STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs. App. No. 2014 AP 2855 CR

ERIBERTO VALADEZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN ON JULY 23, 2014, THE HON. WILLIAM S. POCAN, CIRCUIT COURT JUDGE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF AUTHORITIES

1. CUSTODIAL INTERROGATION

The State's summary of argument does not challenge Defendant-Appellant's contention that he was in custody when a detective questioned him absent Miranda warnings following execution of a search warrant. For reasons made abundantly clear in his Brief, a preponderance of evidence shows Defendant-Appellant was in custody at the time of the interrogation by this detective, cf. State v. Armstrong, 223 Wis.2nd 331, 345-46, 588 N.W.2nd 606 (1999), so that the non-Mirandized statements should have been suppressed.

The court's historical findings of fact are that the handcuffs came off of Defendant-Appellant before he was questioned, that Det. Slomczewski did not know cocaine was in the residence during this questioning, and was engaging Defendant-Appellant in "small talk" so that a reasonable person would not believe they were in custody during the questioning. See Defendant-Appellant's Brief at page 7. Even accepting those findings of historical fact as not being clearly erroneous, this court still must apply constitutional principles to those facts as found. See State v. Stevens, 2012 WI 97 sec. 36, 343 Wis.2nd 157, 822 N.W.2nd 79.

The State's brief attempts to argue that a reasonable person in Defendant-Appellant's position would not have considered his freedom of movement to be restrained to the degree associated with formal arrest. Id. at pp. 6-8. But an application of constitutional principles to the historical facts found by the court would also consider the following additional historical, all noted in the State's brief:

*no knock search warrant;

*tactical squad officers forcibly entered the home, announcing their presence as they did;

*the detective could not recall whether or not the officers had their weapons drawn during entry;

*ten minutes after the tactical squad entry, the detective and the search team then entered the home;

*Defendant-Appellant had been handcuffed in front of his four year old child;

*the search warrant was read to Defendant-Appellant by the detective; and

*questions were asked of Defendant-Appellant which ultimately were used to support his prosecution,

see State's brief at page 7, in addition to the facts set out in Appellant's Brief at pages 4 through 6.

The State in its brief cites no case in support of its proposition that these historical facts do not add up to custodial interrogation and does not even address the Defendant-Appellant's citation of State v. Martin at pages 14 to 16 of his brief, see 343 Wis.2nd 278 sec. 28. This court reviews *de novo* the circuit court application of facts to the constitutional principles, id., and as stated at page 15 of Defendant-Appellant's brief, makes the custody determination in the totality of circumstances considering many factors. Id. at sec. 35.

As demonstrated in Defendant-Appellant's brief, these historical facts add up to a custodial interrogation. He was not free to just walk out during this "small talk", was never told he was not under arrest before being questioned, cf. Martin at secs. 33 and 35, and was under a restraint on his freedom of movement of the degree associated with formal arrest. Cf. Stansbury v. California, 511 U.S. 318, 322 (1994). It is not relevant if the characterization of the questioning as "small talk" is accurate, as Det. Slomcewski's clear objective in this conversation was to use any words he knew were reasonably likely to elicit an incriminating response. See Rhode Island v. Innis, 446 U.S. 291, 301 (1980)

Because the State could not reasonably argue that this was not a custodial interrogation, it argues instead that any error in admitting Defendant-Appellant's statement was harmless, citing State v. Harvey, 2002 WI 93 sec. 46, 254 Wis.2nd 442, 647 N.W.2nd 189. The bedroom where cocaine was found was largely linked to Defendant-Appellant by his admission during this custodial "small talk" that he occupied that bedroom; this was not harmless error.

Items were found during the search of the southwest bedroom which do not tie to Defendant-Appellant without benefit of this admission:

*A men's tennis shoe with suspected crack cocaine lying in the middle of the

floor was never otherwise tied to anyone;

*inside a child's sneaker was $450 in cash and the State never showed whose sneaker this was, how the cash got into the sneaker, whose cash it was, or whether it had anything to do with drugs;

*no one ever showed how or why Defendant-Appellant would have kept photos of himself in a shoe box in that room, as people often keep photos of loved ones such as siblings, and less frequently keep numerous pictures of themselves; and

*the search took place January 23, 2013, while the WE Energy bills were from 2012 (the State does not specify what months of that year) and had money inside them (which the defense argued may have been to pay the We Energy bills), and there is no indication how or when Defendant-Appellant's Wisconsin ID got into that bedroom.

All of these findings are much less meaningful as proof the Defendant-Appellant occupied the southwest bedroom where the cocaine was found without his un-Mirandized admission that this was his bedroom. It is therefore far from clear beyond a reasonable doubt that a rational jury would have believed absent his admission that these identifiers proved his guilt, even moreso had he been permitted to enhance his theory of the defense with use of the confidential informant at trial, and so the error was not harmless. See Harvey, supra.

The non-Mirandized statements were not harmless error, so that the judgment of conviction should be vacated and the cause remanded for a new trial without these statements being considered in evidence.

2. THE CONFIDENTIAL INFORMANT

The informant's testimony would not have implicated Defendant-Appellant in drug possession or sales at his home, but would have instead supported his theory of defense that it was his brother Miguel and not him who was involved in the possession and sale of cocaine from the searched location.

It is the Defendant-Appellant's position that the circuit court's decision denying disclosure of the confidential informant's identity implicated his right to a fair trial, in that his theory of defense would have been aided by testimony from this person implicating his brother Miguel in the charged offenses. Cf. State v. Nellessen, 2014 WI

84 sec. 36, ____ Wis.2nd ____, 849 N.W.2nd 654. This is supported by the search warrant affidavit referenced by the state at page 13 of its brief, when it correctly points out that the CI did not allege Defendant-Appellant was involved in the possession or distribution of cocaine but did so for his brother Miguel.

Pursuant to the *in camera* review procedure then in effect under the appellate decision in Nellessen cited by the State at footnote 3, the defense had no opportunity to review the documents on which the court found that Defendant-Appellant as well as his brother Miguel were implicated in the cocaine sales, and neither does appellate counsel for argument purposes. The trial court's decision is to be reviewed *de novo* as cited at pages 18-19 of his brief.

The case against Defendant-Appellant was built on the cocaine in the southwest bedroom. The confidential informant may well have supported the defense theory that this cocaine had nothing to do with him, even if evidence suggests that Defendant-Appellant may have been involved in other uncharged drug dealing conduct based upon the sealed materials which were reviewed *in camera*.

Guilt or innocence turns in this case, not on whether a jury believes that Defendant-Appellant was generally involved in unspecified drug possession or distribution, but whether he was guilty beyond a reasonable doubt of the drug possession or distribution charged in this case. To the extent the informant would have assisted Defendant-Appellant in proving his theory of defense to the jury, denial of the informant's identity denied him of a fair trial, such that the judgment of conviction should be vacated and the case remanded for retrial with this information ordered turned over to the defense.

3. SENTENCING PENALTY FOR EXERCISING RIGHT TO TRIAL

Lastly, Defendant-Appellant did not forfeit his right to raise the trial court's improper consideration of his exercising the right to trial when it sentenced him. See State v. Caban, 210 Wis.2nd 597, 604, 609, 496 N.W.2nd 191 (Ct. App. 1992)(forfeiture rule is a rule of administration this court may decline to apply)

The state quotes the very basis of this portion of the appeal, and then denies that this comment "even remotely suggests that it punished Defendant-Appellant for

exercising his right to trial:

"…You say you accept responsibility. But we have a situation where you went to trial and motion alleging that these weren't your crimes."

(State Brief at page 17) See also Defendant-Appellant brief at page 13 (the court said he did not penalize him for taking the case to trial, but this was the opposite of accepting responsibility)

Defendant-Appellant believes the State reads the Jackson case too narrowly. See United States v. Jackson, 390 U.S. 570, 581 (1968). The fundamental principle of Jackson is that there should not be a trial penalty, and Defendant-Appellant believes these comments by the trial court indicate clearly he was penalized at sentencing because he took the case to trial.

As a result of this "trial penalty", the judgment of conviction should be vacated and the case remanded for resentencing without such a penalty being applied.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the judgment of conviction be overturned, and that this case be remanded to the trial court for a new trial without the un-Mirandized statements of the Defendant-Appellant, with disclosure of the confidential informant in support of his theory of the defense and right to a fair trial, and if sentenced again then without a "trial penalty" being applied to him.

Dated at Wauwatosa, Wisconsin, this 24th day of April, 2015.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced using proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum 2 points, maximum of 60 characters per full line of body text.

The length of this brief is 1626 words and 5 pages.

Signed: _____

Dated: _____

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I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious (please describe the class of mail utilized) on April 25, 2015. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) STATS.

I hereby certify that:

1. I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

2. This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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