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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2220-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

ADAM W. VICE,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO SUPPRESS ENTERED IN WASHBURN COUNTY CIRCUIT COURT, THE HONORABLE JOHN P. ANDERSON, PRESIDING

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

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ARGUMENT

I. The issue of whether Vice's polygraph examination and post-polygraph interview were totally discrete events is not before this Court.

A. Vice—not the State—misreads *Sulla*.

As explained in the State's brief-in-chief, the State did not petition for review on the issue of whether Vice's polygraph examination and post-polygraph interview were totally discrete events because the State prevailed on that issue at the court of appeals. (State's Br. 24 n.5.) Vice did not file a cross-petition on the issue; rather, he raised it in his response to the State's petition. (Vice's Br. 19 n.3.) As previously discussed, in granting the State's petition for review, this Court explicitly instructed the State *not* to raise or argue issues not set forth in the petition unless otherwise ordered by the Court. (State's Br. 24 n.5.) Under these circumstances, the State maintains that the discreteness issue is not before this Court. (State's Br. 24 n.5.) This Court's decision in *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659, supports the State's position. (State's Br. 24 n. 5.)

In attempting to revive the issue he initially *conceded* at the circuit court, Vice argues that the State misreads *Sulla.* (R. 28:9; Vice's Br. 19 n.3). It is the other way around.

Vice represents that the defendant in *Sulla* was "the appellant," who "sought to raise additional issues on review which would have changed the result or outcome in the" lower court. (Vice's Br. 19 n.3.) Vice submits that his situation is different. As the Defendant-Respondent, he reasons, he is "merely offering an alternative legal ground for affirming" the court of appeals. (Vice's Br. 19 n.3.) Vice points to those portions of the petition for review statute, Wis. Stat. § (Rule)

809.62, which permit an opposing party to raise an alternative ground for affirming the court of appeals in a response to a petition. (Vice's Br. 19 n.3.) He believes that those provisions allow him to brief the discreteness issue even though this Court never ordered the parties to argue issues presented outside of the petition for review. (Vice's Br. 19 n.3; A-App. 145.)

In reality, the defendant in *Sulla* was not "the appellant" in this Court. (Vice's Br. 19 n.3.) He prevailed at the court of appeals on his claim that he was entitled to an evidentiary hearing on his plea-withdrawal motion, and the State petitioned this Court for review on that issue. *See Sulla*, 369 Wis. 2d 225, ¶¶ 1–7 & n.5.

According to the State's reply brief in *Sulla*, which is accessible on CCAP, Sulla had raised additional issues in his response to the State's petition for review. (A-App. 147.)[1] He renewed at least one of them in his response brief before this Court. (A-App. 148.) In reply, the State argued that while Sulla was permitted to raise additional issues in his response to the petition for review under Wis. Stat. § (Rule) 809.62(3), this Court had ordered the State *not* to raise or argue issues not set forth in the petition unless otherwise ordered by the Court. (A-App. 147–48.) Because this Court could have granted review and instructed the parties to address the additional issues raised in Sulla's response to the petition but did not, the State maintained that those issues were not before this Court. (A-App. 146–48.)

In making its argument, the State in *Sulla* noted a potential conflict that this Court had previously recognized

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[1] This Court may take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.01(2)(b).

between Wis. Stat. § (Rule) 809.62(6) and Wis. Stat. § (Rule) 809.62(3)(d) and (3m)(b). (A-App. 147). Wisconsin Stat. § (Rule) 809.62(6) *prohibits* parties from raising or arguing issues not set forth in the petition for review *unless otherwise ordered by this Court*. "Yet subsections (3)(d) and (3m)(b) expressly authorize a responding party to raise issues not necessarily identified in the petition for review." *In re Ambac Assur. Corp.*, 2012 WI 22, ¶ 43, 339 Wis. 2d 48, 810 N.W.2d 450 (Abrahamson, C.J., concurring).

So, how did this Court in *Sulla* resolve that potential conflict? It made clear that its order granting review controls: because this Court "did not order that any issues presented outside of the petition for review be granted and briefed," it refused to address Sulla's additional arguments. *Sulla*, 369 Wis. 2d 225, ¶ 7 n.5.

Here, as in *Sulla*, Vice has briefed an issue that he raised in his response to the State's petition for review. (Vice's Br. 18–24.) Like in *Sulla*, this Court did not order the parties in this case to argue issues presented outside of the petition for review. (A-App. 145.) Because the issue that Vice seeks to argue was not raised in the State's petition for review, as was the case in *Sulla*, the issue is not before this Court. *See Sulla*, 369 Wis. 2d 225, ¶ 7 n.5.

Practically speaking, this outcome makes sense. Suppose an opposing party raises several alternative grounds for affirming the court of appeals in the party's response to a petition for review. And assume that, like in this case, this Court instructs the petitioner not to argue issues not presented in the petition for review. If the respondent is permitted to brief his various alternative arguments, that leaves the petitioner with a 3,000 word reply brief to effectively *respond* to those arguments and address the issue or issues that were presented in the petition for review. *See* Wis. Stat. § (Rule) 809.19(8)(c)2. And that is assuming that

the petitioner in reply is bold enough to disregard this Court's instruction—per Wis. Stat. § (Rule) 809.62(6)—to not argue issues not presented in the petition for review.

The better approach is the one that this Court took in *Sulla*: this Court's order granting review tells the parties which issues are on the table and which are not. After all, notwithstanding the language in Wis. Stat. § (Rule) 809.62(3)(d) and (3m)(b), this Court "may limit the issues to be considered on review." Wis. Stat. § (Rule) 809.62(6).

B. Cases that predate *Sulla* and do not concern an order granting a petition for review do not change the analysis.

To support his position that he may brief the discreteness issue absent an order from this Court directing him to do so under Wis. Stat. § (Rule) 809.62(6), Vice cites to *State v. Darcy N.K.*, 218 Wis. 2d 640, 581 N.W.2d 567 (Ct. App. 1998), and *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987). (Vice's Br. 19 n. 3.) Neither case deals with the situation presented in *Sulla* and currently before this Court. *Darcy N.K.* does not even involve a case in this Court. Moreover, in *Baudhuin*, the State as the petitioner raised an alternative argument for sustaining the circuit court's order granting suppression. *See Baudhuin*, 141 Wis. 2d at 648. There was no dispute that that issue was outside the scope of this Court's order granting review. *See id.* Therefore, *Darcy N.K.* and *Baudhuin* are inapposite.

For the above reasons, the discreteness issue is not before this Court. The State continues to comply with this Court's order granting review. (A-App. 145.) It will not

address the discreteness issue absent an order from this Court directing it to do so under Wis. Stat. § (Rule) 809.62(6).[2]

II. Under the totality of the circumstances, Vice voluntarily confessed to sexually assaulting a four-year-old girl.

In its brief-in-chief, the State has explained why, with reference to ordinary principles of voluntariness, Vice's confession was voluntary under the totality of the circumstances. (State's Br. 20–23, 30–38.) Armed with precedent, the State has identified where the court of appeals was right and where it went wrong. (State's Br. 30–38.) The State has also demonstrated why this Court should clarify that a reference to an honesty test result during police questioning is an ordinary (rather than an important) factor to consider in assessing the voluntariness of a confession. (State's Br. 27–30, 37.)

Vice's brief is not outwardly responsive to the State's arguments. (Vice's Br. 24–38.)

For example, Vice cites to *State v. Davis*, 2008 WI 71, ¶ 42, 310 Wis. 2d 583, 751 N.W.2d 332, for the proposition that a reference to an honesty test result during police questioning is an "important" factor in assessing voluntariness. (Vice's Br. 26.) But he does not acknowledge that this language from *Davis* has caused confusion amongst the bench and bar, nor does he disagree with the State that the proposition is legally unsupported. (State's Br. 25–28; Vice's Br. 24–38.) Vice does not challenge the State's position that it would be more consistent with precedent to treat

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[2] It is worth reiterating, as Vice acknowledges, that he initially conceded the discreteness issue and was held to that concession during the first appeal in this matter under the doctrine of judicial estoppel. (Vice's Br. 12.)

references to honesty test results as an ordinary factor in assessing voluntariness. (State's Br. 37; Vice's Br. 24–38.) The State takes this as a concession. *O'Connor v. Buffalo Cty. Bd. of Adjustment*, 2014 WI App 60, ¶ 31, 354 Wis. 2d 231, 847 N.W.2d 881 ("[U]nrefuted arguments are deemed conceded.").

The arguments that Vice does advance do not persuade.

A. Vice was not a vulnerable suspect, the officers did not threaten him, nor did they have a plan to extract a false confession or otherwise exhibit egregious or outrageous behavior.

Vice makes several unavailing arguments for why his confession was involuntary.

First, he seems to disagree with the court of appeals' conclusion that his personal characteristics do not support a finding of involuntariness (A-App. 125), highlighting instead the circuit court's finding that his "physical state . . . appeared to be compromised to a certain degree" at times, (R. 124:8; Vice's Br. 36-37). But, as the State and Vice agree, the video of the interrogation settles the debate. (Vice's Br. 37.) This Court can watch the video and see that Vice was calm, he did not cry, he was not shaking, and he did not get sick. Further, Vice had had plenty of sleep the night before, he had eaten, and he had not recently ingested alcohol or drugs. (R. 109:30–31.) That does not constitute a physically compromised state. *See Mincey v. Arizona*, 437 U.S. 385, 398–401 (1978) (suspect in great physical pain in hospital); *Greenwald v. Wisconsin*, 390 U.S. 519, 520–21 (1968) (suspect, with limited sleep, denied food and medication); *State v. Hoppe*, 2003 WI 43, ¶ 49, 261 Wis. 2d 294, 661 N.W.2d 407 (suspect experienced vomiting, dehydration, and tremors due to alcohol withdrawal). The circuit court's finding here was clearly erroneous.

Second, Vice claims that the officers threatened him, seemingly to get around this Court's clear precedent that encouraging cooperation does not render a confession involuntary. (Vice's Br. 36.) The court of appeals correctly concluded that the officers made no threats. (A-App. 125.) Telling a suspect that a mob is waiting for him outside the jailhouse is threatening. *See Payne v. Arkansas*, 356 U.S. 560, 567 (1958). So is telling a suspect that she will lose her children if she does not cooperate with police. *See Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). But the vague statement, "[W]e can't have people running around doing things they can't remember," is not. (R. 128:17.) Vice offers no precedent to support his contrary position. (Vice's Br. 36.)

Third, in an apparent effort to defend the court of appeals' conclusion that this case involves egregious or outrageous police conduct—not subtle pressures amounting to coercion (A-App. 131)—Vice asks this Court to believe that the officers here had a calculated plan to produce a false confession, (Vice's Br. 29–30). Citing to cases that are not binding on this Court, he claims that police trickery crosses the line when it is calculated to produce a false confession. (Vice's Br. 28–29.)

Even assuming the officers used deception[3] to elicit Vice's incriminating statements, there was no "calculated" plan to produce a false confession. (Vice's Br. 28–29.) Vice contends (and the court of appeals agreed), that the officers exploited his supposed lack of memory to extract a confession. (Vice's Br. 27–29; A-App. 129.) But it is obvious from the

[3] The State reiterates its position that the officers here did not make a definitively false statement or misrepresentation to Vice about his polygraph result or its import. (State's Br. 35.) Vice has not responded to that argument. (Vice's Br. 27–38.)

record that the officers did not walk into the interview with a strategy to challenge Vice's memory. Vice initiated the conversation about memory loss, immediately asking if it was possible that he blacked out and did not remember the assault. (R. 128:4.) As Vice perpetuated his claim of memory loss, the officers made clear that they did not believe him. (R. 128:13 ("[I]f we believe[d] that you didn't remember, we wouldn't be talking to you about this, you know?").) They had good reason not to: throughout the interview, Vice was able to recall specific details of past events. (R. 128.) And despite his purported lack of memory about the assault, Vice said that he knew "for a fact" that he did not pull down his pants and take out his penis during the crime. (R. 128:22.) It is no wonder why the officers repeatedly asked Vice to simply tell the truth during the interview. (R. 128:6–7, 10, 18.)

In his effort to find egregious or outrageous police conduct in this case, Vice also notes that the officers here appeared to utilize the "'Reid technique' of interrogations." (Vice's Br. 33.) He cites to *Miranda v. Arizona*, 384 U.S. 436, 457 (1966), to support his criticism of the technique. (Vice's Br. 35.) Of course, the Supreme Court in *Miranda* discussed the Reid technique in the context of *custodial* interrogations, which Vice does not mention likely because he was not in custody when he confessed. *See Miranda*, 384 U.S. at 439–58. But more to the point, Vice fails to acknowledge that *Miranda* warnings—which he indisputably received—were designed to lower the risk that interrogation tactics like the Reid technique would produce a coerced confession. *See id.* at 458.

Vice may not want to talk about the *Miranda* warnings because "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984). His avoidance of the issue leaves

him with no response to the State's argument that it appears unprecedented for the court of appeals to have held the *Miranda* warnings *against* the State in this case. (State's Br. 37; Vice's Br. 33–35.)

At the end of the day, it is important to remember the ultimate inquiry here: did the officers overcome Vice's free will through their tactics? *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). That is why the facts of this case—not generic articles about false confessions (Vice's Br. 29–30)—should be the focus of this Court's analysis.[4] And the facts of this case reveal a suspect who was *not vulnerable*, who was *not in custody*, who *was advised of his Miranda rights*, who was *not threatened*, who often *resisted police questioning*, and who *supplemented the officers' information* on numerous occasions. (State's Br. 30–38.) Vice maintained his free will during police questioning.

B. All the polygraph cases that Vice relies upon are distinguishable.

Instead of looking at the officers' conduct here through the lens of precedent, Vice relies on many cases that are not binding on this Court. (Vice's Br. 30–36.) All of them are distinguishable—some of them overwhelmingly so.

For example, in *People v. Leonard*, 59 A.D.2d 1, 13–15, 397 N.Y.S. 386 (N.Y. App. Div., 1977), the suspect's "faculties were impaired," the "interrogation was both lengthy and intense," the detective "threat[ened] to throw the defendant through a window," and the defendant was incorrectly told

[4] It should be noted that Vice's "expert" on false confessions did not testify at the suppression hearing; she gave an offer of proof at a later *Daubert* hearing. (R. 122:3.) Because the circuit court suppressed Vice's confession, it never ruled on the admissibility of her testimony. (R. 122:93.)

that his polygraph result would be admissible in court. Or take *Martinez v. State*, 545 So.2d 466, 467 (Fla. 4th DCA 1989), where police threatened the suspect with the electric chair. And then there is *State v. Sawyer*, 561 So.2d 278, 288 (Fla. 2d DCA 1990), a case involving a sleep-deprived suspect who endured a 16-hour interrogation where he was "harangued, yelled at, cajoled, [and] urged approximately fifty-five times to confess."

The closest fact pattern that Vice has identified comes from *State v. Craig*, 864 P.2d 1240, 1242 (Mont. 1993), though that case is still distinguishable because the officers there repeatedly accused the uneducated suspect of lying. *Craig* is hardly a model for this Court to follow. As the dissent notes, the majority opinion does not consider the totality of the circumstances, nor does it consult ordinary principles of voluntariness. *See Craig*, 864 P.2d. at 1243–45 (Nelson, J., dissenting).

The bottom line is that this Court can find non-binding cases that arguably support both parties' positions in this case. (State's Br. 29–30.) That is why precedent—especially that of the Supreme Court—should serve as the measuring stick for what occurred here. Vice does not dispute that the circumstances of this case are nowhere near the level of misconduct that the Supreme Court has relied upon to invalidate confessions. (State's Br. 34; Vice's Br. 24–38.)

That concession is telling.

CONCLUSION

This Court should reverse the circuit court's order granting Vice's motion to suppress.

Dated this 6th day of November 2020.

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 2,987 words.

Dated this 6th day of November 2020.

KARA LYNN JANSON
Assistant Attorney General

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.

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Dated this 6th day of November 2020.

KARA LYNN JANSON
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Supplemental Appendix
State of Wisconsin v. Adam W. Vice
Case No. 2018AP2220-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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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WITH WIS. STAT. § 809.19(13)

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This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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