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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**

# APPELLANT'S REPLY BRIEF

Respectfully submitted by:
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## SUMMARY OF THE ISSUES

On 02/19/17, the defendant, Brian Frazier, filed a postconviction motion to withdraw his plea and vacate his conviction. (R.81 at 1 – 13) Frazier argued that both his trial counsel and appellate counsel were ineffective for failing to suppress Frazier's confession to first degree sexual assault of a child and physical abuse of a child. *Id*. at 10. Frazier argued that although his interview started as non-custodial, it subsequently morphed into a custodial interview due to questions and statements made by Lt. Dennis Weiner of the Columbus Police Department. *Id*. at 6 – 7.

Frazier argued that as the interrogation progressed, Lt. Weiner gradually revealed his intention to arrest Frazier. *Id*. at 6. Lt. Weiner made statements indicating that he believed the child accuser, RMS. Lt Weiner stated, in relevant part, "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 3. (Referring to statements by RMS.) When Frazier 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*.

After Lt. Weiner made this statement, the following exchange occurred:

**Frazier:** I -- what the fuck. What the – oh, God, what if – how –

**Lt. Weiner:** Fair enough. I'm going to give you a couple of minutes. I'm going to come back and talk to you and we'll see if it goes anywhere, and if not, then we'll just figure out what we're doing here, okay.

**Frazier:** I --

**Lt. Weiner:** Just chill and gather your thoughts for a couple of minutes, all right. I'll be right back with you.

**Frazier:** I don't believe this. Is it okay if I – no, can I make a call?

**Lt. Weiner:** No, I don't want you calling anybody until we're done talking, okay.

**Frazier:** Yeah, okay.

**Lt. Weiner:** We got business to take care of first, okay.

**Frazier:** Yeah.

(R.104 at 11:6 – 21)

Lt. Weiner also made comments implying that Frazier was going to be arrested. 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." *Id*. at 11:25 – 12:3. After Lt. Weiner again reiterated that he believed RMS, Frazier asked "Well, what do you – so no matter what I say I'm going to be under arrest?" Lt. Weiner did not deny this. He replied "Well, help me understand what happened." *Id*. at 12:5 – 19. Less than a minute later, Frazier made inculpatory statements confessing to the sexual assault. (R. 81 at 4)

The Honorable Judge White denied Frazier's motion without a hearing. (R.86 at 1 – 3). Judge White stated that the tone of the questioning was conversational. *Id*. at 1 – 2. Additionally, Judge White stated "The defendant was never told he was not allowed to leave. He was not handcuffed or locked in room where the questioning took place. The time period of the questioning was not lengthy. No other officers were present nor does the defendant claim this was the case. Also, the defendant was brought water when asked by Weiner if he wished to have a drink." *Id*. at 2

Frazier appealed the decision. Frazier argues that he was in custody because Lt. Weiner accused Frazier of assaulting RMS, implied that Frazier was going to jail, and prevented Frazier from making a phone call. (Frazier Br. at 5) Frazier also contends that his attorneys were ineffective for failing to suppress the *Miranda* violation, constituting a manifest injustice that would allow Frazier to withdraw his plea. (Frazier Br. at 10)

The State argues that Frazier was not in custody and therefore his attorneys were not ineffective as a motion to suppress would have failed. (State Br. at 12 – 18) The State cited *State v. Bartelt*, 2017 WI App 23, ¶ 34, 375 Wis. 2d 148, 895 N.W.2d 86 which held that officers telling a suspect that he is the prime target of their investigation does not transform an interview into a custodial interrogation. (State. Br. at 14 – 16) The State subsequently filed a Statement of Supplemental Authority. This supplement authority is a recent decision from the Supreme Court of Wisconsin affirming the Court of Appeals' decision in *Bartelt*. See *State v. Bartelt*, 2018 WI 16. In this new decision, the Supreme Court of Wisconsin held that an admission to guilt to a serious crime was a factor to consider in a custody analysis, but that given the totality of the circumstances, it did not transform Bartelt's status to "in custody". *Id*. at ¶ 53.

The defense concedes that both of the *Bartelt* decisions support the State's contention that a law enforcement officer's questioning and accusations of a serious crime do not transform a subject's status to "in custody." However, there is a factual distinction between *Bartelt* and the instant case which shows that Frazier was "in custody" based on the totality of the circumstances.

## ARGUMENT

### 1) The instant case is distinguishable from *Bartelt* because Lt. Weiner declined Frazier's request to make a cell phone call and stated that "we have business to take care of first."

There are numerous similarities between the instant case and the facts presented in *Bartelt.* In *Bartelt*, the defendant arrived at the Slinger Police Department voluntarily and was told that he was not under arrest, and that he could leave at any time. *Id*. at ¶ 8 - 9. Bartelt was escorted to the interview room but was not searched. *Id*. at ¶ 8. One of the doors of the interview room was left open. *Id*.

Similarly, Frazier drove himself to the police station. (R.81 at 2) Lt. Weiner began the interview by 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) Also, like in *Bartelt*, Lt. Weiner made accusatory statements against Frazier which ultimately led to Frazier making a confession.

However, there was a key distinction between the two cases. In *Bartelt*, the defendant's cell phone rang and he was given the opportunity to answer it. In the instance case, Frazier had just been accused of committing a sexual assault of a child. Frazier was clearly taken aback by this and he stammered statements such as "Oh God" and "I don't believe this." *Id*. at 11:3 – 15. Frazier then asked to make a phone call and this reasonable request was denied.

The *Bartelt* decision cited *United States v. LeBrun*, 363 F.3d 715, 722 (8th Cir. 2004), which stated that the possession of a cell phone was relevant to the question of whether the interview was coercive and whether a reasonable person in the same circumstances would feel restrained." *State v. Bartelt*, 2018 WI 16, ¶ 38.

None of the aforementioned factors alone are dispositive. However, in the instant case, Lt. Weiner stated that he was going to leave the interview room. Frazier was going to be in this room all alone for a couple of minutes at least. Therefore, making a phone call would not have been rude toward Lt. Weiner nor would it have affected Lt. Weiner's questioning about the case. There was no reason why Frazier shouldn't have been allowed to make the call, especially if he was supposedly free to leave at any time. Yet Lt. Weiner prohibited Frazier from making this call and furthermore stated that Frazier couldn't call anyone until they were done talking.

A reasonable person in Frazier's position; at a police station, subject to forceful accusations of sexually assaulting a child, and not being allowed to use his phone when there was no reason to prohibit this, would not feel free to leave. This is especially true after hearing statements implying that this reasonable person would be going to jail.

The custody determination is made in the totality of the circumstances considering many factors. *State v. Lonkowski*, 2013 WI 30, ¶ 28, 346 Wis. 2d 523, 828 N.W.2d 552, citing *State v. Martin*, 343 Wis. 2d 278, ¶ 35, 816 N.W.2d 270. Certainly, an interview at a police station may weigh toward the encounter being dispositive, but that fact is not dispositive. *Id.* Frazier readily concedes that there are some factors which point toward a non-custodial interrogation. However, Lt. Weiner's accusations of child sexual assault, coupled with statements implying that Frazier was going to jail no matter what he said, certainly point toward a custodial interview. Lt. Weiner's refusal to let Frazier make a phone call when he was alone in a room, without any justification, tip the scales in favor of finding that this was a custodial interrogation.

## CONCLUSION

Frazier's interrogation did not start out as custodial. However, Lt. Weiner's actions changed Frazier's custodial status as a reasonable person would not have felt free to leave the police station under the totality of the circumstances. Regrettably, neither Frazier's trial attorney nor his appellate attorney filed a motion to suppress the confession. It was not until after Frazier's first postconviction motion that he became aware that his *Miranda* rights had been violated.

Frazier's confession was a key component of the State's case. Failing to suppress this confession satisfies both prongs of the *Strickland* analysis. [See *Strickland v. Washington*, 466 U.S. 668, 687 (1984), holding that the defendant must prove counsel's performance was deficient and prejudicial.]

Therefore, Frazier moves this Honorable Court for an order allowing him to withdraw his plea and to vacate his conviction.

Dated this 13th day of April, 2018

_____

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## 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 1966 words as counted by the commercially available Microsoft Word Processor.

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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.

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Attorney for the Defendant-Appellant