STATE OF WISCONSIN

COURT OF APPEALS

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.

REPLY BRIEF 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

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I. 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.

In its response, the State confuses concepts and complicates what is otherwise a simple issue. The Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution prohibit the State from using a compelled statement to obtain a conviction.[1] *See* U.S. CONST. amend. V; ***Kastigar v. United States***, 406 U.S. 441, 444-445 (1972); WIS. CONST. art. I, § 8; ***State v. Spaeth***, 2012 WI 95, 343 Wis. 2d 220, 819 N.W.2d 769. This prohibition does not bar the State from prosecuting a defendant; however, in cases where the defendant has been compelled to make a statement, it requires the State to prove that its case rests on evidence derived from a legitimate source, wholly independent of the defendant's compelled statement. ***Kastigar***, 406 U.S. at 460. This means that a defendant's compelled statement enjoys "use" and "derivative use" immunity, but not "transactional" immunity. ***Id***. at 403.

The Wisconsin Supreme Court has explained "derivative use" immunity means that the State cannot use a defendant's compelled statement "to furnish a link in the chain of evidence necessary for prosecution." *See* ***State v. Hall***, 207 Wis. 2d 54, 557 N.W.2d 778 (1997) (drug stamp law unconstitutional because it does not provide a purchaser with "derivative use" immunity); *see also* ***In re Grant***, 83 Wis. 2d 77, 81, 264 N.W.2d 587 (1978) (absent "derivative use" immunity, a child's mother cannot be

[1] In fact, this constitutional privilege extends to all phases of a criminal case. ***State v. Peebles***, 2010 WI App 156, ¶ 19, 330 Wis. 2d 243, 792 N.W.2d 212.

compelled to disclose the identity of the child's father); ***Spaeth***, 343 Wis. 2d 220, ¶¶ 70-79; (a defendant's voluntary ***Mirandized***[2] statement must be suppressed when it is derived from a compelled statement to a probation agent).

In this case, the State cannot meet its burden to prove that P.R.'s second statement was derived from a legitimate source, wholly independent of Mr. Quigley's compelled statement. During pretrial litigation, the State admitted that: (1) Mr. Quigley was compelled to provide his probation agent with an incriminating statement; (2) the prosecutor obtained Mr. Quigley's compelled statement; (3) after reading Mr. Quigley's compelled statement, the prosecutor instructed Detective Melichar to re-interview P.R.; and (4) Detective Melichar re-interviewed P.R., uncovering new evidence of criminal conduct. (1:1-3; 7:3; 12:1; 58:18).[3] Since the State's admission demonstrates that it used Mr. Quigley's compelled statement to furnish a link in the chain of evidence necessary for prosecution, P.R.'s second statement must be suppressed.

Yet, the State rejects this analysis because Detective Melichar testified that he would have re-interviewed P.R., regardless of whether he was contacted by the prosecutor (because he believed that P.R. was "holding back" during her first interview). (Response at 21-22); (58:12). However, this testimony is not only speculative, but irrelevant to the question of whether P.R.'s second statement was derived from a legitimate source, wholly independent of Mr. Quigley's compelled statement. Instead, it suggests that Detective Melichar may have obtained the same evidence from P.R. in the absence of Mr. Quigley's compelled statement—but the State does not argue inevitable discovery on appeal.

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

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

Instead, the State cites a number of cases from other jurisdictions, and one unpublished case from Wisconsin, to suggest that P.R.'s second interview was not, in fact, tied to Mr. Quigley's compelled statement. (*See* response at 19). However, the cases the State cites are not relevant to the instant inquiry because they discuss what must be shown when there is confusion as to whether evidence is derived from a compelled statement or another legitimate source. (*See* Response at 19). Here, there is no such confusion. The circuit court found, and the State has admitted, that Detective Melichar re-interviewed P.R. *because* the prosecuting attorney read Mr. Quigley's compelled statement. (7:3; 12:1; 58:18; 59:6A:113). There is simply no dispute as to whether the second interview was related to Mr. Quigley's compelled statement. Everyone agrees that it was.

Thus, the only remaining issue is whether the error is harmless. "[E]rrors in admitting evidence that should have been excluded under the Fifth Amendment are subject to the harmless error analysis." ***In re Commitment of Harrell***, 2008 WI App 37, ¶ 36, 308 Wis. 2d 166, 747 N.W.2d 770 (*citing* ***Arizona v. Fulminante***, 499 U.S. 279, 295 (1991)). An error is harmless if the State—the beneficiary of the error—can prove beyond a reasonable doubt that the error complained of did not contribute to the outcome. ***Harrell***, 308 Wis. 2d 166, ¶ 37.

Here, the error is not harmless because the constitutional error—using Mr. Quigley's compelled statement as an investigatory lead—contributed to the outcome of the case. It prompted Detective Melichar to re-interview P.R, resulting in a new complaint, filed in Case No. 12-CF-884. P.R.'s second statement to the police was the sole basis for those charges. (1:1-3). Thus, had her statement been suppressed, Mr. Quigley would not have pled to the new charges.

Since the State violated Mr. Quigley's constitutional privilege against self-incrimination, this Court must vacate Mr. Quigley's pleas and reverse the circuit court's ruling on his motion to suppress.

II. Trial Counsel Was Ineffective for Failing to Move to Suppress Mr. Quigley's Statements to 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 Have Been Suppressed, He Would Not Have Entered His Pleas.

The State argues that Mr. Quigley is not entitled to plea withdrawal because he did not prove deficient performance or prejudice. (Response at 7-14). The State concedes that the underlying issue—whether Mr. Quigley was "in custody" during his interrogation—is "a close question." (Response at 12). However, it asserts that, regardless of whether Mr. Quigley had a meritorious basis to suppress his statement, his attorney's advice was reasonable since, postconviction, the circuit court denied his motion to suppress. (Response at 12-13). Regarding prejudice, the State asserts that Mr. Quigley cannot prevail because, even without Mr. Quigley's statement, the State had sufficient evidence to secure a conviction. (Response at 13-14).

Clearly, the State does not understand the ***Strickland*** standard.[4] It asks this Court to hold that trial counsel is not deficient for failing to suppress or identify inadmissible evidence before advising a defendant to plead guilty because reasonable minds may differ in determining what evidence is legally admissible. However, this is not the law. The law states that trial counsel is deficient if he or she fails to identify a meritorious

[4] *See* ***Strickland v. Washington***, 466 U.S. 668 (1984).

suppression issue before advising a client to plead. *See* ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986).

Regarding prejudice, the State asks this Court to hold that prejudice does not hinge upon whether the defendant would have entered a plea absent the error, but whether the State could secure a conviction. (Response 13-14). Again, this is not the law. The law states that, when a plea is at issue, the defendant satisfies the "prejudice" requirement by showing that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

In this case, the real issue is whether the police violated the Fifth Amendment by interrogating Mr. Quigley without a ***Miranda*** warning. Mr. Quigley raised this issue in his initial brief; however, the State rejected the argument without providing an analysis:

> Quigley's reliance on *State v. Burnside*, Case No. 2013AP1293-CR (Wis. App. Apr. 29, 2014) (unpublished) Fine, J., is unavailing. First, *Burnside* is not binding precedent. The facts of this case are more similar to *Lonkoski* than to *Burnside*. *See Lonkoski*, 346 Wis. 2d 523, ¶ 7. But most importantly, *Burnside* is not an ineffective assistance claim after a guilty plea.

(Response at 13).

Contrary to the State's unsupported assertion, ***Burnside*** is on point. In both ***Burnside*** and the instant case, the defendant was detained in a city, transported to a police station, isolated in an interrogation room, and assured that he was "voluntarily" cooperating with a police investigation. *See* ***Burnside***, 2013AP1293, unpublished slip op. ¶¶ 2-16 (WI App Apr. 29, 2014); (A:151-153). Since Burnside's un-***Mirandized*** confession was suppressed, the same result should occur here.

Moreover, the State's reliance on ***Lonkoski*** is misplaced. ***Lonkoski*** is unlike the instant case in that "Lonkoski came to the sheriff's department without being asked." ***State v. Lonkoski***, 2013 WI 30, ¶ 7, 346 Wis. 2d 523, 828 N.W.2d 552, *cert. denied,* 134 S. Ct. 251, 187 L. Ed. 2d 185 (2013). Here, Mr. Quigley was not only instructed that he "needed" to speak with a detective, but, was patted down, placed in the back of a patrol car, and transported to the police station. (67:11, 20, 12-CF-360; 64:1; A:144). Clearly, ***Burnside*** is more pertinent than ***Lonkoski***.

Additionally, Mr. Quigley established prejudice. At the ***Machner*** hearing, Mr. Quigley testified that he would not have entered his pleas and proceeded to trial had he known that his confession was inadmissible. (67:25-27, 12-CF-360).

Further, the record supports his assertion. According to trial counsel, Mr. Quigley was so concerned about his confession that he discussed it with counsel for two and one-half hours before he pled. (66:11-12, 12-CF-360). He also sought to suppress P.R.'s second statement to the police, suggesting that he wanted to know exactly what the State could introduce at trial before deciding whether to plead. (67:25-27, 12-CF-360).

Since Mr. Quigley met his burden to prove deficient performance and prejudice, this Court should vacate Mr. Quigley's pleas, and reverse the circuit court's order denying his motion to suppress.

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 at Milwaukee, Wisconsin this 2nd day of December, 2015.

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 1,733 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 2nd day of December, 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

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