STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Case No. 18 AP 858-CR

BRIAN L. HALVORSON,

Defendant-Respondent.

APPEAL FROM ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS, DATED 13 APRIL 2018 AND FROM AN ORDER DENYING THE STATE'S MOTION FOR RECONSIDERATION (OF GRANTING OF DEFENDANT'S MOTION TO SUPPRESS STATEMENTS), DATED 13 APRIL 2018.
IN THE CHIPPEWA COUNTY CIRCUIT COURT, BRANCH III,
THE HONOURABLE STEVEN R. CRAY,
CIRCUIT COURT JUDGE, CHIPPEWA COUNTY, PRESIDING.

BRIEF & APPENDIX OF PLAINTIFF-APPELLANT

Respectfully Submitted,

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POSITION ON ORAL ARGUMENT & PUBLICATION

Oral Arguments and publication are not appropriate for this matter. The issues are not complex and the issues are controlled by established case law.

STATEMENT OF ISSUES

Has the holding of ***State v. Armstrong*** been effectively overruled by the United States Supreme Court

in ***Howes v. Fields***?

Trial Court answered: No.

Was Mr. Halverson in custody for ***Miranda*** purposes during his telephone interview with Officer Danielson?

Trial Court Answered: Yes.

STATEMENT OF THE CASE

This prosecution was commenced on 24 February 2017 with the filing of a Criminal Complaint in Branch III of the Chippewa County Circuit Court, the Honourable Steven R. Cray, Circuit Court Judge, presiding. (R 1). An initial appearance was held on 8 June 2018.(R 16). On 17 July 2017, Mr. Halverson filed a Motion to Suppress Statements. (R 18). An evidentiary hearing was held on 23 October 2017 at which time the trial court orally granted the motion. (R 48:26; App 115).

After orally granting the Motion to Suppress, the judge stated that the state could file a Motion for Reconsideration to present additional testimony by the officer who failed to honor his subpoena as well as an agent with the Department of Corrections. Id. at 26-27.

On 27 February 2018 the state filed a Motion for Reconsideration. (R 38). On 28 February 2018 a second evidentiary hearing was held. (R49). Following that

hearing, the court orally denied the state's Motion for Reconsideration.

On 13 April 2018 a written order granting Mr. Halverson's Motion to Suppress Statements was filed. A written order denying the state's Motion for Reconsideration was filed on that same date. Finally on that date, a Notice of Appeal was filed by the state pursuant to Sec. 974.05(1)(d)3, Stats..

This matter was commenced when Officer Matthew Danielson was investigating a 2016 incident involving the theft and destruction of documents by an inmate at the Stanley Correctional Institute located in Stanley, Wisconsin, in Chippewa County. (R 48: 4).

On 27 September 2016, Officer Danielson had a phone conversation with Brian L. Halverson. Id. This phone conversation occurred at about 10:00 A.M. in the morning. Id. At the time of the phone conversation, Mr. Halverson was an inmate in the Vernon County Jail. Id. This phone conversation lasted about three to four minutes. Id. at 16. During this phone conversation, Mr. Halverson was told by the officer that the officer possessed two letters written by him wherein he admitted to the theft and destruction of the victim's documents. Id. at 5. Afterwards, during this phone interview, Mr.

Halverson admitted that he stole and destroyed the documents. Id. at 6.

At the hearing on 23 October 2017, Officer Danielson admitted he did not read Mr. Halverson the *Miranda* warnings. Id. at 7. Officer Danielson stated he did not give the warning because he did not think of Mr. Halverson as being in custody with him. Id. at 8.

Officer Danielson testified that he did not arrest Mr. Halverson and did not feel he was in a position to arrest him at that time. Id. at 18. Nor was he physically able to arrest Mr. Halverson at the time of the phone interview since he had no physical control of Mr. Halverson. Id. at 19. The defense presented no witnesses at this hearing. Id. at 20.

After arguments, the state asked to adjourn the hearing because the witness from the Vernon County Jail had failed to appear despite being served a subpoena. Id. at 22. The judge declined to do so and ruled that the officer's failure to give the warning was basically due to the unusual circumstances. Id. at 23-24. The judge granted the motion to suppress. Id. at 26. No written order was entered. The court did state that the state could file a Motion for Reconsideration to present additional testimony. Id at 26-27; App 115-116.

At the 28 February 2018 hearing, the deputy from the Vernon County Jail, Matthew Hoff, testified. He testified neither he nor any of his coworkers personally remembered the call on 27 September 2016. Id. at 15. He testified to the standard practice that is involved when law enforcement calls wanting to interview an inmate. (R49:14). Once a call is received, the information is communicated to floor staff. Id. at 16. The call would be sent to a private line in the program room. Id. The floor officer would then meet with the inmate outside the pod in which the inmate resided and explain to the inmate that they have a call and from who the call is. Id. at 16. The inmate is given a choice to answer the call or to return the call. Id. at 17. The inmate is not forced to leave the residential area to go to the program room to take the call. Id. at 19. If the inmate agrees to take or return the call, he or she is free to terminate the call at any time. Id. at 18-19.

If the inmate agrees to take or return the call, he or she is taken to the program room. He or she is not shackled or handcuffed during the walk from the residential area to the program room and back. Id. at 20. The inmate is not free to roam around the jail and is accompanied by a jailer. Id. The program room is

locked during the phone call. Id. at 22.

Prior to the testimony, the court was informed Mr. Halverson's probation agent was present to testify and the agent would explain that on 27 September 2016 Mr. Halverson was in custody in the Vernon County jail for a thirty day sanction until 12 October 2016. Id. at 6. This agent was not allowed to testify. The court did receive as evidence Exhibit 1, a Department of Corrections printout, which verified Mr. Halverson was in custody on this sanction from 12 September until 12 October 2016. The defense did not object. Id. at 13. The defense did not dispute that Mr. Halverson was on a probation hold on 27 September 2016. Id. at 24. The defense presented no witnesses. Id.

Following arguments, the court denied the state's motion and reaffirmed its ruling that the suppression motion was granted. Id at 35; App 124. As noted above, this appeal was then commenced.

STANDARD OF REVIEW

A determination of when someone is in custody for *Miranda* purposes is reviewed under a mixed question of facts and law. A trial court's determination of fact will not be overruled unless its findings are clearly

erroneous. *See* ***State v. Bartelt,*** 2018 WI 16, ¶25, 379 Wis.2d 588, 603, 906 N.W.2d 684, 691.

"Whether those findings support a determination of custody for purposes of Miranda is a question of law that we independently review. [cite omitted]". Id. at ¶ 25, 379 Wis. 2d at 603, 906 N.W.2d at 691-692. If the facts are undisputed, the appellate court will review this issue independently. ***State v. Williams,*** 104 Wis.2d 15, 21-22, 310 N.W.2d 601, 605 (1981).

ARGUMENT

I. THE UNITES STATES SUPREME COURT IN ITS DECISION IN HOWES V. FIELDS HAS OVERRULED THE PER SE RULE ADOPTED IN STATE V. ARMSTRONG THAT AN INMATE IN A JAIL AND/OR PRISON IS IN CUSTODY FOR MIRANDA PURPOSES SOLEY BECAUSE THEY ARE AN INMATE.

In ***State v. Armstrong***, 223 Wis. 2d 331, 588 N.W.2d 606 (1999), the Wisconsin Supreme Court reaffirmed its adoption of *per se* rule that a person in the custody of a correctional institution, a jail or prison, is in custody for *Miranda* purposes. Id. at 355, 588 N.W.2d at 616. The court based this rule upon the holdings of ***Mathis v. United States***, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968), and its state counterpart, ***State v. Schimmel***, 84 Wis. 2d 287, 267 N.W.2d 271 (1978). 223

Wis. 2d at 353, 588 N.W.2d at 616[1].

The United States Supreme Court in ***Howes v. Fields***, 565 U.S. 499, 132 S.Ct. 1181 (2012), noted that it never held that a person was in custody solely because he or she was an inmate in a correctional institution. Id. at 505, 132 S.Ct. at 1187. The Court further noted that it has specifically declined to adopt such a rule. Id. The Court in ***Howes v. Fields*** explained:

> *Mathis* did not hold that imprisonment, in and of itself, is enough to constitute *Miranda* custody. Nor, contrary to respondent's submission, . . . did *Oregon v. Mathiason,* 429 U.S. 492, 494, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) *(per curiam),* which simply restated in dictum the holding in *Mathis*.

565 U.S. at 507, 132 S.Ct. at 1188.

The Court's holding in ***Howes v. Fields*** has established that the *Mathis* case, upon which these two Wisconsin Supreme Court decisions relied, did not stand

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[1] The trial court also relied on the Wisconsin Supreme Court decision in ***Schimmel***. (R49:34; App 123). During the second hearing Attorney Rivard stated that Schimmel was reaffirmed in ***State v. Barlett***[sic], citing it at 17 WI App 23.(R49:30; App 119). As the state noted, that decision was reviewed by the Wisconsin Supreme Court, but the state had not reviewed it in its entirety. (R49: 32; App 121). Since that hearing, the state has reviewed both decisions. Neither ***State v. Bartelt***, 2017 WI App 23 nor ***State v. Bartelt***, 2018 WI 16, makes any reference to ***Schimmel***. Neither ***Bartelt*** decision reaffirmed ***Schimmel***'s holding.

for the proposition for which the Wisconsin Supreme Court relied in reaching its decisions in ***Armstrong*** and ***Schimmel.***

The categorical rule that custody in a correctional institution is *per se* custody for *Miranda* purposes has been rejected as valid law. The United States Supreme Court states:

> Not only does the categorical rule applied below go well beyond anything that is clearly established in our prior decisions, it is simply wrong. The three elements of that rule—(1) imprisonment, (2) questioning in private, and (3) questioning about events in the outside world—are not necessarily enough to create a custodial situation for *Miranda* purposes.

565 U.S. at 508-509, 182 S.Ct. at 1189.

The trial court essentially ruled that it was bound by ***Armstrong*** and based its decision on this Wisconsin Supreme Court's decision. The trial court declined to follow the conflicting decision of the United Stated Supreme Court as the state argued that the trial court should follow ***Howes v. Fields***. (R49:25-26; App 114-115). (R 48:24; App 108) & (R49:34; App 123).

The Wisconsin Supreme Court has said that:

> because the Supremacy Clause of the United States Constitution governs the outcome of any direct conflict between state and federal supreme court precedent on a

> matter of federal law, regardless of whether the conflict is resolved in the court of appeals or here. All state courts, of course, are bound by the decisions of the United States Supreme Court on matters of federal law.

State v. Jennings, 2002 WI 44, ¶ 18, 252 Wis. 2d 228, 237-238, 647 N.W.2d 142, 146-147.

The Wisconsin Supreme Court continued that the Court of Appeals may, in its discretion, certify the matter to the Wisconsin Supreme Court. If the Court of Appeals declines to seek certification or if it is denied, the Court of Appeals is bound by the subsequent United States Supreme Court decision on issues of constitutional law. Id. at ¶ 19, 252 Wis. 2d at 238, 647 N.W.2d at 147[2].

II. THE UNDISPUTED FACTS IN THIS CASE SHOW THAT MR. HALVERSON, WHILE AN INMATE IN THE VERNON COUNTY JAIL, WAS NOT IN CUSTODY FOR FIFTH AMENDMENT PURPOSES WHEN OFFICER DANIELSON HAD A TELEPHONIC CONVERSION WITH MR. HALVERSON AND THUS MR. HALVERSON'S ADMISSIONS TO OFFICER DANIELSON WERE NOT OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT.

[2] Both ***Armstrong*** and ***Schimmel*** addressed only the Fifth Amendment of the United States Constitution. Given the Wisconsin Supreme Court's history of conforming its jurisprudence as to the Wisconsin Constitution, Article I, § 8, to that of the Fifth amendment, ***Howes v. Fields*** controls. ***State v. Jennings***, 2002 WI 44, ¶¶ 37-42, 252 Wis. 2d 288, 246-249, 647 N.W.2d 142, 151-152.

Having established that Mr. Halverson was not in custody for Fifth Amendment/*Miranda* purposes solely because he was an inmate in a jail, and assuming this court has declined to seek certification to the Wisconsin Supreme Court, this court must determine if Mr. Halverson was in custody for ***Miranda*** purposes during his phone conversation with Officer Danielson.

Custody for *Miranda* purposes has been defined as to when a person has been formally arrested or otherwise deprived of his freedom of action in any significant way to a degree associated with formal arrest. 2018 WI 16, ¶ 31, 379 Wis. 2d at 606, 906 N.W.2d at 693.

This determination is based upon the totality of the circumstances and is an objective test. The test is whether "a reasonable person would not feel free to terminate the interview and leave the scene." [Cite omitted]." Id., 379 Wis. 2d at 607, 906 N.W.2d at 693. Several factors such as amount of control exerted, whether the person is restrained, the presence of weapons and whether the weapons are drawn, the number of officers present, and the length of the interrogation are considered in making this determination. Id. at ¶ 32, 379 Wis. 2d at 607, 906

N.W.2d at 693-694.

The Wisconsin Supreme Court has stated:

> If we determine that a suspect's freedom of movement is curtailed such that a reasonable person would not feel free to leave, we must then consider whether "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in Miranda." Howes v. Fields, 565 U.S. 499, 509, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012). In other words, we must consider whether the specific circumstances presented a serious danger of coercion, because the "freedom-of-movement test identifies only a necessary and not a sufficient condition for Miranda custody." Id. (citation omitted). Importantly, a noncustodial situation is not converted to one in which Miranda applies simply because the environment in which the questioning took place was coercive. Mathiason, 429 U.S. at 495, 97 S.Ct. 711. "Any interview of one suspected of a crime by a police officer will have coercive aspects to it ... [b]ut police officers are not required to administer Miranda warnings to everyone whom they question." Id. Therefore, "Miranda warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.' " Beheler, 463 U.S. at 1125, 103 S.Ct. 3517 (citing Mathiason, 429 U.S. at 495, 97 S.Ct. 711).

2018 WI 16, ¶ 33, 379 Wis. 2d at 607-608, 906 N.W.2d at 694.

The facts here are undisputed. Mr. Halverson's motion stated no facts that contradicted the testimony

received at the suppression hearing.[3] Nor did he testify at either motion hearing providing any factual dispute to any testimony presented by the state. The testimony presented by the state is undisputed. The defense did not offer any evidence that suggested that the jail handled the phone call on 27 September 2016 any differently than Corporal Hoff described it.

In *State v, Mills*, 293 P. 3d 1129 (Utah Ct. App. 2012), the Utah Court of Appeals questioned whether "*Miranda* custody can be effectuated over the phone". Id at 1135[4]. The prosecution had provided the court with authority that it could not. "*See Pasdon v. City of Peabody,* 417 F.3d 225, 227–28 (1st Cir.2005) (determining that questioning over the telephone did not constitute custody); *Commonwealth v. Smallwood,* 379 Mass. 878, 401 N.E.2d 802, 806 (1980) ("As for the telephone statements, clearly the defendant was not in custody.")." Id. The defense did not cite any

[3] Mr. Halverson's motion was based upon him being an inmate in the Vernon County Jail and that he was not read the necessary warnings. He alleged no other factual basis for why he was in custody for *Miranda* purposes. (R 18:1-2).

[4] The state found no Wisconsin cases on point. The state did find a Utah case in which the facts were very similar. While this case is not binding on this court, the state believes it should be considered persuasive.

authority that the phone conversation could be custodial for *Miranda* purposes.

During his phone conversation, Mr. Halverson's freedom to depart from the phone conversation was not restricted in any way by officer Danielson or by the jail staff. See 2018 WI 16, ¶ 42, 379 Wis. 2d at 613, 906 N.W.2d at 696. An officer on one end of a phone conversation cannot realistically impede the actions of the person on the other end of the line. Nor would any action be taken by the jail staff to impede Mr. Halverson's actions. (R49: 19). While he would have had to wait for them to escort him back to the residential area, any desire to return to that area would not have been impeded. 565 U.S. at 515-516, 132 S.Ct. at 1193-1194.

Assuming *arguendo* that a telephone conversation between law enforcement and an inmate could constitute *Miranda* custody, Mr. Halverson was not in custody.

The state's evidence presented at the two hearings is uncontradicted[5]. There is no dispute that Mr.

[5] The court did not make any formal findings of fact beyond the fact that Mr. Halverson was in the Vernon County Jail, that he was not read the *Miranda* warning, and that failure to do so required suppression of his statements. (R48:23-26; App 107-110). The court concluded by relying on the validity of the

Halverson was living in the Vernon County Jail and was not read the *Miranda* warning.

A jailer testified that none of the jail staff remembered the events of that day. The state had Corporal Hoff testify to the routine followed by the jail staff when an inmate receives a call. Routine evidence is admissible to prove that a person or organization acted in conformity with that routine on a particular occasion[6]. Sec. 904.06(1), Stats. The court decline to find that Mr. Halverson's call was handled in the routine way even though the jailer's testimony was not contradicted. (R 49:32-33; App 121-122). Because this credible evidence was not contradicted, there is no reason to believe the call involving Mr. Halverson was handled any differently than any other routine call handled by the Vernon County Jail.

The record shows that on 27 September 2016, Mr. Halverson was told he had a call. (R 49:17). He was told from whom the call was received. Id. at 17-18. He was given a choice to return the call. Id. at 17.

Armstrong's *per se* rule for its decision. Id at 34-35; App 123-124.

[6] The state attempted to establish a number of times this routine was followed, but the court *sua sponte* refused to allow the state to follow this line of questioning. (R:49: 20-21). However, the court never reached this issue since it based its decision on the *Armstrong* rule. Id. at 34; App 123.

He was told he could refuse to return it. Id. at 18-19. After agreeing to return the call, he was then escorted to the programing room. He was not handcuffed when walking from the pod in which he resided to the program room. Id. at 18.

Since he was not free to roam around the jail, (Id. at 20), he was escorted to the program room that is the jail library, video room, and is used for storage. Id. at 18. The room has chairs and tables and the inmate can sit down during the call. Id. The room contains a private phone so the calls cannot be recorded. Id. The calls are not monitored by the jail staff. Id. at 19. The jail staff can observe him on the phone and see when the call is terminated. Id. When his call was over, he was walked back to his pod. Id. at 20.

All inmates are escorted to and from the pods. Id. at 20. Once in the room, the door is locked. Id. at 22. When they are done with the call the inmate is taken back to his or her pod. Id. at 22. While Mr. Halverson was in a locked room, he himself was not handcuffed or shackled. (R49: 20).

The call between Mr. Halverson and Officer Danielson lasted about 3 to 4 minutes. (R 48: 6). The

call occurred in the midmorning hours. Id. at 4). He was free to end the call at any time. The jail staff would not have forced him to remain on the phone. No one was present in the room to prevent him from hanging up the phone.

Basically, he was in the same circumstances he would have been if he was at home and was told he had received a call from an officer and was asked to call the officer back. He was free to return the call or not. If he returned the call, he was free to continue the conversation or to hang up at any time. Once the call was ended, he was free to return to his daily routine. That is exactly what happened here.

Even though he was residing in a jail, he did not have the same concerns a person under arrest would have had once taken to a police station. Mr. Halverson was not subject to the shock normally associated with being isolated in a police station. 565 U.S. at 511, 182 S.Ct. at 1190.

Mr. Halverson was in custody on a thirty day sanction for a probation violation. (R49:6 & R41:3;App 128). He would know that talking would not result in his prompt release. He would know his release would not be affected by whether he talked or did not talk.

He would know that Officer Danielson would not have the authority to affect the duration of his probation sanction. Id. at 511-512, 182 S.Ct. at 1191.

In short, none of the factors associated with custody for *Miranda* purposes are present in this case. Id. at 511-512, 182 S.Ct. at 1191. Given the totality of the circumstances, Mr. Halverson was not in custody for *Miranda* purposes and the giving of the *Miranda* warning was not required.

CONCLUSION

WHEREFORE, THE STATE, asks this court to find that Mr. Halverson was not in custody for *Miranda* purposes and that the failure of the officer to read him the *Miranda* warning does not require his statements to the officer during their brief phone conversation to be suppressed. The state respectfully requests this court to reverse the trial court's two rulings and to return this case back to the trial court for further action.

Dated this 3rd day of July 2018.

Respectfully Submitted,

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APPENDIX

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CERTIFICATION

I certify that this Brief and Appendix conforms to the rules contained in sec. 809.19(8)(b) and 809.62(4), Stats., for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on right and left margins with 1 inch margin on top and bottom. The length of this brief is 19 pages, including this one.

Dated this 3rd day of July 2018.

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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 3rd day of July 2018.

_____
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(3)(b).

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the findings or opinion of the circuit court;

(3) a copy of any unpublished opinion cited under Wis. Stat. § 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 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.

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