RECEIVED
10-01-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appellate Case No. 2018AP665

MARQUETTE COUNTY,

Plaintiff-Respondent,

-vs-

CHRISTOPHER P. BRAY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MARQUETTE COUNTY, THE HONORABLE BERNARD N. BULT PRESIDING, TRIAL COURT CASE NOS. 2016TR2358 & 2016TR2466

REPLY BRIEF OF DEFENDANT-APPELLANT

MELOWSKI & ASSOCIATES, LLC

Dennis M. Melowski
State Bar No. 1021187

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
dennis@melowskilaw.com

ARGUMENT

I. THE STATE'S POSITION ON CUSTODIAL INTERROGATION WOULD EFFECTIVELY EVISCERATE THE HOLDING IN *STATE v. KNAPP*.

The State, *vis a vis* its position on whether Mr. Bray was "in custody" for *Miranda* purposes, has effectively provided a roadmap for law enforcement officers throughout Wisconsin on how to avoid ever having to provide *Miranda* warnings to a suspect again. According to the State, because only one of the seven factors for determining when a person is in custody for *Miranda* purposes was present here, it was permissible for Sergeant Ropicky to **extensively** question Mr. Bray at roadside as he did. State's Brief at 6. There are several problems with this position, not least of which it utterly eviscerates the holding in *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

First, the fact that the State confines its custody analysis to the seven *illustrative* factors set forth in *State v. Gruen*, 218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998), ignores the fact that the factors to be considered in *Gruen* were not meant to be exclusive, but rather merely *illustrative*. The *Gruen* court, when describing what circumstances to considered in order to determine whether a person is "in custody" for Fifth Amendment purposes, prefaced the list of elements to be examined with the conditional words: "In *exploring* the degree of restraint, courts have also *considered* as *relevant* factors . . . ." *Id*. at 594-96 (emphasis added).

Nowhere within its prefatory remark is there implanted any notion that the list of factors set forth by the court was intended to be exclusive. The *Gruen* court never stated: "The following factors are the only ones to be considered when determining the moment of custody for *Miranda* purposes." Instead, the *Gruen* court chose to qualify its list by acknowledging that when "exploring" custody issues, among the "relevant" features to be "considered" are . . . . This non-limiting language allows for the exploration of other

circumstances, such as when an individual is detained at roadside and *placed through a battery of field sobriety tests in a context wherein a law enforcement officer has already advised the individual that he suspects the person may be under the influence*. Under these circumstances, the fact of continued detention *after* the field sobriety tests have been completed rather than a release by the officer with the words "You're fit to drive, so you can be on your way" indicates to the individual that they are not free to leave, but rather, are in custody. It seems the State would have this Court overlook the "reality" of these situations in favor of reading *Gruen* as a restrictive holding rather than what it is: a general paradigm for beginning—not ending—the custody analysis.

The second and far more concerning problem with the State's analysis is that it promotes police practices designed to avoid the application of such cases as *Knapp* and *Missouri v. Seibert*, 542 U.S. 600 (2004). The State's argument can be restated thusly: "Once a law enforcement officer makes an arrest decision, he or she should wait to handcuff the suspect and first ask them whatever incriminating questions they so desire."[1] Proceeding in

---

[1]Factually speaking from the record in this case, it should not be forgotten that of the 27 questions put to Mr. Bray regarding his drinking on the night of his detention, the following nine were asked *after* Mr. Bray had submitted to five field sobriety tests and Sergeant Ropicky knew he would be taking Mr. Bray into custody:

Q: Okay. All right. Umm, just be honest, I mean how much have you had to drink? I mean it appears to me that it was more than four beers.

Q: Just be honest with me. I'm asking you.

Q: Would you say it's more than four?

Q: Four to eight?

Q: Okay, all of the same beer, the Spotted Cow?

Q: Once again, on a scale of 1 to 10, 1 being the most sober you've ever been and 10 being the most intoxicated you've ever been, where would you place yourself, honestly?

Q: Two or three?

this fashion renders all of the reasoning which undergirds both *Knapp* and *Siebert* mere surplusage. Neither the United States Supreme Court in *Siebert* nor the Wisconsin Supreme Court in *Knapp* should have bothered to reproach law enforcement practices which are designed to circumvent *Miranda* if the State's rigid and mechanistic approach to custody is adopted by this Court. Simply because Mr. Bray was not handcuffed and told he was under arrest after failing the battery of field sobriety tests when Sergeant Ropicky knew he would not be releasing Mr. Bray does not excuse Ropicky's extensive interrogation of Bray without first *Mirandizing* him.

Third, the State fails to recognize, acknowledge, or address the Wisconsin Supreme Court's admonishment that the right to be free from self-incrimination as protected by the Wisconsin Constitution was not designed to merely ape or mimic the federal right. Instead, the supreme court clearly and unequivocally reproved that Wisconsin would "not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded." *Knapp*, 2005 WI ¶ 59, quoting *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977). Thereafter, the court chided law enforcement officers who deliberately circumvent the *Miranda* Rule with the following reproach:

> Just as we will not tolerate criminal suspects to lie to the police under the guise of avoiding compelled self-incrimination, we will not tolerate the police deliberately ignoring *Miranda's* rule as a means of obtaining inculpatory physical evidence. As we have frequently recognized in the past, what is sauce for the goose is also sauce for the gander.

Q: All right, as opposed to the I think it was three to four when you first gave me?

Q: So now it's two to three?

(R41 at 21:22 to 23:6.)

Knapp, 127 WI ¶72 (citations omitted in part).

If the foregoing language does not make it clear that interrogating drunk driving suspects after the officer has already made the decision to arrest but before the simple act of handcuffing is constitutionally unreasonable, what else could? Effectively speaking, what *really* changed between the moment Sergeant Ropicky had finished administering field sobriety tests to Mr. Bray and the very first second the cold steel of handcuffs were placed upon his wrists? The short answer is: Nothing. Ropicky had made his arrest decision and therefore Mr. Bray was not free to leave. If this Court concludes that the handcuffs were the *sine qua non* necessary to make this a custodial situation, then throughout Wisconsin, after such a decision has been issued, law enforcement officers will simply go through a full battery of incriminating interrogatories after field tests but before the moment they place handcuffs on their suspects. This is most certainly what the letter and spirit of the *Knapp* and *Siebert* holdings could have intended.

Fourth, the State's reliance on *Berkemer v. McCarty*, 468 U.S. 420 (1984), is misplaced. State's Brief at 7. There are several factors central to the High Court's decision in *Berkemer* which are distinguishable from Mr. Bray's situation. First, when the Court was asked by McCarty to impose a blanket rule that *Miranda* rights must be provided to all drivers detained for *Terry*[2] purposes, the Court declined because it noted that traffic detentions are usually very brief in nature. *Berkemer*, 468 U.S. at 437. This was not true in the instance case. Mr. Bray was detained, questioned extensively, then placed through a battery of five field sobriety tests. This process is very much unlike the one described by the Court in *Berkemer* in which Justice Marshall observed that the majority of traffic stops are "temporary and brief . . . [and] last only a few minutes." *Id*.

Justice Marshall also noted that "the typical traffic stop [is] not one where the motorist feels completely at the mercy of the police." *Id*. at 438. In the instant case, unlike that described by

[2]*Terry v. Ohio*, 392 U.S.1 (1968).

Justice Marshall in which the person remains in their vehicle and is merely asked for their license and registration, Mr. Bray was ordered out of his vehicle and put through a battery of five field sobriety tests which he ostensibly failed in addition to the twenty-seven incriminating questions asked of him.

To a great extent, *Berkemer* supports Mr. Bray's position in that Justice Marshall recognized that the rule the Court was adopting regarding the necessity of providing *Miranda* warnings to a suspect detained during a traffic stop would cause courts "occasionally to have difficulty deciding exactly when a suspect has been taken into custody." *Id*. at 441. Thus, *Berkemer* leaves the door open to recognizing that in circumstances just as Mr. Bray's, a custody may exist after a law enforcement officer has put a suspect through a battery of multiple field sobriety tests. The Court further acknowledged that if it adopted a bright-line rule in which *Miranda* would never be applied to circumstances of roadside interrogation, it would "enable the police to circumvent the constraints on custodial interrogations established by *Miranda*." *Id*.

One final note with respect to *Berkemer* is that it must be tempered, as discussed above, by the fact that Article I, § 8 of the Wisconsin Constitution provides greater protection to suspects in Wisconsin than does the Fifth Amendment as the *Knapp* court recognized.

Fifth, the State's proffer that Sergeant Ropicky's telling Mr. Bray he could be on his way once he determined that he was safe to drive does not save the instant case from the application of the *Miranda-Knapp* rule. State's Brief at 11. This assertion on the part of Ropicky came *prior to* field sobriety testing. A person in Mr. Bray's situation, after having been provided with instructions on how to properly perform the field tests, would know whether he or she has passed. If an officer informs a suspect to "hold one leg off the ground and count to thirty," it is a fair assumption that the individual knows they have failed the test if they repeatedly put their foot back on the ground prior to reaching thirty. Likewise, if a person is told to walk a straight line and during the test they step

off of the same, or are incapable of placing their heel to their toe as requested, it is not a stretch of the imagination for them to realize they have failed the test. Under these circumstances, after testing has been completed, no one would any longer believe they were free to leave.

Sixth, unbeknownst to the State, it has placed a dagger in the heart of its own argument. State's Brief at 11-12. The State asserts that had Mr. Bray simply said "I've already told you that" in response to Ropicky's interrogation, his answer in this regard "would not have resulted in anything different." *Id*. This is precisely Mr. Bray's point: if Ropicky had already made up his mind to arrest Mr. Bray—that is, the result being the same as it turned out to be—then the interrogation of Bray must have been a custodial one because nothing would have been "different." If arrest was the inevitable outcome, as the State acknowledges, Ropicky ought to have known he needed to provide Mr. Bray with *Miranda* warnings, lest he be considered to be "circumventing" the requirement as discussed in *Knapp* and *Siebert*.

Seventh, the State premises its argument that *Knapp* and *Siebert* are distinguishable from the present case upon the point that the custody in those cases was more restrictive than that in the present case. State's Brief at 12-14. Again, this argument should be rejected because it assumes, incorrectly, that tiny rooms and police stations are the *only* earmarks of custody. As Mr. Bray has repeatedly explained above, and as the Supreme Court recognized in *Berkemer*, custody is *fluid*. There simply are other circumstances in which custody occurs even outside of tiny rooms in police stations.

Finally, the State attempts to avoid the application of the fruit of the poisonous tree doctrine with an argument which can best be characterized as an "Aww, shucks, Ropicky's questioning wasn't that bad" argument. State's Brief at 14-15. This position fails to give any credence to the *Knapp* court's admonishment that "what's good for the goose is good for the gander." The whole point of having suppression of tainted evidence after illegal police interrogation is *to send a message* that such practices will not be

tolerated. If this Court does not impose such a remedy, it is a near certainty that law enforcement officers will continue to engage in the practice of intensive roadside interrogation because they will understand that every other bit of evidence they have gathered, video recordings after the illegal interrogation, observations of impairment post-arrest, chemical test results, *et al*., will still be able to be used against the accused. Of what value is *Knapp*, and more importantly, Article I, § 8 of the Wisconsin Constitution in these circumstances?

WHEREFORE, Mr. Bray respectfully requests that this Court reverse the decision of the circuit court below and remand his case with direction to grant his motion to suppress his statements and the physical evidence obtained after his right to be free from self-incrimination as that right is guaranteed by Article I, § 8 of the Wisconsin Constitution.

Dated this 27th day of September, 2018.

Respectfully submitted:

MELOWSKI & ASSOCIATES, LLC

By:_____

Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant

CERTIFICATION

I hereby 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. The text is 13-point type and the length of the brief is 2,265 words. I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). The electronic brief is identical in content and format to the printed form of the brief. Additionally, this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on September 27, 2018. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 27th day of September, 2018.

MELOWSKI & ASSOCIATES, LLC

_____

Dennis M. Melowski
State Bar No. 1021187
Attorneys for Defendant-Appellant