STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Case No. 2015AP001366 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ARMIN G. WAND, III,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
OF CONVICTION AND SENTENCE AND ORDER
DENYING POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR
LAFAYETTE COUNTY, THE HONORABLE
THOMAS J. VALE, PRESIDING

REPLY BRIEF

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REPLY BRIEF

I. Confession should have been suppressed because it was involuntary.

State v Hoppe, 2003 WI 43, ¶36., 261 Wis. 2d 294, 661 N.W.2d 407 holds that a defendant's statements are voluntary "if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on

the defendant by representatives of the State exceeded the defendant's ability to resist." The ultimate determination as to whether the Wand's statement was voluntary is a question of the law for this court and no deference is owed to the circuit court. ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987).

The court must balance Wand's characteristics with the details of the interrogation. ***State v. Hoppe***, 2003 WI 43, ¶39-40, 261 Wis. 2d 294, 661 N.W.2d 407.

> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. Id.at ¶ 39.

With respect to these criteria, the circuit court found as follows:

> Age: Wand was 32 years old. (146:41).
>
> Education: The court made no finding as to Wands education level.
>
> Intelligence: The court found that Wand was low functioning with an IQ of 67.(Id 41, 44). He is a passive individual.(Id. 50).
>
> Physical condition: The court found that Wand had difficulty communicating and that he was legally blind.(Id.42). The court noted that Wand had been fed and given the opportunity to rest.(Id.52).

The court did not find that Wand had slept. Wand testified that he had not slept and that he was disturbed by the guard checking on him every few minutes (197:238); the jail care sheet reflects that guards checked

on Wand thirty-five times from midnight until 7:00 a.m. (100:Ex18).[1] His interrogator on September 9th, acknowledged that he was tired.(100:Ex 11: 143).

> Emotional condition–court held that any "Mental and emotional stress caused by sources other than the police do not affect the voluntariness of the statement"(142:48.)

However, ***Hoppe*** makes clear, one's emotional condition **does** play a part. 2003 WI 43, at ¶39. Here, the court did not consider that Wand had just lost most of his family and his home in a fire and had been isolated and subject to many hours of coercive questioning just a few hours before.

> Prior experience with law enforcement: The court found that Wand had prior experience talking with police (Id. 42) although court recognized that "doesn't mean it improved his functioning or his intelligence."(Id.44).[2]

While the court found that Wand asked to talk with police on September 9, 2009, the court ignored the fact Wand did **not** call the officers to talk about the fire. He called the officers only to deny an allegation the special agents had made the night before - after he invoked his right to silence - that Jeremy had told police

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[1] While the Ex 18 notations indicate that Wand was asleep much of the time, one wonders how could Wand have known that the guards were checking on him every few minutes if he had been, in fact, asleep.

[2] State presented a record indicating 2 felonies, 9 misdemeanors, 10 forfeitures and once civil case. (100Ex 8). This is inconsistent with the PSI which reflects Wand had six misdemeanor and one felony(forgery) conviction.(125). In any case, there is no suggestion that he had any prior experience with an intense police interrogation.

that Armin had kissed another woman.[3] Wand clearly stewed about the rather silly allegation overnight and felt it was necessary to deny the accusation. (100: Ex 11: 5-6). Wand so lacked sophistication in dealing with the police that he did not understand the can of worms he would open by contacting the special agents.

His gullibility is reflected by fact that when the agents arrested him, Wand refused to talk anymore because he had thought the agents would have let him go if he admitted he was involving in planing the fire.(100: Ex6: 1894,1895).[4] Wand did not fully understand the consequences of his statements.

Even if this court does not consider Dr. Thompson's tests and. Dr. White's ultimate conclusions in considering the suppression motion, much of Dr. White's comments are descriptions of the videos and transcripts of the interrogation admitted into evidence as exhibits at the suppression hearing and were available to the circuit court when it made its decision. For example, the observations that White made about the pressure the agents put on Wand toward the end of the six and-one-half hour interview on September 9th, to encourage him to confess (cited in Wand's brief at 21-22) were quotes and observations from the video and transcript admitted as exhibits 10 and 11 at the suppression hearing.(100 Ex 10 and 11).

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[3] Agent Fernandez admitted that Armin did not call them to talk about the fire.(197: 136).

[4] WAND: Yah but the o, if, if I been, been honest well why am I s, still goin ta jail for? (100 Ex 6: 1894).

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WAND: I'm done talkin b, because, d, I feel an all y, y, you guys lie to me.(Id 1895).

This court can determine for itself, if White's observations were correct. But, this information was available to the circuit court at the time it decided the suppression motion.

In any case, Wand did ask the trial court to reconsider its decision on the suppression motion taking into consideration the new evidence Wand was presenting in his postconviction motion.

> This court has discretion to consider new evidence regarding a pretrial suppression ruling. ***State v. Johnson***, No. 2008AP645-CR (Wis. App. 12/9/2008) (Wis. App., 2008). The court should do so where, as here, there is evidence show that the coercive pressures overwhelmed Wand's resistance leading to an unreliable confession.

(180:4-5).

The circuit court chose not to do so.

Finally, the State claims that Wand did not raise the issue of reliability of his statements.(State's brief 2). Wand did raise that issue. In his argument to the court on the second day of the suppression hearing, Wand pointed out the involuntariness and unreliability of his statements go hand in hand.

> In the State's response brief, they point out that arguing that he was in an emotionally compromised position is somewhat ironic given what the ultimate contents of his statements ended up being. I would submit to the Court that that's only ironic if you assume the statements were indeed voluntary, and I guess it becomes somewhat, somewhat circular in that regard, and we're here to talk about whether those statements are reliable or whether they are not reliable because they are involuntary. And because that's what at issue here, I don't think we can take the contents of those statements as dispositive or to negate his emotional state until we've determined whether they are reliable and whether

they are voluntarily made.

(146:8-9).

One clear example that should have given the circuit court pause in admitting the September 9th, statement was an incident that occurred during the middle of Wand's statement. When the agent told Wand that the fire in the living room could not have grown in the way Wand said it did (100: Ex 11: 4384-4387). Wand, then, gave a detailed account about pouring gasoline on the fire to get it going. (Id.4391-4716). When the agent realized that the way Wand said he poured the gasoline would have resulted in Wand being burned (Id.5181), the agent asked Wand if he really grabbed a gas can.(Id.4719). Wand responded, "Not really. I mean, I don't know what to say. Because when I said I never did, you guys said that I'm lying." Wand went on to explain why he said he got a gas can, "B-b-b-because when I said I never did, well, then you, you said it's kind of hard to start the fire just with paper and carpet."(Id.4767-4768). When the agents said they just wanted him to tell them the truth, Wand said, "Well, the, the truth is Jeremy never started the fire. He was not there, and I was, um, sleeping."(Id.4810-4811). The agents told Wand that was not the truth and continued to question him based on the assumption that he and Jeremy started the fire.(Id.4849-4928).

That exchange, which was available to the circuit court, clearly showed that Wand would change his story to fit what he thought the special agents wanted to hear.

The trial court should have considered the unreliability of Wand's September 9th, and suppressed that statement.

II. Armin alleged sufficient basis for withdrawal of his guilty pleas.

Contrary to the State's claim (State's brief 31), the main thrust of Wand's postconviction motion, in his brief to the trial court and in his brief to this court, has always been that his confession, upon which his plea was predicated, was coerced and is unreliable and that - taken with evidence that shows that there is a real question that there the fire was deliberately set - provides a basis for finding a manifest injustice warranting a plea withdrawal.(165: 3-14; 180:3-5). As pointed out in his brief-in-chief (See Appellant's brief 35) and in his postconviction motion(1653-4), other jurisdictions have held that an unreliable confession can be a basis for withdrawing a plea.

Wand's postconviction motion elaborated in considerable detail why the confession is unreliable.(165:7-14). He, not only pointed out how the Special Agents' tactics in questioning Wand can lead to false confessions(Id.7-9), and how Wand's personal characteristics make him a person at risk of giving a false confession(Id), he also pointed out how his confession and Jeremy's confessions, where consistent were contaminated, and in other important details were inconsistent.(Id 12-14). He also pointed out how his confession was inconsistent with statements of Sharon Wand.(Id. 14).

Further, Wand showed why the state's fire marshal was wrong in concluding that the fire was intentionally set, how the fire marshal's conclusion were at odds with Sharon Wand's statement and fire fighters eye witness statements. (Id 4-6).

If those facts do support a finding of a manifest injustice, as other jurisdictions have found, then the trial

court was bound to grant Armin Wand a hearing on his postconviction motion.[5] ***State v Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50(1996).

> If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing.

The state cites ***State v. Fosnow***, 2001 WI App 2,¶9, 240 Wis. 2d 699, 624 N.W.2d 883 for the proposition that " Newly discovered evidence, however, does not include the 'new appreciation of the importance of evidence previously known but not used." That case should not govern here.

In ***Fosnow*** exams by several experts provided no support for Fosnow's NGI plea which he then dropped, leading to conviction on no contest pleas. Years later, a prison psychiatrist determined that he suffered from dissociative identity disorder at the time of his offenses. Fosnow argued in a § 974.06 motion that this new opinion was newly discovered evidence entitling him to plea withdrawal. The court of appeals rejected his claim, holding that the basis for an NGI defense was available to him before conviction. The court specifically referred to Fosnow's "extensive 'psychiatric evidence,'" including his DID symptomatology. ¶¶16-22. This was a fact specific holding on the use of "newly discovered" psychiatric evidence. Indeed, the Wisconsin and sister state cases ***Fosnow*** cites involve the rejection of new postconviction psychiatric experts.¶¶13-14,26.

Fosnow cites ***Steele v. State***, 97 Wis. 2d 72, 97, 294 N.W.2d 2 (1980) noting the Wisconsin Supreme Court has expressed concern regarding the ability of

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[5] Contrary to the State's suggestion(State's brief 30), Wand requested the trial court to hold an evidentiary hearing.(189:4).

litigants to procure testimony from psychiatric experts that is "tailor[ed] . . . to the particular client whom they represent."

This case is very different. Paul Bieber's report is based on eye witness statements, that were not discussed in the fire marshal's report.(167:10-11).

The state's conclusion that there was an arson is based upon the belief that there had been a second fire started in the boys' bedroom.(166:15).To reach that conclusion, the state had to assume that the door to the boys' room was closed at some point because if it had not been closed the fire could have spread from the living room-where the fire marshal conceded he could not determine the origin of the fire(166:11) - to the boys' room. Indeed, the state alleged that Jeremy locked that door.(2:6.)

Bieber's report says,

> In considering the potential of room-to-room extension from the fire in the living room into the bedroom, the position of the bedroom door (open or closed) during the fire is a critical factor. In other words, if the bedroom door was open during most or all of the fire, fire extension from the living room into the bedroom cannot reasonably be excluded as the cause of the burn patterns Fire Investigator Boswell is attributing to a "separate and independent" area of origin. Only if the door dividing the living room from the bedroom was in the closed position can a conclusion of multiple areas of origin be sustained.

(167: 10).

However, as R. Paul Bieber points out in his report, the door to the boys room was observed by fire fighters at the scene to be open.

> [The]statement of Fire Chief Randy Martin (the first firefighter on the scene) who was able to look through the west window of the bedroom, through the open doorway to the living room, and see fire burning in the living room. Had the door between the bedroom and living room been closed this would not have been possible.

(Id.10-11).

Bieber also noted,

> Later in the fire's progression, the first eye-witness to observe flames in the bedroom (Firefighter Cody Stamm) saw burning in the area of the bedroom closet, immediately adjacent to the door leading to the living room, and not in the area of the room identified by Fire Investigator Boswell as the separate area of origin of the fire in the bedroom. Firefighter Stamm extinguished the fire burning in the closet, but did not encounter any other flames in the bedroom.

(Id. 11).

Sharon Wand's statement supports the conclusion that the door was open.

> Approximately seven weeks after the fire and after Fire Investigator Boswell completed his final report, the first eyewitness to the fire, Sharon Wand, was interviewed in her hospital room. During the first of two interviews "Sharon Wand indicated that the door to the boy's room…was open and that there was no fire in the boy's room..."

(Id.).

Bieber's report is based upon eye witness statements. Bieber did not tailor those statements to fit Wand's argument. Either the door was open, or it was closed. If it was closed, then a second fire was likely started in the boys' room. But, if the door was open and

there was no fire in part of the room identified by Agent Boswell as the site of a second fire, as Sharon and the fire fighters said, then there is no scientific basis to say that the fire was deliberately set.

The circuit court should have granted Armin Wand a hearing on his postconviction motion.

CONCLUSION

For the reasons stated here and in his brief-in-chief, Armin G. Wand, III, asks this court to reverse the trial courts determination that his September 9th statement is admissible and remand for a trial. In the alternative, Armin Wand asks this court to remand for an evidentiary hearing on his motion to withdraw his plea.

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CERTIFICATIONS

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, 14 point body text,11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 2819 words.

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.

And, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stats. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date .A copy of the certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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