STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case Nos. 2015AP000681-CR & 2015AP000682-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KARL L. QUIGLEY,

Defendant-Appellant.

On Notice of Appeal from Judgments of Conviction and Orders Denying Postconviction Relief Entered in the Kenosha County Circuit Court, the Honorable S. Michael Wilk Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JOHN R. BREFFEILH
Assistant State Public Defender
State Bar No. 1085119

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
breffeilhj@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

United States Constitution

Wisconsin Constitution

ISSUES PRESENTED

1. Whether the State met its burden to prove that the evidence in Case No. 12-CF-884 was derived from a legitimate source wholly independent of Mr. Quigley's compelled statement to his probation officer.

After the State filed charges in Case No. 12-CF-360, it asked the police to re-interview the victim because, in a compelled statement, Mr. Quigley "described additional sexual conduct to his probation agent." (59:6; A:113).[1] The victim's second interview provided the State with additional evidence, which it charged in Case No. 12-CF-884. (1:1-3). Mr. Quigley moved to suppress that evidence, however, his motion was denied. (9:1-3; 59:17; A:124). The circuit court reasoned that, even though Mr. Quigley's compelled statement caused the police to re-interview the victim, the resulting evidence was not derived from Mr. Quigley's compelled statement because the victim and Mr. Quigley described different criminal acts. (59:17; A:124). Moreover, the circuit court found that the police "had a right to re-interview [the victim] independent of […] anything that may have been said or done by the defendant in the statement to the probation agent." (59:17; A:124).

2. Whether trial counsel was ineffective for failing to file a motion to suppress Mr. Quigley's initial statement to the police on the grounds that he was not ***Mirandized***[2] before the police conducted an in custody interrogation.

---

[1] All citations correspond to Case No. 12-CF-884 (Appeal No. 2015AP000682) unless otherwise specified.

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

The circuit court found that trial counsel was not ineffective because a reasonable person in Mr. Quigley's position would have felt free to terminate the officer's interrogation and leave the scene. (64:18-25; A:143-150).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Quigley does not request publication or oral argument. This case can be resolved by applying well-settled principles of law to a set of uncontested facts.

STATEMENT OF FACTS

On March 14, 2011, Officer Willie Hamilton of the Kenosha Police Department responded to a McDonald's restaurant, at approximately 7:50 p.m., to investigate a complaint about an older man acting inappropriately with a minor female. (67:6, 12-CF-360; 40:20).

When Officer Hamilton arrived at the McDonald's, the manager informed him that the suspect, Karl Quigley, was sitting in a booth by himself. (67:6, 12-CF-360). According to the manager, an accompanying minor, P.R., was in the bathroom. (67:6-7, 12-CF-360).

The manager informed Officer Hamilton that she observed P.R. place her legs on Mr. Quigley's lap and her head on Mr. Quigley's shoulder. (67:6, 12-CF-360). The manager was concerned because she did not believe that Mr. Quigley was P.R.'s father. (67:6, 12-CF-360).

When Officer Hamilton approached Mr. Quigley, P.R. exited the bathroom. (67:8, 18, 12-CF-360). Officer Hamilton asked P.R. her age, and whether she had permission to be with Mr.

Quigley. (67:8-10, 18, 12-CF-360). He also noticed two cell phones next to Mr. Quigley. (67:8-10, 18, 12-CF-360).

Officer Hamilton asked if he could search the cell phones. (67:9-10, 12-CF-360). Mr. Quigley and P.R. consented to the search, but did not agree as to who owned which phone. (67:9-10, 12-CF-360). When Officer Hamilton searched the phones, he discovered that one of the phones contained naked pictures (or videos) of P.R. (67:10, 12-CF-360).

When asked about his relationship with P.R., Mr. Quigley stated that he knew his actions were "wrong," but could not help himself because he loved P.R., and wanted to marry her. (67:10, 12-CF-360).

Officer Hamilton told Mr. Quigley that he "needed" to speak with a detective at the Public Safety Building. (67:11, 20, 12-CF-360; 64:19; A:144). After Mr. Quigley agreed to speak with the detective, Officer Hamilton patted him down, and placed him in the back of a locked squad car. (67:11-12, 20, 12-CF-360). He then transported Mr. Quigley to the police station, where he was isolated in a waiting room next to the detectives' bureau. (67:14-16, 20-21 12-CF-360). Mr. Quigley was not handcuffed; however, he remained in that waiting room until Detective Jason Melichar finished questioning P.R., who was also at the police station. (67:21, 30, 13-CF-360; 40:22).

During her one-hour interview, P.R. stated that she kissed Mr. Quigley. (9:1; 67:21, 13-CF-360). She also stated that Mr. Quigley exposed himself to her, asked her to touch him, and asked her to produce explicit videos found on her cell phone. (9:1).

After interviewing P.R., Detective Melichar moved Mr. Quigley into an interrogation room. (67:21-22, 12-CF-360).

At the time, Mr. Quigley was on probation for possession of marijuana. (67: 22, 12-CF-360; CCAP). He had also been on probation in other cases, which led him to believe that his contact with Officer Hamilton would result in an immediate hold. (67:22, 12-CF-360). Further, he believed that, because he was on probation, he had to cooperate with Detective Melichar. (67:22-23, 12-CF-360).

Once in the interrogation room, Detective Melichar closed the door, and advised Mr. Quigley that he was free to leave if he did not want to talk about the case:

> Q: I'm the Detective that's been assigned to your case here. Um, before we talk, I – I just want to explain a couple of things to you [to] make sure we're clear. Um, I want to make sure first that you understand you know you're not under arrest. You understand that? Okay. And you understand that, um, you're free to leave and we're here just to talk about this case.
>
> A: Right.
>
> . . .
>
> Q: Okay. So, you came down to the police department, you got a ride down with my officers tonight, is that right?
>
> A: Yes.
>
> Q: Were you ever handcuffed or told you were in custody or anything like that?
>
> A: No.
>
> Q: Okay. And you've been waiting in our Detective Bureau waiting room where there's a TV and book and things like that, right?
>
> A: Yeah.

(70, 13-CF-360; 40:24-25).

During the subsequent interrogation, Mr. Quigley admitted that he loved P.R., intended to marry her, kissed her with his tongue, touched her buttocks, bought her a cell phone, and asked her to produce explicit videos with that cell phone. (70, 13-CF-360; 40:24-56). He also admitted that P.R. flashed him, and touched him in an intimate way (over his pants). (70, 13-CF-360; 40:46-48).

After making these admissions, Mr. Quigley stopped the interrogation; prompting Detective Melichar read Mr. Quigley his ***Miranda*** rights:

> Q: …Why the long pause, Karl? Karl? What are you thinking about?
>
> A: What's happening.
>
> Q: Okay. And what is happening?
>
> A: I'm getting ready to be arrested.
>
> Q: Why do you feel like that?
>
> A: Because what I was doing is wrong.
>
> Q: Are you changing the way you feel about being freely here?
>
> A: No, I did come here freely.
>
> Q: Okay. Do you still think you're here freely? Has something changed? Have I done something to make you feel any different?
>
> A: No.
>
> Q: Okay.

A: It's just I already know.

Q: You know what?

A: That I'm gonna be arrested.

Q: So, you feel like you're gonna be arrested?

A: Yeah.

Q: Okay. Well, if your perception has changed and you don't think you're no longer freely here, then I'm gonna read you what's called your Waiver of Constitutional Rights so we can keep talking about this case. It's a procedural thing that I'm required to do if you feel that you're not here voluntarily. You understand that? Karl, do you understand what I told you?

A: No.

Q: Okay. Basically, I'm gonna go get a form and I'm gonna read it to you. And after I read you that form, I'm gonna ask you if you want to continue to talk to me about this case. You understand that?

A: Yeah.

. . .

Q: Okay, Karl, so this is the form I was telling you about. I have to read you this. [Reads ***Miranda*** warnings]. Do you understand everything I read to you?

A: Yes, basically I'm under arrest, right?

Q: This is a form where you feel – you've told me a few minutes ago that you no longer feel that you're free to leave and that you're gonna be arrested. So, if you perceive yourself to be in custody, I'm gonna read you this form just to be on the safe side and to make sure

you understand what your rights are before I ask you any further questions.

A: Yeah, but isn't this, ah, what they usually read right before they arrest you?

Q: Ah, this is a form that's read to people to inform them of their rights. I can't really interpret it and give you my explanation of what it is. I'd be going into kind of some legal stuff that I'm not supposed to get into. This is a form informing you of your rights.

A: No, but you could just…

Q: This is a form informing you of your rights. I want to make sure you understand your rights and before I ask any questions.

A: I understand my rights.

(70, 13-CF-360; 40:48-50)

Then, Mr. Quigley asked Detective Melichar if he was under arrest; however, he did not receive an answer:

A: You can just go ahead and tell me if I'm being arrested.

Q: I don't know, Karl. I'm investigating this case. Do I think it's likely? If you want my opinion, yeah. I – I'll be honest with you, I think it's probably likely, yeah. But I don't know all the details yet. And that's what I'm trying to help you figure out – us figure out.

. . .

A: I don't suppose there's any chance of me being able to step outside and have a cigarette and wake myself up, huh?

Q: Um, I can't let you go outside for a cigarette. Um, but I can get you a soda or you can walk back and forth a little bit…

. . .

A: It just don't make sense that I'm supposed to be here voluntarily, but I'm not allowed to go have a cigarette.

Q: Well, you – that's kind of changed, Karl.

A: What – what do you mean?

Q: Your – your perception of you being here voluntarily's kind of changed. And that changes things for me, too.

A: No, I – because I've known since – way since still at McDonald's that

Q: Did anyone force you to come down here?

A: No, nobody forced me to come down.

Q: So, you came down here of your own free will, is that right?

A: Yes.

Q: And no one else made you do anything?

A: No.

Q: Okay.

(70, 13-CF-360; 40:51-54).

After this exchange, Detective Melichar informed Mr. Quigley that he was going to be held on a probation hold. (70, 13-CF-360; 40:55).

The following morning, Mr. Quigley provided his probation officer with a written statement describing his relationship with P.R. (9:2; 12:3-8). That statement began:

> I have been advised that I must account in a truthful and accurate manner for my whereabouts and activities, and that failure to do so is a violation for which I could be revoked. *I have also been advised that none of this information can be used against me in criminal proceedings.*

(12:3; 12:3-8) (emphasis added).

In Mr. Quigley's compelled statement, he admitted to engaging in multiple acts of sexual misconduct with P.R. (12:3-6). Many of the admissions involved acts that were not previously reported to the police (by Mr. Quigley or P.R.). (12:3-8).

On March 26, 2012, the State filed a 9-count complaint, in Case No. 12-CF-360, charging Mr. Quigley with criminal acts related to P.R.'s initial statement. (1:1-8, 13-CF-360).

On March 28, 2012, the State received a copy of Mr. Quigley's compelled statement. (7:3; 9:2; 12:1). After reviewing that statement, the State determined that "[Mr. Quigley] described additional sexual conduct to his probation agent," and instructed Detective Melichar to re-interview P.R. (7:3; 9:2; 12:1). On August 4, 2012, Detective Melichar re-interviewed P.R. (7:3; 58:9). During that second interview, P.R. made additional allegations of sexual misconduct, which were charged, on August 6, 2012, in Case No. 12-CF-884. (1:1-3).

Mr. Quigley moved to suppress P.R.'s second statement on the grounds that it was derived from Mr. Quigley's compelled statement to his probation agent. (9:1-3). In his motion to suppress, Mr. Quigley explained:

> The State, based on information in the compelled statement, instructed Detective Melichar to re-interview [P.R.]. This second interview, derived from information from the compelled statement, lead to the charges issued in 2012 CF 884.

(9:3).

In response, the State filed an affidavit admitting that it directed Detective Melichar to re-interview P.R. after it received Mr. Quigley's compelled statement. (12:1). However, it maintained that P.R.'s second statement should not be suppressed because "there was ample reason to believe that more sexual activity had taken place beyond what [P.R.] had disclosed … [and] [t]he State would have asked detectives to follow-up with [P.R.] absent the statement from Mr. Quigley." (11:1). Moreover, the State argued that P.R.'s second statement was admissible because her statement implicated Mr. Quigley in conduct that was not disclosed in his compelled statement. (11:1-2).

Although the circuit court found that Detective Melichar re-interviewed P.R. "*because* the defendant described additional sexual conduct to his probation agent," it denied Mr. Quigley's motion to suppress on the grounds that P.R.'s statements were "wholly independent of [Mr. Quigley's] compelled testimony." (59:6, 16-18; A:113, 123-125) (emphasis added).

The circuit court's rejected the State's claim that the officers would have inevitably re-interviewed P.R.:

> The thrust of the defendant's motion then must be that the State would never have interviewed [P.R.] again. And that since she was interviewed again, there are the new charges that may not have been brought against the defendant. It was only because the State suspected because of the probation statement by the defendant that there were more actions…
>
> . . .

> In this case with Mr. Quigley, the officers followed up with a known witness; that is, [P.R.] and would have done so regardless of any statement the defendant may have made.
>
> *I don't know whether that is true*, but they certainly had a right to do that because the other case, 12-CF-360, was still pending.

(59:12-13; A:119-120) (emphasis added).

However, the circuit court focused on Detective Melichar's "right" to re-interview P.R., finding that his "right," combined with the differences between the two statements, rendered P.R.'s second statement admissible:

> The facts in this case to me clearly show that although the defendant made a statement to probation and parole, all the statements involved 2012 incidents. 12-CF-884 all involves 2011 incidents. I don't see a nexus or a connection…
>
> . . .
>
> I believe that the police had a right to re-interview [P.R.] independent of the – anything that may have been said or done by the defendant in the statement to the probation agent. And the fact that the defendant, describes statements concerning sexual activities with [P.R.] months – differently than the charges in 12-CF-884, which were disclosed … in an interview subsequent to the defendant's statement to his probation agent, I – believe … should not be the source of a dismissal of the action in suppression of evidence in 12-CF-884.
>
> I believe the State acted properly in this matter. I believe the police acted properly. I don't believe that anything the defendant said to his probation agent resulted in 12-CF-884 being charged. I don't believe that the fact that the defendant is charged after an interview by the police with [P.R.] bars this action, and so I'm going to deny the Defendant's Motion to Suppress.

(59:16-18; A:123-125).

On February 11, 2013, Mr. Quigley pled no contest to 3 counts in Case No. 12-CF-360, and 2 counts in Case No. 12-CF-884. (60:24-25). The remaining counts were dismissed and read-in. (60:30-31). On May 9, 2013, Mr. Quigley received a global sentence of 21 years of initial confinement and 18 years of extended supervision, with an additional 3 years of probation. (61:45-47).

On July 29, 2014, Mr. Quigley filed a motion for postconviction relief, seeking plea withdrawal, on the grounds that trial counsel was ineffective for failing to move to suppress his statement to Detective Melichar. (40). He argued that a reasonable person under the circumstances would not have felt free to end the interrogation and leave the police station. (40). Moreover, he alleged that he would not have pled no contest had he known that his statement to Detective Melichar could be suppressed. (40).

The circuit court held 5 postconviction hearings between July 29, 2014, and February 18, 2015. (65-69; 12-CF-360). During those hearings, trial counsel testified that he did not discuss suppressing Mr. Quigley's statement to Detective Melichar when he met with Mr. Quigley. (62:7). Trial counsel testified that he only discussed the issues which were, in his option, meritorious. (62:7). Further, he testified that he did not believe Mr. Quigley had a basis to suppress his statement to Detective Melichar. (62:7).

Mr. Quigley testified that he would not have pled no contest had he known that his statement to Detective Melichar could be suppressed. (67:25-27, 12-CF-360). Finally, Officer Hamilton testified to the facts and circumstances leading up to Mr. Quigley's interrogation at the police station. (67:5-18, 12-CF-360). Ultimately, the circuit court denied Mr. Quigley's motion for postconviction relief, finding that he was not in custody when he was interrogated by Detective Melichar. (64:18-25; A:143-150).

ARGUMENT

I. This Court Should Reverse the Circuit Court's Rulings and Withdraw Mr. Quigley's Pleas Because the State Violated Mr. Quigley's Fifth Amendment Rights by: (1) Using a Compelled Statement Against Him, and (2) Interrogating Him Without Advising Him of His Rights Per ***Miranda***.

A. Standard of review

This case presents mixed questions of law and fact. Thus, this Court reviews the circuit court's findings of historical fact for clear error, and reviews its application of law *de novo*. ***State v. Spaeth***, 2012 WI 95, ¶ 30, 343 Wis. 2d 220, 819 N.W.2d 769.

B. P.R.'s second statement to the police must be suppressed because it is derived from Mr. Quigley's compelled statement to his probation agent.

The Fifth Amendment to the United States Constitution reads, in part: "No person shall … be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. This privilege has been incorporated into the Fourteenth Amendment to apply to the states, ***Mallory v. Hogan***, 378 U.S. 1, 6 (1964), and Wisconsin has its own equivalent in Article I, Section 8 of the Wisconsin Constitution.

In ***Spaeth***, the Wisconsin Supreme Court explained that:

> The privilege "reflects many of our fundamental values," including an unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses," and the "realization that the privilege, while sometimes a shelter to the guilty, is often a protection of the innocent."

Spaeth, 343 Wis. 2d 220, ¶ 33.

The United States Supreme Court has found that "the Fifth Amendment privilege is the most important exemption to the government's power to compel testimony." ***Kastigar v. United States***, 406 U.S. 441, 444 (1972). "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution *or could lead to other evidence that might be so used*." ***Id***. at 444-445 (emphasis added).

If the State compels a defendant to incriminate himself, it must first grant that defendant "immunity that is coextensive with the privilege against self-incrimination," meaning, the State cannot use a compelled statement to further *any* part of its criminal investigation. ***Id***. at 449. "This total prohibition on use provides a comprehensive safeguard, *barring the use of compelled testimony as an 'investigatory lead*,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." ***Spaeth***, 343 Wis. 2d 220, ¶ 37 (emphasis in original).

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to [a] prosecution, the […] authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.

Kastigar, 406 U.S. at 460.

This burden of proof is not limited to the mere negation of taint; rather, "it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is *derived from a legitimate source wholly independent of the compelled testimony.*" ***Spaeth***, 343 Wis. 2d 220, ¶ 38 (emphasis in original) (*quoting* ***Kastigar***, 406 U.S. at 460).

In this case, the State failed to prove that P.R.'s second statement to police was derived from a legitimate source wholly independent of Mr. Quigley's compelled statement to his probation officer. In its motion to join these two cases for trial, the State admitted that:

> While the prosecution of 12CF360 was ongoing, the State, namely Assistant District Attorney James Kraus, requested that Detective Jason Melichar approach [P.R.] and inquired as to any further incidents. *The State suspected that there were more incidents as the defendant described additional sexual conduct to his probation agent*. Detective Melichar did meet with [P.R.] on August 4, 2012, and she alleged further sexual conduct involving the defendant. These allegations gave rise to the charges in 2012CF884.

(7:3) (emphasis added).

During a subsequent motion hearing, Detective Melichar confirmed that the State asked him to re-interview P.R. (58:18). Moreover, the State filed an affidavit, affirming that it asked Detective Melichar to re-interview the victim *after* it received Mr. Quigley's compelled statement. (12:1). Therefore, it is clear that P.R.'s second interview occurred *because* the State obtained Mr. Quigley's compelled statement, and indeed, the circuit court made this finding:

> I'm satisfied from the – from the statements that were made in the motion by the State for joinder and/or other acts, that the basis for the re-interviewing of [P.R] was *because* the defendant described additional sexual conduct to his probation agent.

(59:6; A:113) (emphasis added).

After making this finding, the circuit court should have ended its inquiry, and granted Mr. Quigley's motion to suppress. Instead of proving that P.R.'s second statement was "wholly

independent" from Mr. Quigley's compelled statement to his probation agent, the State admitted that the statements were, in fact, causally related. However, the circuit court did not grant Mr. Qugiley's motion to suppress.

Instead, the circuit court found that the statements were admissible because: (1) Detective Melichar had a "right" to re-interview the victim, and (2) the victim alleged new acts which Mr. Quigley did not discuss during his compelled statement. (59:17; A:124). However, neither conclusion provides a compelling reason to admit the evidence in question.

First, Detective Melichar's supposed "right" to re-interview the witness is irrelevant. The circuit court did not (and cannot) cite a single case to support its finding that the State's Fifth Amendment violation can be excused because the police were engaged in conduct that was otherwise legal. The test is not whether the police action was, on its own, legal. The test is whether the police action was derived from a legitimate source, wholly independent of Mr. Quigley's compelled statement. ***Spaeth***, 343 Wis. 2d 220, ¶ 38. In this case, we know that it was not because both Detective Melichar and the State admitted that P.R. was re-interviewed "*because* [Mr. Quigley] described additional sexual conduct to his probation agent." (7:3; 12:1; 58:18; 59:6; A:113) (emphasis added).

Second, it does not matter that Mr. Quigley and P.R. described different acts. Suppression is not outcome determinative. For example, if the police enter an individual's home without a warrant, the fruits of their search will be suppressed, regardless of whether the police obtained what they sought, or some unexpected evidence of a different crime. *See e.g.* ***State v. Kiper***, 193 Wis. 2d 69, 532 N.W.2d 698 (1995). This is the result because suppression is designed to deter police misconduct. ***Davis v. United States***, 131 S. Ct. 2419, 2426, 180 L. Ed. 2d 285 (2011). Therefore, the issue

is not whether the State obtained unexpected evidence of guilt. The issue, particularly in this case, is whether the State violated Mr. Quigley's constitutional rights, and if so, whether future misconduct would be deterred if the evidence were suppressed. ***State v. Knapp***, 2005 WI 127, ¶ 22, 285 Wis. 2d 86, 700 N.W.2d 899. Here, the answer to both questions is yes.

The evidence clearly shows that the State consciously violated Mr. Quigley's constitutional rights by using his compelled statement to re-interview the victim. The State admitted to doing this when it filed its motion and affidavit. (7:3; 12:1). Its actions were unconstitutional. Moreover, suppression is necessary to deter future misconduct. Thus, this Court should reverse the circuit court's order, and suppress the contents of P.R.'s second statement.

C. Trial counsel was ineffective for failing to move to suppress Mr. Quigley's statements to the Detective Melichar because they were the product of an un-***Mirandized*** in custody interrogation. Mr. Quigley's pleas should be withdrawn because had Mr. Quigley known that his statements could be suppressed, he would not have entered his pleas.

Police officers must administer ***Miranda*** warnings before conducting in custody interrogations. ***State v. Schloegel***, 2009 WI App 85, ¶ 7, 319 Wis. 2d 741, 769 N.W.2d 130; ***Miranda***, 384 U.S. at 478-479. "[A] person is 'in custody' for purposes of ***Miranda*** when he or she is 'deprived of his [or her] freedom of action in any significant way.'" ***State v. Armstrong***, 223 Wis. 2d 331, 353, 588 N.W.2d 606 (*quoting* ***Miranda,*** 384 U.S. at 444). "Law enforcement has custody over a suspect within the meaning of ***Miranda*** where a reasonable person would not feel 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 (*citing* ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995)). This is an objective

standard, and does not depend "on the subjective views harbored by either the interrogating officers or the person being questioned." ***Stansbury v. California***, 511 U.S. 318, 323 (1994).

The question is therefore whether a *reasonable person* in Mr. Quigley's position would have, under the totality of the circumstances, felt free to end Detective Melichar's questioning and leave the police station. *See* ***State v. Burnside***, No. 2013AP1293, unpublished slip op. (WI App Apr. 29, 2014); (A:151-153). In this case, the answer is clearly no.

Here, Mr. Quigley was on probation when he was approached by Officer Hamilton. (67:22, 12-CF-360; CCAP). Mr. Quigley testified that he knew, from past experience, that his encounter with Officer Hamilton would result in a probation hold. (67:22-23, 12-CF-360). Moreover, during his interrogation, he stated that he already knew he was going to be held on a probation hold before that decision was formally made:[3]

> Q: Here's what we're gonna do. Um, you're on probation.
>
> A: Mm-hm.
>
> Q: What are you – you're on paper for drugs and something?
>
> A: Mm-hm.
>
> Q: I ran this case, ah, by your PO.
>
> A: Mm-hm.

[3] Postconviction, the State asserted and Mr. Quigley did not refute that the probation hold occurred when Detective Melichar stepped out of the interrogation room to get a written ***Miranda*** form. (43:9-10). While Detective Melichar was out of the room, he called Mr. Quigley's probation agent, and a hold was issued. (43:9-10).

Q: And what they're electing to do is put a PO hold on you.

A: I already knew that.

Q: You knew that already?

A: Mm-hm. I already spoke to the officer about it.

Q: Oh, okay. So then you already know that you're gonna have to sit tonight.

A: And he said – and he tried to tell me that my PO is new and (unintelligible).

Q: Oh. That's not accurate.

A: Well, I already knew that.

(70, 13-CF-360; 40:55).

During the initial police contact at McDonald's, Mr. Quigley heard the police ask P.R. a series of questions that suggested he was engaging in an inappropriate and criminal relationship with P.R. (67:8-10, 12-CF-360). Mr. Quigley knew that Officer Hamilton had discovered naked pictures (or videos) of P.R. on his cell phone. (67:8-10, 12-CF-360). Further, he told Officer Hamilton that he knew his actions "were wrong," but could not help himself because he wanted to marry P.R. (67:8-10, 12-CF-360).

Officer Hamilton then told Mr. Quigley that he "*needed*" to go to the Public Safety Building to speak with a detective. (67:11, 20, 12-CF-360; 64:19; A:144). He patted Mr. Quigley down, placed him in the back of a locked police car, and drove him to the police station. (67:11-12, 20, 12-CF-360). Mr. Quigley was isolated in a police waiting room for an hour. (67:21, 13-CF-360). Then, a police detective escorted Mr. Quigley from the waiting

room to a separate interrogation room where he was questioned about his criminal activity. (67:21-22, 12-CF-360; 70).

These facts would lead a reasonable person to believe that he or she was not be free to end Detective Melichar's interrogation and leave the police station. Mr. Quigley was clearly the focus of a serious criminal investigation. He was not free to leave the police station.

Further, Detective Melichar's repeated attempts to convince Mr. Quigley that he was not in custody are only relevant insofar as they demonstrate that: (1) Detective Melichar did not understand the law – an officer's duty under ***Miranda*** does not hinge upon the defendant's subjective belief that his is or is not in custody – and (2) he too was concerned that a reasonable person in Mr. Quigley's position would believe that he was in fact, in custody.

Indeed, these facts invite a comparison to ***Burnside***, where this Court determined that the defendant was "in custody" for the purposes of ***Miranda***, even though he "agreed" to "voluntarily" answer questions at the police station. ***Burnside***, 2013AP1293, ¶¶ 13-16; (A:153).

In ***Burnside***, the Milwaukee police department was investigating a late-night shooting when an officer stopped a car that matched the description of the shooter's car. ***Id***. at ¶¶ 2-3 (A:151). The driver, Brandon Burnside, was detained until a detective could arrive on the scene. ***Id***. at ¶ 4; (A:151). The detective interrogated Mr. Burnside at the scene, and convinced him to "voluntarily" speak with him "downtown." ***Id***. at ¶ 6; (A:151-152). Mr. Burnside was "transported" in the back of a locked police car to the police administration building, where he was placed in an interrogation room. ***Id***. at ¶¶ 7-8; (A:152). Then, when the detective arrived, Mr. Burnside was moved to a "larger room" because it was "more comfortable to sit in." ***Id***. at ¶ 7; (A:152). Mr. Burnside was not handcuffed in either room. ***Id***.

(A:152). At the beginning of the interrogation, the detective said "This is gonna be an interview of a subject regarding the homicide at 3012 West North Avenue at 1:52 am. RI # 102230019. This subject is not in custody and this is not a ***Mirandized*** interview." ***Id***.; (A:152).

During that interrogation, Mr. Burnside made a number of statements which he later sought to suppress. ***Id***.; (A:152). On appeal, this Court suppressed those statements, concluding that "the police deprived Burnside of his freedom of action in a significant way." ***Id***. at ¶¶ 7-10, 16 (*quoting* ***Miranda***, 384 U.S. at 444); (A:152-153). This Court determined that Mr. Burnside was "in custody" because he was isolated at the police administration building, and noted that "***Miranda*** specifically recognized that there is an inherent 'compulsion to speak in the isolated setting of the police station.'" ***Id***. (*quoting* ***Miranda***, 384 U.S. at 461); (A:153).

The facts of Mr. Quigley's detention and interrogation are nearly identical to those in ***Burnside***. As in Burnside, Mr. Quigley was isolated in a room inside the police station after being transported there by the police. Although he was clearly the focus of a serious criminal investigation, Detective Melichar repeatedly assured him that he was "voluntarily" cooperating with the investigation. Mr. Quigley was moved within the police station. Moreover, he was on probation and knew from past experience that his agent would issue a hold.

Because the police failed to provide Mr. Quigley with a ***Miranda*** warning before Detective Melichar began the interrogation, his statements should have been suppressed. Thus, trial counsel was ineffective for failing to move to suppress Mr. Quigley's statements, and failing to advise him that his statements were inadmissible before advising him to plead.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 259, 273, 558 N.W.2d 379 (1997). To determine whether trial counsel's performance fell below the constitutional standard, Wisconsin courts apply the two-prong test outlined in ***Strickland v. Washington***, 466 U.S. 668 (1984). ***Smith***, 207 Wis. 2d at 273. The defendant must establish that trial counsel's performance was deficient, and that trial counsel's errors or omissions prejudiced his defense. ***Strickland***, 466 U.S. at 687. To prove deficient performance, the defendant must establish that trial counsel "made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." ***Id***. The prejudice prong requires a showing that "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Smith***, 207 Wis. 2d at 276 (*citing* ***Strickland***, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. The defendant need only demonstrate to the court that the outcome is suspect, but need not establish that the final result of the proceeding would have been different. ***Smith***, 207 Wis. 2d at 275.

Here, the record demonstrates that trial counsel never filed a motion to suppress Mr. Quigley's statements to Detective Melichar. Moreover, trial counsel and Mr. Quigley both testified that they never discussed whether there was a basis to suppress those statements. (62:7; 67:25-26, 12-CF-360).

Mr. Quigley testified that he would not have entered his pleas had he known that his statements to Detective Melichar could have been suppressed. (67:25-27, 12-CF-360). He testified that he wanted trial counsel to suppress *any* inadmissible evidence, and would have gone to trial had he known that his statements to Detective Melichar were inadmissible. (67:25-27, 12-CF-360).

Under these facts, trial counsel was clearly deficient for failing to either file a motion to suppress, or discuss the admissibility of Mr. Quigley's statements with him before advising him to plead no contest. Since a motion to suppress would have been granted if filed, trial counsel's deficient performance prejudiced Mr. Quigley's because he would not have pled no contest had he known that his statements were inadmissible. The circuit court erred in finding otherwise. This Court should reverse the circuit court's decision.

CONCLUSION

The circuit court erred in denying Mr. Quigley's pre-plea motion to suppress P.R.'s second statement to the police. The police obtained that statement *because* Mr. Quigley was compelled to make an incriminating statement to his probation agent. The circuit court also erred in denying Mr. Quigley's motion for postconviction relief, as the testimony established that Mr. Quigley was in custody when he was interrogated without receiving his ***Miranda*** warnings.

The circuit court's decisions should be reversed and Mr. Quigley should be permitted to withdraw his pleas.

Dated on August 13, 2015, at Milwaukee, Wisconsin.

Respectfully submitted,

JOHN R. BREFFEILH
Assistant State Public Defender
State Bar No. 1085119

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
breffeilhj@opd.wi.gov

Attorney for Defendant-Appellant

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 5,857 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 August 13, 2015.

Signed:

JOHN R. BREFFEILH
Assistant State Public Defender
State Bar No. 1085119

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
breffeilhj@opd.wi.gov

Attorney for Defendant-Appellant

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 § 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.

Dated August 13, 2015.

Signed:

JOHN R. BREFFEILH
Assistant State Public Defender
State Bar No. 1085119

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
breffeilhj@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page