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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

CASE No. 2017AP001249 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

BRIAN D. FRAZIER,
Defendant-Appellant

APPEAL FROM THE ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW PLEA DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL

THE HONORABLE JUDGE ALAN WHITE PRESIDING

Columbia County Case No. 11CF489

DEFENDANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES PRESENTED

1) Whether Frazier was "in custody" when the interviewing officer prohibited Frazier from making a phone call, accused Frazier of sexually assaulting a child, and implicitly stated that Frazier was going to spend the evening in jail.

   The trial court said no without a hearing.

2) Whether Frazier's attorneys were ineffective for failing to suppress Frazier's confession due to the *Miranda* violation, constituting a manifest injustice that would allow Frazier to withdraw his plea.

   The trial court said no without a hearing.

STATEMENT ON PUBLICATION

The defendant does not request publication.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court believes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE

According to the criminal complaint, Brian Frazier sexually assaulted his 6 year old nephew, RMS, sometime between May of 2010 to November 2011. (R.1 at 1) RMS alleged that Frazier anally assaulted him while he was lying on Frazier's bed. *Id*. RMS also alleged a separate incident where Frazier slapped RMS when RMS stole some of Frazier's pizza. *Id*. at 2. This slap caused RMS's teeth to cut his cheek. *Id*. Lt. Dennis Weiner interviewed Frazier about the incidents. *Id*. During the interview, Frazier put his hands over his face and began breathing rapidly. *Id*. Frazier then stated "honestly is always the best policy" and subsequently confessed to the allegations. *Id*.

Frazier was charged with 1st degree sexual assault of a child under the age of 12 and also with physical abuse of a child. *Id*. at 1. The Office of the State Public Defender appointed Attorney Dennis Ryan to represent Frazier. (R.4 at 1) Frazier eventually reached a plea deal with the State. Frazier pled "no contest" to the child abuse allegation. (R.33 at 1) Frazier also pled "no contest" to a lesser charge of sexual assault, sexual contact with a person under the age of 13. *Id*. Frazier received a total sentence of 15 years of initial confinement followed by 7 years of extended supervision. *Id*.

Frazier pursued postconviction relief. (R.35 at 1) The Office of the State Public Defender initially appointed Attorney Tristan Breedlove to the case, but she was replaced by Attorney Robert Hinkle. Attorney Hinkle litigated a post-conviction motion seeking to withdraw Frazier's plea. Frazier claimed that he was not aware that the term "sexual contact" required the State to prove the defendant acted with the intent to become sexually aroused or gratified or for the purpose of degrading or sexually humiliating RMS. (R.40 at 1 – 6) This postconviction motion was denied and is not the subject of this appeal. (R.53 at 1 – 3)

Attorney Hinkle filed a no-merit notice of appeal. (R.57) Attorney Hinkle subsequently filed a no-merit brief in case number 2015AP001127-CRNM. However, Attorney Hinkle moved to withdraw the no-merit brief due to a newly discovered *Miranda* issue. In an order dated 10/07/16, the Court of Appeals dismissed the no-merit appeal without prejudice and allowed Frazier to pursue the additional post-conviction issue conditioned on a claim of ineffective assistance of postconviction counsel. (R.74)

The Office of the State Public Defender appointed this writer, Attorney Michael Covey, to pursue this ineffective assistance claim. (R.75) Attorney Covey filed a motion to withdraw Frazier's plea due to his prior attorneys' failure to suppress his confession to Lt. Weiner. (R.81) [Please Note: this postconviction motion is 11 pages long. The motion was filed with a 2 page affidavit and a 2 page cover letter. The index identifies these documents as a postconviction motion; with only 13 pages. For purposes of this brief, this writer will refer to Frazier's affidavit as R.81 at 12 – 13. Of course, all three documents will be included in the appendix.]

In his motion, Frazier conceded that the interview with Lt. Weiner started out as non-custodial. (R.81 at 6) Frazier drove himself to the police station. *Id*. at 2. Lt. Weiner began the interview be stating that Frazier was there voluntarily, that he was not under arrest, and that he didn't have to speak with Lt. Weiner if he didn't want to. (R.104 at 1:17 – 24)

However, several minutes into the questioning, this interview morphed into a custodial interrogation. Lt. Weiner asked Frazier if he had any sexual contact with the kids. (R.104 at 7:23 – 24) Lt. Weiner subsequently detailed the allegations against Frazier. *Id*. at 8:7 – 24. Lt. Weiner made it very clear that he believed RMS was telling the truth. He stated "…how would a seven year old know that having something stuck in their ass would make them bleed? How would a seven year old even have that slightest idea unless it happened?" *Id*. at 9:14 – 18. Lt. Weiner subsequently stated

"I believe him (referring to RMS) to be honest and I think Human Services does as well. That's why we're here. That's where your brother was this afternoon. His appointment was with me and with Human Services having this investigated." *Id*. at 10:10 -14.

Lt. Weiner then stated "It's not really going to make any difference in what's going on here tonight. I mean it really isn't. I mean all I am looking for is some honesty and if you did something really stupid and really inappropriate, it is probably going to scar the kid for life, it's best to get it off your chest and we'll move on with things. But for him to provide such a detailed account, and again especially taking into account his special needs, just – I believe him. I absolutely believe him." *Id*. at 10:17 – 11:2. Frazier then asked Lt. Weiner if he believed that he did it. Lt. Weiner replied "I believe his statement and his statement was that it was you." *Id*. at 11:3 – 5.

Soon afterwards, Lt. Weiner told Frazier that he was going to leave the room and that he was giving Frazier a couple of minutes to gather his thoughts before he came back to continue the questioning. Frazier asked if he could make a call. Lt. Weiner replied "No, I don't want you calling anybody until we're done talking, okay…we got business to take care of first, okay." *Id*. at 11:8 – 20.

After a couple of minutes, Lt. Weiner returned to the interrogation. He stated "Is there anything you want to tell me? I mean I'm not judging you, I'm not, and anything you tell me right now is not going to change what's probably going to happen tonight or how we are going to end this." Frazier replied "What do you mean?" Lt. Weiner responded "I mean I'm looking for some facts. I'm looking for some information. His information was too detailed for him to just make it up." *Id*. at 11:25 – 12:7.

After Lt. Weiner reiterated again that he believed RMS, Frazier asks "…so no matter what I say I'm going to be

under arrest." Lt. Weiner did not deny this was going to happen. Instead he replied "Well, help me understand what happened." *Id*. at 12:8 – 19. Less than a minute later, Frazier confessed to the sexual assault. At no point did Lt. Weiner read to Frazier his *Miranda* rights.

In his affidavit, Frazier asserted that prior to these allegations, he had never been convicted of a crime and that he was inexperienced with law enforcement. (R.81 at 12) Frazier stated that Lt. Weiner made it clear that he believed RMS's allegations. *Id*. Frazier felt that he was not going to be able to leave the police station. *Id*. Frazier stated that he felt he was going to be arrested. *Id*. Frazier was not allowed to make a phone call and his suspicions were confirmed when Lt. Weiner stated that nothing Frazier was going to say was going to change what was going to happen that night. *Id*.

Frazier also asserted in his affidavit that he did not know his *Miranda* rights. *Id*. Frazier stated that due to his inexperience in legal matters, he did not know that what happened at the police station should have led to the confession being suppressed. *Id*. Frazier asserts that neither his trial attorney nor his postconviction attorney told him that his confession could have been suppressed. *Id*. at 13. Finally, Frazier asserted that he did not enter his plea knowingly and voluntarily and that had he known that the confession could have been suppressed, then he would not have accepted the plea agreement. *Id*.

The Honorable Judge Alan White denied Frazier's motion without a hearing. (R.86 at 1 – 3) Judge White based his decision mainly on the conversational tone of the questioning. *Id*. at 1 – 2. Judge White also stated that Frazier was never told that he couldn't leave; was not handcuffed or locked in a room; was not subjected to lengthy questioning; and was brought water when asked if he wanted a drink. *Id*. at 2. Judge White noted that when Frazier asked to make a call, that he did not specifically ask to call an attorney. *Id*. Judge White cited *State v. Lonkowski*, 2013 WI 30, 346 Wis.

2d 523, 828 N.W.2d 552. Judge White relied on *Lonkowski's* holding that it would not adopt the defendant's position that *Miranda* is required (when) custody is imminent. (R.86 at 2 citing *Lonkowski* at 529) Judge White stated that since Frazier was not in custody for *Miranda* purposes, that Frazier's attorneys had good reason not to file a suppression motion. (R.86 at 3) Frazier appeals Judge White's decision and order.

ARGUMENT – Issue One

1) **Frazier was "in custody" when the interviewing officer prohibited Frazier from making a phone call, accused Frazier of sexually assaulting a child, and implicitly stated that Frazier was going to spend the evening in jail.**

To guard against the coercive pressures of "the incommunicado police dominated atmosphere," *Miranda* announced a requirement that, before conducting any custodial interrogation, police officers must warn a person of certain constitutional rights and the dangers of waiving them by speaking. *Miranda v. Arizona*, 384 U.S. 436, 456, 467-73.

"Custodial interrogation" occurs when a person in police custody is subjected to questioning. The *Miranda* decision defined custody as occurring when a person is deprived of his freedom of action in any significant way. *Id* at 444. A person is in custody for purposes of *Miranda* if that person is either formally arrested or has suffered a " 'restraint on freedom of movement' of a degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121(1983)(per curiam). In determining whether a person is "in custody", the question is whether, under the totality of the circumstances, a reasonable person in the defendant's position would have felt "at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In making this determination, the sole issue is how a reasonable person in the suspect's position would have

understood his situation. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

In the instant case, Lt. Weiner conducted a custodial interrogation of Frazier without reading him his *Miranda* rights. There can be no dispute that the conversation Lt. Weiner had with Frazier was an interrogation. Clearly, Lt. Weiner was questioning him about the sexual assault and child abuse allegations.

There is also no dispute that the interrogation started out as non-custodial. Frazier arrived at the police station voluntarily and in his own vehicle. Lt. Weiner confirmed at the outset of the interrogation that Frazier was there voluntarily, was not under arrest, and was not required to speak with Lt. Weiner. Though, according to the discovery, Lt. Weiner stated that he had planned on arresting the defendant if he didn't come to the police station voluntarily, he apparently did not communicate that intention to Frazier, initially. See *Berkemer v. McCarthy*, 468 U.S. 420, 442 (1984) (officer's decision to arrest motorist not *Miranda* custody because officer never communicated his intention to the motorist).

As the interrogation progressed, Lt. Weiner gradually revealed his intention to arrest Frazier. He first declared that both he and Human Services believed RMS's allegations of the sexual assault, and that there was no way that such a young child would be able to give such a detailed description. Lt. Weiner made it crystal clear to Frazier that he believed that he had anally assaulted RMS. In *Stansbury v. California*, 511 U.S. 318, 325 (1994), the Supreme Court explained that "an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned" can bear on the custody assessment if they are somehow manifested to the individual under interrogation."

As many courts have noted, a person who knows that the police have strong suspicion and / or strong evidence that the person is guilty of a serious offense has reason to believe the police will not let him go free. See, e.g; *United States v. Jacobs*, 431 F.3d 99, 105 (3rd Cir. 2005) (custody where, inter alia, officer communicated to defendant that he thought she was guilty); *United States v. White*, 890 F.2d 1413, 1416 (8th Cir. 1989) (officers telling defendant he matched profile of drug trafficker suggested custody); *Holguin v. Harrison*, 399 F. Supp. 2d 1052, 1058 (N.D. Cal. 2005) (granting habeus where state court did not consider the fact that interrogating officers accused suspect of homicide); *United States v. Wauneka*, 770 F.2d 1434, 1438-39 (9th Cir. 1985) (custody when questioning turned "accusatory"; officers communicated suspicion of rape); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (reasonable person would have believed he was in custody while being questioned at police station where, inter alia, "all of the questions indicated that the detectives considered him a suspect"); *Mansfield v. State*, 758 So. 2d 636, 644 (Fla. 2000) (custody where, inter alia, defendant "was confronted with evidence strongly suggesting his guilt, and he was asked questions that made it readily apparent that the detectives considered him the prime, if not the only, suspect"); *Jackson v. State*, 528 S.E.2d 232, 235 (Ga. 2000) ("A reasonable person in Jackson's position, having just confessed to involvement in a crime in the presence of law enforcement officers would, from that time forward, perceive himself to be in custody, and expect that his future freedom of action would be significantly curtailed.")

When Lt. Weiner stated his belief that Frazier had committed a forcible sexual assault of a seven year old, and further intimated that the details of the child's statement made it strong evidence, a reasonable person in Frazier's position would not believe he could simply terminate the interview and be free to go.

Additionally, this reasonable perception of custody was further confirmed by Lt. Weiner, who twice told Frazier

that there was nothing he could do to change it. Lt. Weiner first told Frazier that anything he said was "not really going to make a difference in what goes on here tonight". He later reiterated that "anything you tell me right now is not going to change what's probably going to happen tonight or how we're going to end this." Given how clearly Lt. Weiner had told Frazier that he knew (and had good evidence to prove) that he had raped a child, it was quite obvious how he was "going to end this": by arresting Frazier. Frazier asked "So no matter what I say, I'm going to be under arrest?" This question indicated that Frazier knew or at least strongly suspected that he would not be allowed to leave the police station. Lt. Weiner did not deny that Frazier would be placed under arrest.

Furthermore, Lt. Weiner prevented Frazier from making a phone call. He responded to Frazier's request with "No, I don't want you calling anybody until we're done talking, okay… we got business to take care of first, okay." This is another factor strongly indicating custody. *Miranda* repeatedly described the practice the Court sought to end as "incommunicado" interrogation. *Miranda v. Arizona*, 384 U.S. 436 at 445, 446, 456, 457, 463, 475, 476. *Miranda* also relied upon *Haynes v. State of Washington*, 373 U.S. 503 (1963), in which it had reversed the conviction of a defendant…whose persistent request during his interrogation was to phone his wife or attorney. *Miranda*, 384 U.S. at 456. Like the defendant in the instant case, Mr. Hayes was denied the opportunity to use the phone until after the interrogation was complete. *Haynes*, 373 U.S. at 504.

If Frazier was not in custody, Lt. Weiner would not have had the authority to prevent him from calling whoever he wished, whenever he wished. The fact that Lt. Weiner had, and exercised, the authority to prevent Frazier from calling anyone until after the two were "done talking" shows that he had, by this point, assumed control over Frazier's actions. Given the totality of the circumstances, a reasonable person in Frazier's position would not have felt at liberty to

terminate the interrogation and leave. Since Lt. Weiner continued to interrogate Frazier after this point without giving him *Miranda* warnings, the resulting incriminating statements are inadmissible.

Judge White found differently, and ruled against Frazier without conducting a motion hearing. The sufficiency of the postconviction motion is a question of law which the Court of Appeals reviews de novo. *State v. Allen*, 274 Wis. 2d 568, ¶ 9, 682 N.W.2d 433. If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. *Id*. However, if the motion does not raise such facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the grant or denial of the motion is a matter of discretion entrusted to the circuit court. *Id*.

Judge White relied on *State v. Lonkoski*, 2013 WI 30, 346 Wis. 2d 523, 828 N.W.2d 552 in denying Frazier's motion. In *Lonkoski*, The Supreme Court of Wisconsin examined whether the defendant was in custody for *Miranda* purposes at the point that he asked for an attorney during his questioning by law enforcement officers. *Id*. at ¶ 2.

There are certainly similarities between *Lonkoski* and the instant case. In *Lonkoski*, the defendant came to the sheriff's department without being asked and voluntarily submitted to questioning by law enforcement officers. *Id*. at 7. Like Frazier, Lonkoski was not restrained in any way. *Id*. Like Frazier, Lonkoski was told he was not under arrest. *Id*.

However, there is a key distinction between *Lonkoski*, and the instant case. In *Lonkoski*, the Wisconsin Supreme Court reasoned that during the period in question, law enforcement was not accusing the defendant of a crime. *Id*. at ¶ 7, ¶ 30, ¶ 44. The opposite occurred with Frazier. Prior to Frazier giving his confession, Lt. Weiner accused Frazier multiple times, emphatically, that he had anally raped a 7 year

old child. That is a key distinction, as no reasonable person would think they could just leave the police station at that point.

Additionally, in his decision, Judge White emphasized that when Frazier asked to make a phone call, he did not explicitly ask to call an attorney. (R.86 at 2) However, that reasoning is not relevant to whether Frazier was in custody. The issue is whether or not Lt. Weiner exercised control over Frazier which would indicate a custodial situation. Whether Frazier wanted to call an attorney, a parent, or a girlfriend is moot. The relevant point is that Lt. Weiner prohibited Frazier from making this call; and that this happened after he repeatedly accused Frazier of raping a child.

Given these facts, Frazier's motion did raise an issue that, if true, would entitle him to relief. Therefore the circuit court should have held an evidentiary hearing.

ARGUMENT – Issue Two

2) Frazier's attorneys were ineffective for failing to suppress Frazier's confession due to the *Miranda* violation, constituting a manifest injustice that would allow Frazier to withdraw his plea.

To withdraw a guilty or no contest plea after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow plea withdrawal would result in a manifest injustice. *State v. Dillard*, 2014 WI 123, ¶ 83, 358 Wis. 2d 543, 859 N.W.2d 44. Where ineffective assistance of trial counsel is the alleged manifest injustice, the defendant must prove counsel's performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

When a defendant has had a prior postconviction motion, it is not enough for him to allege that trial counsel's ineffective assistance constituted manifest injustice entitling him to plea withdrawal. Absent a sufficient reason, a defendant is procedurally barred from raising issues that could have been raised on direct appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Where the ineffective assistance of postconviction counsel is alleged as the sufficient reason, the defendant must set forth with particularity facts showing that postconviction counsel's performance was both deficient and prejudicial. *State v. Ballientte*, 2011 WI 79, ¶ 21, 336 Wis. 2d 358, 805 N.W.2d 334 (citing *Strickland*, 466 U.S. at 687).

In addition, as part of the pleading requirements, the defendant must allege that his newly raised issues are "clearly stronger" than those raised previously. *State v. Starks*, 2013 WI 69, ¶ 57, 349 Wis. 2d 274, 833 N.W.2d 146. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157.

In the instant case, neither Attorney Dennis Ryan nor Attorney Andrew Hinkel raised the *Miranda* violation issue to Frazier. Neither attorney litigated this issue or moved to suppress Frazier's statements. This was a crucial error, as Frazier's confession made it nearly impossible for him to prevail if he had chosen to go to trial. Frazier asserted in his affidavit that he would have gone to trial if his confession had been suppressed. (R.81 at 13) This error, committed both at the pre and postconviction stages of the case, easily satisfy both prongs of the *Strickland* analysis.

Additionally, the *Miranda* violation was clearly a stronger claim for the defense to litigate postconviction than the claim that Frazier didn't know the definition of "sexual

contact." The prior claim was doomed the moment Attorney Ryan stated that he explained what "sexual contact" meant to Frazier. Also, the Frazier's claim that he assaulted RMS in order to discipline him matched perfectly the alternate definition of "sexual contact"; that Frazier intended to degrade or humiliate RMS.

There was no strategic reason not to litigate the *Miranda* claim. If Frazier had prevailed on this issue pre-conviction, then he would have been in a stronger position for both the plea negotiations and / or the trial. If this issue had been litigated at the first postconviction hearing, then Frazier could have withdrawn his plea. Therefore, this *Miranda* violation meets the *Starks* requirement that this newly raised issue is stronger than the previously litigated postconviction issue.

CONCLUSION

Frazier's made his confession to Lt. Weiner in a custodial setting where he was not read his *Miranda* rights. Frazier was inexperienced in legal matters and did not know his *Miranda* rights when he confessed. Moreover, he did not know that his statement could have been suppressed prior to the first postconviction motion, much less prior to entering his plea. Therefore, his plea was not knowingly and voluntarily given.

Frazier's attorneys were ineffective for not moving to suppress his confession due to the *Miranda* violation. Frazier filed a second postconviction motion seeking a *Machner* hearing. This motion alleged facts which, if true, would entitle Frazier to relief. Judge White erroneously denied the motion without a hearing.

Therefore, the defendant, Brian Frazier, moves this Honorable Court to overturn Judge White's decision and to remand the case to the circuit court for further proceedings.

Dated this 6th day of November, 2017

_____

Michael Covey
Attorney for the Defendant-Appellant
State Bar ID: 1039256

CERTIFICATION OF THE BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. The length of this brief is 4879 words as counted by the commercially available Microsoft Word Processor.

_____

Attorney for the Defendant-Appellant

CERTIFICATION OF ELECTRONIC FILING

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

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.

_____

Attorney for the Defendant-Appellant

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and contains at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) a copy of any unpublished opinion cited under s. 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 one or more initials or other appropriate pseudonym or designation 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.

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Attorney for the Defendant-Appellant

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