STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP2506-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. H. BARTELT,

Defendant-Appellant.

APPEAL FROM A JUDGMENT ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE TODD K. MARTENS PRESIDING

REVISED BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Statutes

Other Authorities

ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because the arguments of both parties can be fully presented in the briefs. The court might wish to publish its opinion because this appeal involves a factual scenario that has not been expressly addressed in a previously reported Wisconsin case.

ARGUMENT

I. Since Bartelt was not in custody when he asked about an attorney, the police were not required to end the interrogation at that time or precluded from resuming it the next day.

Because the safeguards of *Miranda* apply only in custodial interrogations, a person who is not in custody cannot anticipatorily invoke his Fifth Amendment right to counsel. *State v. Hambly*, 2008 WI 10, ¶ 41, 307 Wis. 2d 98, 745 N.W.2d 48; *State v. Kramer*, 2006 WI App 133, ¶ 9, 294 Wis. 2d 780, 720 N.W.2d 459; *State v. Hassel*, 2005 WI App 80, ¶ 9, 280 Wis. 2d 637, 696 N.W.2d 270. It is not enough that custody may be "imminent." *State v. Lonkoski*, 2013 WI 30, ¶¶ 37-40, 346 Wis. 2d 523, 828 N.W.2d 552.

A request for counsel by a person who is not in custody is not binding on the police, who may continue to interrogate the person without counsel present. *Lonkoski*, 346 Wis. 2d 523, ¶¶ 41-42. *See Kramer*, 294 Wis. 2d 780, ¶ 14.

Whether a person is in custody is assessed under an objective test, i.e., whether under the totality of the

circumstances, a reasonable person would not feel free to terminate the interview and leave. *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004); *Lonkoski*, 346 Wis. 2d 523, ¶¶ 27-28.

In *Lonkoski*, the supreme court held that a person is not necessarily in custody under this test just because the investigation has focused on him. *Lonkoski*, 346 Wis. 2d 523, ¶¶ 33-35.

However, no Wisconsin case has expressly decided whether a person is in custody after he has confessed or made other similarly incriminating statements.

Cases from other jurisdictions are conflicting. *State v. Thomas*, 33 A.3d 494, 512 (Md. Ct. Spec. App. 2011). *See Locke v. Cattell*, 476 F.3d 46, 53 (1st Cir. 2007) (noting that there was no clearly established federal law regarding custody following an admission).

Some cases, such as some of those cited by the defendant-appellant, Daniel J. H. Bartelt, consider a suspect's incriminating statements as dispositive. *Thomas*, 33 A.3d at 512 (and cases cited).

Other cases hold that a confession does not automatically transform a noncustodial interview into a custodial interrogation, but is simply one factor in the totality of the circumstances. *Thomas*, 33 A.3d at 512 (and cases cited). Under this view, a significant consideration in the analysis is whether the incriminating statement changed

the atmosphere of the questioning. *Thomas*, 33 A.3d at 512-13.

The view that a suspect's incriminating statements do not automatically make an interrogation custodial is more consistent with established Wisconsin law.

As noted, under Wisconsin law a "custody determination is made in the totality of the circumstances considering many factors." *Lonkoski*, 346 Wis. 2d 523, ¶ 28. *Accord, e.g., State v. Morgan*, 2002 WI App 124, ¶ 12, 254 Wis. 2d 602, 648 N.W.2d 23; *State v. Gruen*, 218 Wis. 2d 581, 594, 582 N.W.2d 728 (Ct. App. 1998). This is also the federal rule. *E.g., Yarborough*, 541 U.S. at 663.

Focusing on any single factor to the exclusion of all other factors bearing on the question of custody is contrary to this established methodology. *See Lonkoski*, 346 Wis. 2d 523, ¶ 35 (citing *Stansbury v. California*, 511 U.S. 318, 326 (1994)).

Moreover, the objective standard eschews the subjective beliefs of a suspect who knows he is guilty and therefore thinks that he should be in custody. *Lonkoski*, 346 Wis. 2d 523, ¶ 35 (citing *State v. Koput*, 142 Wis. 2d 370, 378-80, 418 N.W.2d 804 (1988)).

The same should be true of a suspect who says he is guilty and therefore thinks that he should be in custody.

The test does not assume the view of "the suspect in the particular case, who may assume he or she is being arrested because he or she knows there are grounds for an

arrest." *Morgan*, 254 Wis. 2d 602, ¶ 23. In *Yarborough*, the Supreme Court did not even consider the fact that a suspect had confessed as one of the objective circumstances bearing on the question of whether he was in custody. *See Yarborough*, 541 U.S. at 658, 665.

Furthermore, the conditions that make an encounter custodial are "those caused or created by the authorities." *State v. Schambow*, 176 Wis. 2d 286, 293, 500 N.W.2d 362 (Ct. App. 1993) (citing *State v. Clappes*, 117 Wis. 2d 277, 285, 344 N.W.2d 141 (1984)). So if the police do nothing to change the atmosphere of the questioning following a confession, nothing is changed.

A suspect who confesses may have reason to expect that an arrest may be inevitable or even imminent, but without more there is no objective reason to believe that he is in custody at the instant he finishes his admission.

In *Koput*, the defendant admitted that he was not in custody when he arrived at the police station for an interview, but claimed that he was in custody by the time he gave an inculpatory statement at 4:15 p.m. *Koput*, 142 Wis. 2d at 378. So the question was not whether Koput was in custody at the end of his confession but at the beginning.

Answering that question, the supreme court said that "the defendant was not in custody until after his confession, sometime after 4:15 P.M." *Koput*, 142 Wis. 2d at 380. The court did not say that Koput was in custody when he made

his confession, but at some unspecified time afterwards, sometime other than at the beginning of his confession.

The court noted that even after the confession the police felt that they were dealing with a crackpot rather than a criminal. *Koput*, 142 Wis. 2d at 382. Although the court discounted these beliefs because they were subjective in that case, the court's next sentence stating that the question of custody must be resolved by the facts as they would appear to a reasonable person in the circumstances, *Koput*, 142 Wis. 2d at 382, suggests that if the police had made it apparent to Koput that they thought he was a crackpot, he would not have been in custody despite his confession.

State v. Goetz, 2001 WI App 294, 249 Wis. 2d 380, 638 N.W.2d 386, suggests more clearly that a confession is not conclusive on the question of custody, but simply one factor that must be considered with all the other circumstances to find the answer.

In *Goetz*, police officers executing a search warrant told the defendant that she was not under arrest, and was not going to be arrested unless she interfered with the search. *Goetz*, 249 Wis. 2d 380, ¶ 13. Goetz admitted that there was marijuana and marijuana paraphernalia in the house. *Goetz*, 249 Wis. 2d 380, ¶ 13. After the police retrieved the incriminating evidence, they told Goetz to sit in the living room. *Goetz*, 249 Wis. 2d 380, ¶ 13.

This Court held that despite the confession and seizure of incriminating evidence, "[t]his was not a situation where a reasonable person would have considered her freedom of movement to be restrained to the degree associated with a formal arrest." *Goetz*, 249 Wis. 2d 380, ¶ 13. The court added that "Goetz was not in custody at the time of questioning simply because she was later handcuffed." *Goetz*, 249 Wis. 2d 380, ¶ 16.

Therefore, the better reasoned rule, and the one more consistent with instructive Wisconsin precedent, is that a confession does not necessarily transform a noncustodial interview into a custodial interrogation, but is simply one factor to be considered in the totality of the circumstances.

In this case, the circumstances show that Bartelt was not in custody before or immediately after he made incriminating statements.

The police wanted to interview Bartelt in connection with a separate attack on a woman who was not the victim in this case. (105:12.)

The police called Bartelt, and asked him to come to the police station. (105:13-14.) When Bartelt arrived, the police escorted him to an interview room in an area that had a one way lock requiring a key to get in but not to get out. (105:16.) The two doors to the interview room itself were not secured, and one of them was never closed in any event. (105:18, 23.)

The police wore casual clothes, kept their guns holstered, and did not frisk Bartelt. (105:20-21.)

As the interview began, the police told Bartelt that he was not in trouble, that he was not under arrest, and that he was free to leave any time he wanted. (31:2.)

When the police suggested during the interview that Bartelt should admit his involvement in the attack, he asked what would happen to him then. (31:27-28.)

The police told Bartelt to tell the truth, and they would "go from there." (31:28-29.)

Bartelt admitted that he was in the park where the attack took place, and that he "went after that girl." (31:28.) He said that he knocked the girl down because he wanted to scare her. (31:30-31.) He said he dropped the knife he had, and both he and the girl ran away. (31:32.)

After a series of additional questions, the police asked Bartelt if he would be willing to provide a written statement. (31:37-38.)

When Bartelt asked what would happen then, a detective said, "Then we have to figure out where we go from there. I can't say what happens then. We'll probably have more questions for you, quite honestly. Okay?" (31:38.)

Bartelt asked, "Should I or can I speak to a lawyer or anything?" (31:38.)

The police replied, "Sure, yes. That is your option," and continued asking Bartelt questions. (31:38-40.)

Later, the police left the interview room for a while. (31:40-41.) When they returned they told Bartelt that he was under arrest. (31:41.)

These circumstances show that the interview was not custodial when it started. *Cf. Lonkoski*, 346 Wis. 2d 523, ¶ 28 (listing circumstances to be considered in determining whether the suspect is in custody).

The police did not tell Bartelt that he would be arrested if he admitted his involvement in the attack, but left open the consequences of an admission.

When Bartelt admitted his involvement, he did not admit committing anything more than a misdemeanor battery, *see* Wis. Stat. § 940.19, for which offenders may be summoned instead of arrested. *See* Wis. Stat. § 968.04(2).

After this admission nothing changed. The police just kept asking Bartelt questions.

Immediately before Bartelt asked about a lawyer, the police told him that if he made a written statement, which he never did, the most likely consequence would be that the questioning would probably continue.

There was never any suggestion by the police that Bartelt would be arrested if he confessed. There was no suggestion after he confessed that the circumstances had changed so that, contrary to their earlier assurance, he was now in custody and not free to leave.

In fact, the circumstances did not change until well after Bartelt asked about a lawyer.

Under these circumstances, a reasonable person would have had no objective reason to believe he was in custody at the time he asked about a lawyer. Since Bartelt was not in

custody when he asked about an attorney, he could not invoke his Fifth Amendment right to counsel. The police were not required to end the interrogation at that time or precluded from resuming it the next day.

II. Since Bartelt's question about counsel was too ambiguous to constitute a clear invocation of a right to counsel, the police would not have been required to end the interrogation at that time or precluded from resuming it the next day.

Even if Bartelt had been in custody when he asked about an attorney, the police would still not have been required to end the interrogation at that time or precluded from resuming it the next day.[1]

The police are not required to stop questioning a suspect who makes an ambiguous or equivocal reference to an attorney that may or may not be an invocation of a right to counsel. *State v. Edler*, 2013 WI 73, ¶ 34, 350 Wis. 2d 1, 833 N.W.2d 564; *State v. Ward*, 2009 WI 60, ¶ 43, 318 Wis. 2d 301, 767 N.W.2d 236; *State v. Jennings*, 2002 WI 44, ¶ 29, 252 Wis. 2d 228, 647 N.W.2d 142. The suspect must articulate his desire to have counsel present with sufficient clarity that a reasonable police officer would understand his

[1] An appellate court may affirm the ruling of the circuit court on a ground never presented to or considered by that court. *State v. Horn*, 139 Wis. 2d 473, 490, 407 N.W.2d 854 (1987); *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985). The court is not bound by the parties' analysis of applicable law, and may affirm the ruling of the circuit court regardless of whether the correct legal argument was made in that court by the respondent on appeal. *State v. Marhal*, 172 Wis. 2d 491, 494 n.2, 493 N.W.2d 758 (Ct. App. 1992); *State v. Truax*, 151 Wis. 2d 354, 359, 444 N.W.2d 432 (Ct. App. 1989).

reference to be a request for an attorney under the circumstances. *Edler*, 350 Wis. 2d 1, ¶ 34; *Jennings*, 252 Wis. 2d 228, ¶¶ 30, 36.

Bartelt's question about an attorney was too ambiguous to constitute a clear invocation of a right to counsel.

Although one part of Bartelt's question, i.e., "can I speak to a lawyer," can be a perceptible request for counsel under some circumstances, *Edler*, 350 Wis. 2d 1, ¶ 36, it was not under the circumstances of this case.

Since Bartelt was not in custody at the beginning of the interview, the police never advised him of his *Miranda* rights. Bartelt was never told that he could have an attorney present during the questioning.

So Bartelt's question could easily have been nothing more than an inquiry about what he had not been told, i.e., whether he would be permitted to have an attorney during the questioning.

That actually appears to have been the case when the immediate circumstances of Bartelt's question are considered.

Bartelt asked the police what would happen if he gave a written statement. (31:38.) The police responded that they could not say for certain what would happen. (31:38.) Bartelt then asked about speaking to a lawyer. (31:38.)

Bartelt seems to have been asking for some clarification. If the police could not tell him everything that

would happen, could they at least tell him if he could have an attorney.

Moreover, the query whether Bartelt could speak to a lawyer was only one part of his question. The other part asked whether Bartelt "[s]hould . . . speak to a lawyer." (31:38.)

A question asking if a suspect should speak to an attorney is equivocal. *Ward*, 318 Wis. 2d 301, ¶ 43. It asks the police what they think the suspect should do. *Ward*, 318 Wis. 2d 301, ¶ 43.

A compound question composed of both undeniably ambiguous and arguably ambiguous parts is ambiguous in its entirety. Asking whether he should or could speak to a lawyer was not a clear invocation of a right to counsel that would have required the police to cease the interrogation.

Finally, Bartelt finished his question with the words "or anything." (31:38.)

This disjunctive added a nonspecific alternative to the inquiry. If Bartelt's question was not ambiguous before, it certainly was ambiguous after he added an alternative that is inherently ambiguous because it includes anything.

The police reasonably understood Bartelt's question as simply an inquiry about whether he could be permitted to have an attorney as the *Miranda* rights advise. (31:38.)

The corrected transcript of the interrogation shows that when the police answered Bartelt's question by telling

him that it was his option whether to have an attorney or not, Bartelt said, "Okay. I think I'd prefer that." (31:38; 129.)

This additional statement does nothing to resolve the ambiguity in Bartelt's remarks.

The prefatory word "think" makes what follows it inherently ambiguous because it has the meaning of reflecting, pondering, considering or weighing. *Think*, *The American Heritage Dictionary of the English Language* (5th ed. 2016); *Think, Webster's Third New Int'l Dictionary* (unabr. 1986).

So Bartelt wanted to know if he could have an attorney, and now that he knew he could have one he was considering whether he should have one.

The word "prefer" expands the ambiguity of Bartelt's remarks since it is a comparative term meaning to like better, to value more highly or to consider to be more desirable. *Prefer, American Heritage Dictionary, supra; Prefer, Webster's Dictionary, supra.*

Thus, a suspect may prefer to have an attorney but still be willing to talk to the police without one. *See, e.g., Oldham v. State*, 467 N.E.2d 419, 424 (Ind. Ct. App. 1984); *State v. Carr*, 2010 Ohio 2764, ¶ 18, 2010 WL 2473337 (Ohio Ct. App. June 18, 2010). This is a common kind of choice. For instance who hasn't gone into a restaurant and said something like, I prefer Coke but I'll be willing to take Pepsi.

Several courts have held that a statement that a defendant would prefer to have an attorney is ambiguous.

Stiltner v. Carter, 268 Fed. Appx. 496, 498 (8th Cir. 2008); *Smith v. State*, 546 So.2d 61, 62 (Fla. Dist. Ct. App. 1989); *Delashmit v. State*, 991 So.2d 1215, 1221 (Miss. 2008).

Finally, Bartelt did not even say he would prefer to have an attorney. He simply said he would prefer "that," which indicates with reference to Clusing's statement that his preference was for an option to have an attorney.

So Bartelt wanted to know if he could have an attorney, and now that he knew he could have one he was considering whether he should have one, and he was leaning toward the conclusion that it would be better if he did have one. But he did not clearly and unequivocally tell the police that he would not continue talking to them unless he had a lawyer present.

Maybe Bartelt would finally decide that he wanted an attorney, but maybe not. His statements considered together did not amount to a clear invocation of his right to counsel.

But even if Bartelt's remarks could conceivably be construed as a request for counsel, they were still ambiguous in another respect. It is not clear whether Bartelt might have wanted to speak to a lawyer before any further interrogation or just in connection with a written statement.

Connecticut v. Barrett, 479 U.S. 523 (1987), held that an invocation of the right to counsel that was limited by its terms to making a written statement did not prohibit the police from continuing to interrogate a defendant who agreed to make oral statements without an attorney present.

Because it was not clear whether Bartelt's alleged request was for a purpose that would have precluded further interrogation or for a purpose that would have permitted it, it was ambiguous, and therefore did not require the police to end their questioning.

Since Bartelt's comments about counsel were too ambiguous in several respects to constitute a clear invocation of the right to counsel, the police would not have been required to end the interrogation at that time or precluded from resuming it the next day, even if Bartelt had been in custody when he asked his question.

CONCLUSION

Because Bartelt's reference to an attorney did not prevent the police from continuing to interrogate him, his subsequent statements and any other evidence derived from them was properly admitted into evidence at his trial

It is therefore respectfully submitted that the judgment of the circuit court should be affirmed.

Dated: September 21, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 3,275 words.

Dated this 21st day of September, 2016.

_____
THOMAS J. BALISTRERI
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of September, 2016.

_____
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