STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP858-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BRIAN L. HALVERSON,

Defendant-Respondent.

ON APPEAL FROM FINAL ORDERS ENTERED IN THE CHIPPEWA COUNTY CIRCUIT COURT, THE HONORABLE STEVEN R. CRAY, PRESIDING

PLAINTIFF-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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I. Halverson identifies no principled basis for this Court to extend state constitutional protections to preserve the abrogated rule in *Armstrong*.

In his supplemental response brief, Halverson renews his request to this Court to exercise its limited law-defining authority to find expanded protections in the state constitution to preserve the abrogated rule in *Armstrong*. (Halverson's Supp. Resp. 3–5.) The State[1] maintains that this Court is bound by Wisconsin Supreme Court precedent interpreting article I, section 8 to provide identical protections with those provided in the Fifth Amendment. Moreover, even if this Court was not so bound, Halverson does not identify any compelling basis in Wisconsin law for this Court to find expanded protections in the state constitution.

A. This Court is bound by supreme court precedent interpreting article I, section 8 identically to the Fifth Amendment.

Halverson insists that this court can and should reach his state constitutional argument as part of its secondary role "of law defining and law development" that "under some circumstances it necessarily performs." (Halverson's Supp. Br. 3–4 (quoting *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 47, 326 Wis. 2d 729, 786 N.W.2d 78).) But this Court, "as

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[1] As in its previously filed supplemental brief, the attorney general uses "the State" to refer to the collective position advanced by the attorney general and district attorney in this case, and "the district attorney" and "attorney general" when referencing specific arguments made in the individual briefs. Like Halverson (Halverson's Supp. Resp. 2), however, the attorney general has intended its supplemental briefs in this matter to supplement—not supplant—the district attorney's briefs. It wholly joins the arguments presented in those briefs and asks this Court to read all of the briefs together in deciding the issues presented.

it adapts the common law and interprets the statutes and federal and state constitutions in the cases it decides," cannot define or develop the law in a way that is inconsistent with Wisconsin Supreme Court holdings. *Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997). If this Court in this *Miranda* challenge found protections in article I, section 8, beyond those recognized by the supreme court, it would risk creating a conflict with that court's holdings.

Specifically, in addressing challenges regarding a defendant's constitutional protections against self-incrimination, the Wisconsin Supreme Court has routinely interpreted the Wisconsin Constitution in article I, section 8, to provide identical protections to those in the Fifth Amendment. *See, e.g.*, *State v. Edler*, 2013 WI 73, ¶ 29, 350 Wis. 2d 1, 833 N.W.2d 564; *State v. Ward*, 2009 WI 60, ¶ 55, 318 Wis. 2d 301, 767 N.W.2d 236; *State v. Jennings*, 2002 WI 44, ¶ 40, 252 Wis. 2d 228, 647 N.W.2d 142. Halverson does not discuss those cases or identify anything about the circumstances of his case that would compel a different approach to interpreting article I, section 8.

Indeed, the only case in which the supreme court has read article I, section 8 to provide stronger protections was *State v. Knapp*, 2005 WI 127, ¶ 73, 285 Wis. 2d 86, 700 N.W.2d 899. But, as argued (Dist. Att'y Reply 2–5), *Knapp* is distinguishable because it involved an officer's *intentional Miranda* violation, which demonstrated a palpable need for deterrence through an expanded exclusionary rule under the state constitution. *Id.* ¶¶ 72–73. Here, Halverson does not—and cannot—argue that Officer Danielson sought to intentionally violate Halverson's rights. *Knapp* does not help him.

B. Halverson identifies no compelling reason for this Court to find expanded protections in the state constitution.

Even if this Court were to consider the state constitutional issue, Halverson fails to provide a principled explanation for why it should find expanded protections in article I, section 8. He asserts, vaguely, that "[c]onsiderations of fairness and logic dictate that this court" should decide that *Armstrong* remains valid under the state constitution. (Halverson's Supp. Br. 4.) His argument appears to boil down to the assertion that *Armstrong* created a clear, bright-line rule that has stood for two decades, and that recognizing its direct abrogation by subsequent United States Supreme Court law does not make sense given the significance of the right at stake. (Halverson's Supp. Br. 4–5.)

But just because a rule is bright-line is not a reason to conjure previously unrecognized protections in the state constitution to save it. Nor is the rule's vintage a good reason. As discussed (Dist. Att'y Br. 8–9, Dist. Att'y Reply 2), *Armstrong*'s rule was based on a faulty understanding of Supreme Court law interpreting the protections afforded by the Fifth Amendment. In other words, the Court in *Fields* did not announce an about-face in Fifth Amendment law; rather, the rule in *Armstrong* was incorrect from its inception. *See Howes v. Fields*, 565 U.S. 499, 508–09 (2012) (stating that a categorical rule that incarceration is custody for *Miranda* purposes not only "go[es] well beyond anything that is clearly established in our prior decisions" but also "is simply wrong").

Finally, as for Halverson's argument that "the significance of the right at stake" requires preservation of the bright-line rule under the state constitution (Halverson's Supp. Br. 5), the State agrees that a person's right to avoid self-incrimination is important. But so too are the panoply of constitutional protections recognized in the federal and state

constitutions. The importance of the right, without more, cannot drive the creation of a per-se rule. Moreover, Halverson presents no explanation why the correct analysis—the totality-of-the-circumstances assessment that the Court clarified in *Fields*—inadequately protects his or any incarcerated defendant's rights against self-incrimination, such that preserving *Armstrong*'s bright-line, one-size-fits-all rule is warranted.

This Court should decline Halverson's request to preserve *Armstrong*'s per se rule under the Wisconsin Constitution.

II. Halverson was not in custody for *Miranda* purposes during the phone call.

As discussed, law enforcement's asking questions over the phone to an inmate—absent restraints or limits on freedom of movement beyond what the inmate normally experiences in prison—does not effectuate *Miranda* custody. (State's Supp. Br. 6–8.) Here, the record demonstrates that Halverson's freedom of movement was not curtailed beyond the limits he already experienced as a jail inmate and he was not subjected to any additional or elevated levels of restraint during the phone call.

And to that end, this Court would be making Wisconsin an outlier on this question if it were to hold that the phone call here effectuated *Miranda* custody. No court considering a defendant's *Miranda* challenge to a phone call between law enforcement and an inmate has held that the call effectuated custody for *Miranda* purposes. (*See* State's Supp. Br. 7–8 & nn. 2–3.) Here, the district attorney and State cited nine cases in which courts applied the "freedom of movement" analysis to law enforcement's phone interviews of prisoners; all nine courts held that *Miranda* custody could not be effectuated by

such a phone call absent evidence of restrictions or coercive pressures beyond what the inmate normally experienced in confinement. Halverson has identified no cases to the contrary nor made any effort to distinguish those cases and holdings from the facts in his case.

Rather than address the "freedom of movement" analysis, Halverson seizes upon the attorney general's language describing the necessity that the phone call is voluntary. (Halverson's Supp. Br. 6–7.) He engages in an overly simplistic analysis to argue that Halverson, despite all evidence to the contrary, was an involuntary participant in the phone call. (Halverson's Supp. Br. 7.)

To clarify, the attorney general is not suggesting that voluntariness is an additional requirement on top of satisfying the "freedom of movement" test articulated in *Fields*. Rather, it used voluntariness as shorthand for that test and its factors, all of which support the conclusion that the phone call did not effectuate *Miranda* custody.

Here, while Halverson did not initiate the *conversation* with Officer Danielson, he effectively initiated the call in question by going to the jail's program room and agreeing to return the call. And as for whether Halverson could reject or end their phone call, contrary to Halverson's claim (Halverson's Supp. Br. 7), the State isn't assuming that Halverson subjectively knew he could end the call. It doesn't need to: the test is objective. *See Fields*, 565 U.S. at 515. And the facts here demonstrate that an objectively reasonable person in Halverson's shoes would have known that he could have declined to return Danielson's call or ended the call.

Additionally, as the State argued (Dist. Att'y Br. 14–18; Dist. Att'y Reply 7–11; State's Supp. Br. 8–12), it presented sufficient (and wholly undisputed) facts to support the

conclusion that a reasonable person in Halverson's position would have felt free either to decline the call or, having made the call, end it.

A reasonable person in Halverson's position would have felt free to not return the call based on the following testimony: that jail staff would have informed Halverson that he received a call, that he could return it if he wanted, and who it was from (R. 48:16–17); and that jail staff would not have forced Halverson to take the call or to walk from the pod to the jail program room (R. 48:18–19).

Likewise, a reasonable person, having agreed to return the call, would have felt free to end it. That conclusion was supported by the circumstances of the call itself: its timing (it lasted about three minutes at around 10 a.m.) (R. 51:4); its nature (jail staff would have made the call to Danielson on Halverson's behalf) (R. 48:16); its tone (Danielson explained who he was and the reason for his call in a calm, non-threatening tone and the conversation continued in that manner until Halverson began yelling (R. 51:6)); and the lack of physical restraint, pressure, or monitoring (Halverson would have been left alone in the room to participate in the call; the call was unrecorded and unmonitored; Halverson was not handcuffed, restrained, or physically forced into or out of the room (R. 48:18–19)). Finally, there is nothing to suggest that Halverson was told that he had to answer the questions of a police officer who was not associated with the jail, not associated with his custody, and whom he did not otherwise know.

Halverson complains that the State's evidence was too "paltry" to support its burden. In addition, he claims that the evidence that the State did present failed to show that the conversation was noncustodial, mainly because Danielson did not recall telling Halverson that he could end the call and

because of "the overwhelming coercion inherent in incarceration." (Halverson's Supp. Br. 6–8.)

To start, the State's evidence was sufficient and undisputed. Officer Danielson provided a detailed description of the tone, tenor, and content of the phone conversation (R. 51:4–7), none of which supported a determination that the call was custodial. Corporal Hoff, who was on duty on the day of Halverson's call, provided a detailed description of how the jail routinely handled inmate calls. (R. 48:16–19.) While he did not recall the specifics of Halverson's call, he noted that nothing unusual had occurred that would have caused him to believe that Halverson was an unwilling participant in the call. (R. 48:21–22.)

That evidence was far from paltry. As an initial matter, evidence of a routine practice is relevant to prove that a person or organization acted in conformity with the practice. Wis. Stat. § 904.06(1). Moreover, "[p]ositive uncontradicted testimony as to the existence of some fact, or the happening of some event, cannot be disregarded by a court . . . in the absence something in the case which discredits" the testimony "or renders it against the reasonable probabilities." *Thiel v. Damrau*, 268 Wis. 76, 85, 66 N.W.2d 747 (1954). To that end, both Danielson and Hoff presented uncontradicted testimony. In addition, the court did not expressly find either witness to be incredible—in fact, it expressly found Hoff to be credible. (R. 48:34 ("I certainly believe that the officer that testified knows what he's talking about.").)

Further, that Danielson did not expressly tell Halverson that he could end the call did not transform the call into a coercive one, especially given Danielson's uncontradicted testimony that the tone of the call was calm and conversational, and there was nothing to suggest that Halverson was pressured to participate. In other words, the

freedom-of-movement test is a totality of the circumstances test; it does not hinge on whether the officer expressly told the inmate of his ability to hang up.

Finally, Halverson's argument that incarceration itself renders any questioning by police "inherently coercive" is contrary to the holding in *Fields* and the freedom of movement test. Specifically, the Court in *Fields* made clear that whether a prisoner's interrogation is coercive depended on whether the inmate experienced more restrictions than he would under typical jail conditions and "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." 565 U.S. at 509. Here, as discussed, Hoff's explanation of the jail's procedure for facilitating these routine phone calls and Danielson's perspective of the conversation itself establish that Halverson did not experience less freedom of movement during the phone call than he otherwise would have in the jail. Further, the relevant environment under the circumstances—not the least of which was the fact that the questioning occurred over the phone—did not present the same "inherently coercive pressures" as the station-house questioning in *Miranda*.

In sum, the State satisfied its burden of demonstrating that, consistent with *Fields*, Halverson was not subjected to conditions causing the phone call between him and Danielson to effectuate *Miranda* custody. The circuit court, in holding that the now-abrogated per se rule in *Armstrong* required suppression and in distinguishing *Fields* factually without applying its analysis to the facts here, erred as a matter of law. This Court should reverse.

CONCLUSION

This Court should reverse the decision of the circuit court and remand with instructions to vacate the order granting Halverson's motion to dismiss and to enter an order denying Halverson's motion to dismiss.

Dated this 16th of July 2019.

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) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,360 words.

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SARAH L. BURGUNDY
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 16th day of July 2019.

_____
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