts as found. *See* ***State v. Marquardt***, 2001 WI App 219, ¶9, 247 Wis. 2d 765, 635 N.W.2d 188. A respondent may advance on appeal any argument that will sustain the trial court's ruling. ***State v. Darcy N.K.***, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998).

C. *Ms. Jackson's statements were obtained in violation of **Miranda** and were also involuntary, requiring the suppression of any physical evidence derived from them.*

As the video shows, Ms. Jackson was brought into the interrogation room at just before 4:30 p.m. and remained there alone for most of the next two hours. (64:Exh.2 at 4:29:30). The interrogation began, as the state recites and the trial court noted, at about 6:24. (64:Exh.2 at 6:24; 87:18; A-App. 119; Appellant's Brief at 5). At 7:25, while doubled over and complaining of stomach pain, Ms. Jackson asked—not for the first time—to leave: "Can I go home right now. Please. I don't want to talk. … Can I go with you? Can I just go home or do I have to stay?" (64:Exh.2 at 7:25:10, 7:02:40; 87:22; A-App. 123).

One officer responds that he needs to make a phone call and leaves the room. (64:Exh.2 at 7:25:22). Another immediately continues the interrogation. (64:Exh.2 at 7:25:40). The court determined that Ms. Jackson was in custody for ***Miranda*** purposes at this point:

> There's no doubt in my mind especially after watching the video and observing Ms. Jackson groaning, moaning, being in obvious pain and discomfort, being in a posture and with a demeanor that was submissive, and what I'm talking about is where she's laying with her head down on an arm on a desk for several minutes and then and asking those questions and not getting any response; and then also taking into consideration what then transpired after and the comments that everyone made at a later fact, it's clear to me that not only did Ms. Jackson feel that she was not free to leave, but a reasonable person … would feel that they would not be free to leave.

(87:22-23; A-App. 123-24). The state concedes that Ms. Jackson was in custody at this point as well. Appellant's Brief at 7. Both the court and the state are correct; a reasonable person in Ms. Jackson's position would understand that the police were not permitting her to leave or, for that matter, to terminate the interrogation. ***State v. Martin***, 2012 WI 96, ¶33, 343 Wis. 2d 278, 816 N.W.2d 270.

Nevertheless, the officers interrogated Ms. Jackson for the next five hours before finally informing her of her ***Miranda*** rights at around 12:39 a.m., after which the interrogation continued for at least another hour before Ms. Jackson was taken to her home. (64:Exh.2 at 12:40:01, 1:42:01; 87:6; A-App. 107). During these hours of interrogation, the officers arranged for Ms. Jackson to consume oxycodone pills and also liquid percocet, which contains oxycodone. (77:62-63, 72-73). During the interrogation, Ms. Jackson made statements that the police included in the warrant affidavit. (4:3-4; A-App. 159-60). These included that she had gone, earlier that day, to the hotel where the killing occurred, that she had brought a knife, and that she had had a confrontation with the victim. (4:3-4; A-App. 159-60).

Stating that the officers' testimony in court that they believed Ms. Jackson was free to leave was "incredible" and that is was "somewhat offended" by what it intimated was the officers' untruthful testimony (87:24; A-App. 125), the court went on to find that their violations of ***Miranda*** were intentional:

> So I want to just get back to when I first read this and every time that I've read it, I become sick to my stomach literally, and I think this is textbook interrogation of what not to do if you want to be doing

> good police work and get stuff admitted in during a hearing.
>
> When I watched the video for the first time within the last couple weeks, it made that opinion even worse. Any observation of that video really put into context that all of these violations in my opinion were done intentionally, they were done flagrantly, they were done recklessly; and they were done without any concerns involving Ms. Jackson's rights, her constitutional rights, her statutory rights, and it was done in an effort to get something out of her before those rights were read, and that's exactly what happened eventually.

(87:29-30; A-App. 130-31).

The court additionally found Ms. Jackson's post-warning statements inadmissible under ***Missouri v. Seibert***, 542 U.S. 600 (2004), and that all of her statements were involuntary under the totality of the circumstances. (87:40, 43-44; A-App. 141, 144-45). The state concedes these points as well. Appellant's Brief at 7.

The intentional violations of Ms. Jackson's ***Miranda*** rights require the suppression of any physical evidence derived from her statements. ***State v. Knapp***, 2005 WI 127, ¶2, 285 Wis. 2d 86, 700 N.W.2d 899. The fact that all of her statements after she was in custody—including those made after she was finally given the ***Miranda*** warnings—were involuntary independently requires suppression, both of the statements and of any derivative evidence. ***Chavez v. Martinez***, 538 U.S. 760, 769 (2003). Thus the state may not use the physical evidence at issue unless it can prove that Ms. Jackson's statements did not serve as an "investigatory lead" toward its discovery—that it was "derived from a legitimate source wholly independent of" the statements. ***Id.***, 769-770 (noting that protection of involuntary statements is

"coextensive with the use and derivative use immunity mandated by" ***Kastigar v. United States***, 406 U.S. 441 (1972)); ***Kastigar***, 406 U.S. at 460 (barring use of compelled statement as "investigatory lead" and requiring prosecution prove that any offered evidence is "derived from a legitimate source wholly independent of the compelled testimony").

D. *The physical evidence was derived from Ms. Jackson's statements, and the inevitable discovery doctrine does not apply.*

The physical evidence the state seeks to introduce was, in fact, derived from Ms. Jackson's statements. As one of the officers testified, Ms. Jackson was eventually brought to her house, where she pointed out the location of the items to the police. (78:197, 200-01). The state does not dispute that, as a factual matter, it was Ms. Jackson's location of the items for the police that led to their discovery. Appellant's Brief at 7-8.

Despite this fact, the state argues that the physical evidence is admissible pursuant to the inevitable discovery exception. That doctrine requires the state to show, by a preponderance of the evidence, three elements: first, "a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct"; second, "that the leads making the discovery inevitable were possessed by the government at the time of the misconduct"; and third, that the police "prior to the misconduct were actively pursuing the alternate line of investigation." ***United States v. Cherry***, 759 F.2d 1196, 1204 (5th Cir. 1985); *see also* ***State v. Schwegler***, 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992).

1. *The state did not show that the physical evidence would have been discovered "but for" the violation.*

Though the state recites the elements of the doctrine, it neglects entirely to grapple with the first prong: the requirement that lawful means would have discovered the evidence "but for" the misconduct. While the state argues at length that the search warrant for the house was *valid* in that it showed probable cause absent the illegally-obtained statements, Appellant's Brief at 8-15, it makes no attempt to show that the decision to seek the warrant and search the house was not *influenced* by the statements. Clearly, if the coerced confession prompted the search, it cannot be said that the evidence would have been uncovered "but for" the illegality—as without the illegality, there would have been no search. ***United States v. Brown***, 64 F.3d 1083, 1085 (7th Cir. 1995) ("what makes a discovery 'inevitable' is not probable cause alone … but probable cause plus a chain of events that would have led to a warrant (or another justification) independent of the [illegality]"); *see also* ***Murray v. United States***, 487 U.S. 533, 539, 543 (1988) (independent source doctrine, from which inevitable discovery doctrine is extrapolated, requires a showing that police "would have sought" warrant absent illegal act). As in any case where the government has obtained the fruit of a compelled statement, it must show not merely that it *might* have obtained the evidence by means independent of the violation, but that it *would* have. ***United States v. Ponds***, 454 F.3d 313, 328-29 (D.C. Cir. 2006).

And the state could not so show. Officer Renkas, who signed the warrant application and testified that he had prepared it (4:4; 80:87), was unable to recall when the

decision was made to seek a warrant to search the house. At one hearing, he testified that while he could not recall exactly when he began the warrants, it "could have been between 6:00 or so." (80:87). When asked about this at a later hearing, he backpedaled:

> Q. When did you start working on the warrants?
>
> A. I don't recall the exact time. I know I responded back to the police department at approximately 5:20 p.m. It would have been sometime after that and between the period that, responding back to the police department, receiving this information, as it was being provided to me throughout the night until the search warrant was signed.
>
> Q. So pretty much as soon as or shortly after you got back to the police department and started working on gathering information for the warrant; is that correct?
>
> A. Whenever there was enough information provided and the decision, however the decision was made to begin the search warrants where we were actually going to be conducting the search warrants to get into the … like I said, I can't recall the exact time that they were, that they began.
>
> Q. Hours later?
>
> A. I don't recall.
>
> Q. You had previously testified you started working on them approximately at 6:00.
>
> A. I know. I responded back at approximately 5:20 and a period of time. I know last time previously

> I responded I didn't exactly recall and gave an approximate time of 6:00.
>
> Q. And that's still your approximate?
>
> A. It could be an approximate time, yes, but the exact time, I'm unsure.

(85:6-8).

As noted above, the violation of Ms. Jackson's ***Miranda*** rights commenced at 7:25, and the warrant was not signed until 11:32. (87:22; A-App. 123; 80:86-87). Given Renkas' above testimony, it is impossible to determine whether the information that was being extracted from Ms. Jackson was part of the "information" he referred to as leading to the "decision … to begin the search warrants": a decision which he did not deny may have come "hours later" than his 5:20 return to the police station. (85:6-8). By failing to demonstrate that the search warrants would have been sought independently of the constitutional violation, the state has failed to meet its burden on the first prong of the inevitable discovery test: to show that the warranted search would have occurred "but for" the illegal interrogation of Ms. Jackson. ***Cherry***, 759 F.2d at 1204.

2. *The state did not show that the police were actively pursuing the warrant prior to the illegal interrogation.*

For related reasons, the state has also failed to meet its burden on the third prong: that the police were "actively pursuing" the leads making discovery inevitable "prior to the the misconduct." ***Id.*** The state frames the question as whether the police were conducting the search of the house when Ms. Jackson pointed out the evidence, Appellant's Brief at 25-26, but this is nonsensical. As the state admits, the illegal

act in this case—the unlawful interrogation—commenced hours before the search of the house even began. There is no logical basis to artificially separate one portion of this interrogation—the portion where Ms. Jackson pointed out the evidence—from the campaign of illegality that preceded and *brought about* those statements. Just as with the first prong, the "active pursuit" requirement seeks to guarantee that the investigation making the discovery "inevitable" is not *itself* the fruit of the primary illegality. Here, because the search did not precede the illegal interrogation, there is no such guarantee.

The state's reliance on ***State v. Lopez*** is thus misplaced. In that case, officers were conducting a warranted search of the defendant's residence when they encountered a locked freezer. 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996). An officer then asked the defendant, who was in custody and present at the residence, where the key was located, and the defendant told him. ***Id.*** at 428. The court concluded that the drugs in the freezer would have inevitably have been found because the officer "had already located and decided to search the freezer" when he asked about the key, and thus "was actively pursuing his decision to search the freezer" when the violation occurred. ***Id.*** Further, the court noted, the officer testified that if he had not found the key, he would have pried the freezer open. ***Id.***

Lopez, like the seminal inevitable discovery case of ***Nix v. Williams***, 467 U.S. 431 (1984), cuts against the state's argument. In ***Lopez***, the opening of the freezer would have occurred whether or not the officer had violated ***Miranda*** by asking about the key. We know this because the plan to search the freezer was already in progress – that is, the police were "actively pursuing [the] alternate line of investigation" – when the violation occurred. ***Lopez***, 207 Wis. 2d at 427-28.

Similarly, in ***Williams***, the famous "Christian burial speech" that violated ***Miranda*** came while a massive and systematic search of the area where the victim's body was located was already underway. ***Williams***, 467 U.S. 435-36. Here, by contrast, the police commenced their hours-long violation of Ms. Jackson's ***Miranda*** rights four hours before the search warrant was even issued and six or seven hours before she finally pointed out the sought-after evidence. The inevitable discovery doctrine articulated in ***Williams*** and ***Lopez*** is not a means for the police to launder such ill-gotten evidence by ignoring the causal chain from violation to recovery.

3. *The inevitable discovery doctrine should not be applied in cases of intentional constitutional violations.*

In ***State v. Knapp***, the Wisconsin Supreme Court considered whether physical evidence obtained as the result of intentional ***Miranda*** violations should be suppressed. 285 Wis. 2d 86, ¶2. The United States Supreme Court had held that the federal Constitution did not require suppression. ***Id.***, ¶1.

Our state court, however, concluded that the Wisconsin Constitution ought to provide greater protection, and suppressed the evidence. ***Id.***, ¶¶2, 57-61. It reasoned that the intentional violation of ***Miranda*** in that case was

> particularly repugnant and requires deterrence…. [T]he rule argued for by the State would minimize the seriousness of the police misconduct producing the evidentiary fruits, breed contempt for the law, and encourage the type of conduct that ***Miranda*** was designed to prevent, especially where the police conduct is intentional, as it was here.

Id., ¶75.

The court went on to note that where the police have reason to believe that important physical evidence, such as a murder weapon, may result from a confession, they will have an incentive to intentionally violate the law if courts deem such fruits admissible:

> Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence, such as a murder weapon or narcotics.
>
> In short, failing to suppress the physical fruits will result in police officers coming away with the wrong message: It is better to interrogate a suspect without the ***Miranda*** warnings than to use legitimate means to investigate crime. Permitting such interrogation would send an ominous signal to the police and prosecutors that citizens may be "exploited for the information necessary to condemn them before the law."

Id., ¶77.

Concluding that permitting the introduction of the physical fruits of intentional ***Miranda*** violations would provide "an unjustifiable invitation to law enforcement officers to flout ***Miranda*** when there may be physical evidence to be gained" the court suppressed the evidence. ***Id.***, ¶78.

As the state has conceded, the police in this case intentionally violated Ms. Jackson's ***Miranda*** rights. Appellant's Brief at 7. As the trial court noted, they did so "flagrantly," and ultimately extracted an involuntary confession. (87:30; A-App. 131; 87:43; A-App. 144). Yet the state proposes to admit the fruits of that confession on the theory that they would have inevitably been discovered.

As discussed above, the state has failed to meet its burden to show each element of the inevitable discovery doctrine. But even if it had, the reasoning of ***Knapp*** militates against applying the doctrine to the intentional and flagrantly unlawful police conduct here. As in ***Knapp***, the officers here, searching for a murder weapon and bloody clothing, clearly did not "view the loss of an unwarned confession as particularly great when weighed against the opportunity to recover highly probative nontestimonial evidence." 285 Wis. 2d 86, ¶77. Permitting the state to use this illegally-obtained evidence thus sends the same "ominous signal" with which ***Knapp*** was concerned: that it is "better to interrogate a suspect without the ***Miranda*** warnings than to use legitimate means to investigate crime." ***Id.***

For this reason, several jurisdictions have concluded that the inevitable discovery doctrine cannot apply to admit evidence discovered as a result of intentional constitutional violations. ***Smith v. State***, 948 P.2d 473, 481 (Alaska 1997) (exception "should not be available in cases where the police have intentionally or knowingly violated a suspect's rights"); ***Com. v. Sbordone***, 678 N.E.2d 1184, 1190 (Mass. 1997) (doctrine may apply "as long as the officers did not act in bad faith to accelerate the discovery of evidence"); ***State v. Holly***, 833 N.W.2d 15, 33 (N.D. 2013) (same, noting that contrary holding would encourage police "shortcuts whenever evidence may be more readily obtained by unlawful means").

Wisconsin should do the same. The circuit court was correct:

> when officers are simply looking for evidence of the crime, it's not good policy to award them or provide them the benefit of the doubt when they violate somebody's constitutional rights for over six to seven hours by simply saying, well, we would have gotten it

> anyway through a back door. It's not going to be a deterrent, it's not going to encourage good police work, it's not going to encourage officers to follow the constitution and do what they're supposed to do, and it's simply going to lead to in my opinion the type of police work that was conducted in this case.

(87:48-49). Permitting the state to admit evidence which it concedes was obtained by intentional violations of Ms. Jackson's constitutional rights ought not to be the policy of the courts of this state.

CONCLUSION

For the foregoing reasons, Ms. Jackson respectfully requests that this court affirm the circuit court's order suppressing her statements and the physical evidence derived therefrom.

Dated this 4th day of February, 2015.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Respondent

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 3,879 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 4th day of February, 2015.

Signed:

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Respondent