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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP2065 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD MICHAEL ARRINGTON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and an Order Denying Postconviction Relief
Entered in the Brown County Circuit Court,
the Honorable Timothy A. Hinkfuss, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

SUZANNE L. HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177
hagopians@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. The state's contention that the government's conduct did not violate Mr. Arrington's right to counsel runs afoul of binding precedent from the United States Supreme Court and this court.

A. The conduct the state asks this court to sanction is a flagrant violation the Sixth Amendment's protections to an accused, as enunciated by the Supreme Court.

The parties agree that whether the state violated Richard Arrington's right to counsel must be determined by applying principles developed in a series of cases from the United States Supreme Court. As this court has noted, "[t]he United States Supreme Court has announced the law in this area." *State v. Lewis*, 2010 WI App 52, ¶1, 324 Wis. 2d 536, 781 N.W.2d 730. But aside from citing the same case law, the parties' positions have little common ground.

The state's contention that the government's conduct did not violate Arrington's Sixth Amendment right to counsel is incompatible with the principles of those cases. If accepted by this court, it would sanction conduct undermining an accused's right to counsel and, as the Supreme Court feared, "reduce the trial to a mere formality" because police could use a surreptitious government agent to obtain statements from the accused that the prosecutor

could then use against the accused. *Maine v. Moulton*, 474 U.S. 159, 170 (1985), *quoting United States v. Wade*, 388 U.S. 218, 224 (1967).

Under the state's position, it is perfectly lawful for the government to engage, as it did here, in the following conduct:

- Detectives enter into an agreement with a jail inmate, who is a confidential informant ("CI"), to secretly record conversations with other identified inmates, including those, like Arrington, who have already been charged and are represented by counsel.

- The expectation is the CI will receive consideration for his work; in fact, the more he produces the more he'll receive.

- Detectives supply jail staff with a recording device that each day jailers strap around the CI's waist.

- Over multiple days the CI initiates lengthy conversations with the identified inmates and asks the accused questions about the crime with which he has been charged.

- Detectives retrieve the recording device after each day, listen to the recording and secure the contents into evidence.

- At the accused's trial, the prosecutor calls the CI as a witness who testifies about the

> accused's statements and describes to the jury exactly what he elicited from the accused as portions of the recording are played for the jury.

That sort of conduct is exactly what the Supreme Court sought to prohibit. Its language is strong and clear. Once the right to counsel has attached, "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171. The protection is not limited to formal police interrogations but extends to "surreptitious interrogations," which include conversations secretly recorded by an individual who is cooperating with police. *Id*. at 176; *Massiah v. United States*, 377 U.S. 201, 202-04 (1964). While the Sixth Amendment is not violated "whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached", "knowing exploitation by the State of an opportunity to confront the accused without counsel is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity." *Moulton*, 474 U.S. at 176.

Regarding the use of jail informants, the government violates the Sixth Amendment by "intentionally creating a situation likely to induce [the accused] to make incriminating statements without the assistance of counsel …." *United States*

v. Henry, 447 U.S. 264, 274 (1980). A Sixth Amendment violation is established if the defendant demonstrates "that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986).

The undisputed evidence outlined above establishes that the detectives, by equipping their CI, Jason Miller, with a secret recording device and expressly authorizing him to record his conversations with Arrington – all of which were initiated by Miller –, took action designed to deliberately elicit incriminating remarks. The scheme worked but it was a flagrant violation of the Sixth Amendment.

B. *Lewis*' holding and facts provide no support for the state's claim that Miller was not functioning as an agent of the state.

Mr. Arrington agrees with the state that *Lewis* is significant to this court's analysis, in part because it is the only reported case in this state involving a Sixth Amendment challenge to statements obtained by a "jailhouse cellmate."[1] *Lewis*, 324 Wis. 2d 536, ¶1. In addition, the facts of *Lewis*, where the inmate acted on his own with no involvement by law

[1] Although the state refers to Arrington and Miller as cellmates (brief, p. 20), they were in the same "pod" but not the same cell. The three recorded conversations occurred through a cell door, each initiated by Miller. (278:64-66).

enforcement, show why the detectives' scheme with Miller cannot survive this court's review.

The state recognizes, as it must, *Lewis*' holding for determining whether an inmate is functioning as a government agent.

> We hold that this requires evidence of some prior formal agreement—which may or may not be evidenced by a promise of consideration—plus evidence of control or instructions by law enforcement.

Id. The undisputed facts establish both parts, evidence of some prior formal agreement and evidence of control or instructions by law enforcement.

1. Evidence of "some prior formal agreement."

The state's claim that there was no prior formal agreement between the detectives and Miller, who the detectives described as CI 355, is unsupported by the detectives' own testimony at the postconviction hearing.

Detective Wanta and Detective Linzmeier, who was the lead detective in Arrington's case, met with Miller and the three devised a plan in which Miller would wear a recording device provided by the detectives and record conversations with inmates, including Arrington. (278:31-37, 50-52). As the trial court found, when at one of those meetings Miller asked the detectives "if he should record any

information from Mr. Arrington, the detective[s] informed him that he could record such conversations."[2] (247:4). Subsequently, Miller and the detectives, with the assistance of jail staff, carried out that plan. (278:37-39).

Contrast those facts with *Lewis*, where the inmate, a man named Gray, had no conversations with law enforcement until *after* he obtained information from his cellmate. *Lewis*, 324 Wis. 2d 536, ¶9. Gray had no agreement with any law enforcement agency in Wisconsin. At one time he had a federal proffer but it did not extend to information obtained from Lewis. *Id*. at ¶1. On that record, this court concluded that Gray "acted purely on his own …." *Id*. Here, although Miller was a willing participant in the scheme to obtain information from Arrington and two other inmates, he clearly did not act on his own. The detectives and Miller entered into a prior formal agreement under which the state provided and secreted on Miller a recording device for the express purpose of recording conversations with inmates, including Arrington. The objective was to obtain information from Arrington about his pending homicide charge.

[2] Detective Linzmeier testified that when Miller asked "if he should record" any conversations with Arrington, he told Miller, "Yes." (278:51). Detective Wanta testified that when Miller asked if he should record conversations with Arrington about his case, Wanta "said he could record conversations with Arrington." (278:36).

Parroting the trial court, the state emphasizes that Miller, through his attorney, volunteered his services to the state. That fact is of little import. In *Moulton*, a co-defendant and his attorney approached police about cooperating. *Moulton*, 474 U.S. at 162-63. The Sixth Amendment was violated because the state knowingly exploited an opportunity to confront an accused without counsel being present. *Id*. at 176. The same is true here.

The state argues there can be no prior formal agreement unless specific consideration to the informant is spelled out in advance. Specifically, the state argues that "under *Lewis*, an 'expectation' of consideration is not enough." (State's brief, p. 25). That's incorrect. This court held that "some prior formal agreement … may or may not be evidenced by a promise of consideration …." *Lewis*, 324 Wis. 2d 536, ¶1. Here, evidence of some prior formal agreement is satisfied by the detectives' testimony about the plan they devised with Miller. A promise of consideration was not needed. But, in fact, consideration was part of the understanding between Miller and the detectives.

The detectives knew Miller was seeking consideration, the specifics of which would be determined by the district attorney. (278:32, 41, 58). Wanta testified they told Miller that "the information he would gather would … be used as part of his consideration." (278:43). The understanding was the more Miller could produce the more he might get. (278:32). In fact, the state ultimately provided Miller

consideration by offering him a plea agreement on his pending charges that contemplated a "full debrief and testimony on Powell and Arrington." (237).

The evidence established a prior formal agreement between the state and Miller.

2. Evidence of "control or instructions by law enforcement."

The state argues there was no control or instructions by law enforcement because Arrington "offers no evidence that the police ordered or instructed that he 'stimulate' the conversations, which *Lewis* requires." (State's brief at 27). The state not only misreads *Lewis*, its argument is incompatible with *Henry*.

Nothing in *Lewis* suggests that "evidence of control or instructions by law enforcement" requires proof that police ordered or instructed an inmate to ask particular questions or even to stimulate conversation. As the state itself notes a few pages earlier in its brief (p. 21), the court of appeals wrote:

> *As long as the police do nothing to direct or control or involve themselves in the questioning of a person in custody by a private citizen, such questioning does not violate the [F]ifth or [S]ixth Amendments.*

Lewis, 324 Wis. 2d 536, ¶25, *quoting United States v. Surridge*, 687 F.2d 250, 255 (8th Cir. 1982) (emphasis added in *Lewis*). Then, the court of appeals wrote:

> The italicized portion says it all and is the holding of the court.

Id. (footnote omitted).

The bottom line is that when there's no involvement by police, the government "cannot be held accountable just because things occur by happenstance." *Id*. at ¶24. Here, the state did not obtain the incriminating, recorded statements from Arrington by happenstance. The police not only involved themselves but exercised control by agreeing to use Miller's services as an informant and equipping him with a device to secretly record conversations with inmates, including Arrington, who were represented by counsel.

The state's argument also fails under *Henry*. There, the police specifically told the jail informant not to initiate any conversation or question Henry about his pending charge. *Henry*, 447 U.S. at 266. Despite the officer's admonishment, the informant was not a passive listener but had stimulated conversations. *Id*. at 217, 273. The government's conduct violated the Sixth Amendment by intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel. *Id*. at 274.

The detectives did not need to tell Miller what to ask because they all knew what was sought. And Miller not only initiated each conversation, he asked Arrington questions about the homicide.

There is not just some evidence, there is undisputed evidence, of control or instructions by law enforcement.

II. The court should reject the state's claim that relief is not warranted due to plain error or ineffective assistance of counsel.

A. The record does not support the claim that counsel chose not to challenge the statements.

In response to Arrington's request for relief due to plain error or ineffective assistance of counsel the state contends that counsel made a conscious decision not to challenge the state's use of the recordings and Miller's testimony. (State's brief, pp. 29-30, 35-36). In truth, the record shows counsel missed the issue. Counsel testified he had not considered whether the government's use of Miller to record Arrington's statements violated the right to counsel, he had not researched the question and, had he done so, he would have sought to suppress the statements. (278:11, 21-22).

While the state is correct that in closing argument counsel told the jury the tape was "muddled garbage" (276:98), the state overcame the tape's poor quality by having Miller decipher it for the jury. Nothing in Miller's testimony or the recordings was helpful to the defense, and counsel did not testify otherwise. Rather, the jury heard that just five days after the shooting Arrington told Miller he "dumped the crib down" because he was mad at

Shorty, and, most importantly, Arrington said nothing about what was his defense at trial, specifically, that it was Shorty, not him, who shot Mr. Gomez.

In addition, counsel acknowledged that his client's "fantastic" demeanor on the witness stand was cast in a different light by the profanity-laced taped conversation in which Arrington talked callously about shooting Gomez and about how he had to keep "the bitch," A.T., off the witness stand. (278:15-16). Contrary to the state's claim, Miller's testimony was the driving force behind the decision to have Arrington testify. At the postconviction hearing, Arrington testified that before trial he didn't want to testify. (278:67). But the night before the state rested its case, Arrington changed his mind when his attorney told him it was in his best interest to testify because of the recordings. (278:67-68). Had his attorney sought and obtained suppression of the unlawfully obtained statements, Arrington likely would not have testified because the jury would have heard his version of the shooting through Detective Linzmeier's testimony.

Miller's testimony was in no way helpful to the defense, and Arrington's counsel did not choose, nor would have any reasonable counsel have chosen, to forego suppression of the incriminating statements.

B. Miller's testimony and the recording were prejudicial and warrant a new trial.

Given the state's reliance at trial on Miller's testimony and the recording, its claim of no prejudice rings hallow. Two principles must guide this court's review. First, as to whether reversal is warranted due to plain error, it is the state's burden to show beyond a reasonable doubt that the error was harmless. *State v. Jorgensen*, 2008 WI 60, ¶23, 310 Wis. 2d 138, 754 N.W.2d 77. Second, although the defendant must show prejudice to prevail on a claim of ineffective assistance of counsel, the question is not whether the evidence was sufficient to support the conviction. *State v. Sholar*, 2018 WI 53, ¶44, 381 Wis. 2d 560, 912 N.W.2d 89. The defendant need not prove the jury *would have* acquitted him, just that there is a *reasonable probability* it would have, absent the error. *Id*. at ¶46.

The state acknowledges that of the 42 witnesses at trial, only four were present at the shooting. Three of those witnesses, including A.T., testified they saw Shorty reaching for something. (271:185; 274:106; 275;49-50). Arrington saw Shorty fire a gun and hit Mr. Gomez. (275:97). Devin Landrum testified he saw Shorty reaching for something that appeared to be a weapon. (275:48). The fourth, Craig Taylor, did not see Arrington fire any shots and, contrary to the autopsy, believed Gomez was shot twice in the back, casting doubt on the reliability of his testimony. (271:69, 102).

Although the state notes that Lawrence Hawkins talked briefly with Arrington outside Taylor's house earlier in the day, Hawkins had left hours before the shooting occurred. (271:215-17).

The other witnesses were not present at the shooting. While Brianna Brown testified that Arrington was upset about Shorty cutting him with a knife, she said Arrington had calmed down and didn't take a gun when he left the apartment. (273:70). Tamakeco Brown testified that Arrington was "pretty shook up" after the stabbing but seemed scared, not angry. (275:68). Although Eugene Harrod told police Arrington said he "fanned Shorty down", Herrod testified he'd been forced by police to make that statement. (271:260, 264-66).

The state was missing a key witness, Shorty, who Arrington told Detective Linzmeier and testified at trial was the one who fired the shot that killed Gomez. Given Shorty's history with guns and violence, that accusation fit his character. But the state was able to undermine Arrington's accusation because he did not tell Miller in their recorded conversations, five days after the shooting, that it was Shorty who shot Gomez. As demonstrated in Arrington's brief-in-chief (pp. 33-37), the state emphasized that contradiction and mocked Arrington's claim that he fired in self-defense, in its questioning of Miller, its cross-examination of Arrington and its closing argument.

Unlike two other witnesses, James Allen and Christopher Howard, who counsel could show received consideration for their testimony against Arrington, counsel could do little to challenge Miller's testimony because, as the prosecutor reminded the jury in closing, "we got the recording". (276:58). Although the prosecutor characterized the state's possession of the recording as "fortunate", it should have been characterized as unlawful. The state nailed down its prosecution of Arrington by using damning evidence that it obtained not by happenstance or good fortune but by devising a plan to obtain incriminating statements in a blatant violation of Arrington's right to counsel. A new trial is required, either due to plain error or ineffective assistance of counsel.

CONCLUSION

Arrington asks the court to reverse the judgments of conviction and order denying postconviction relief, and remand with directions that the statements obtained by Miller be suppressed.

Dated and filed by U.S. Mail this 10th day of June, 2020.

Respectfully submitted,

SUZANNE L. HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177
hagopians@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,937 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 10th day of June, 2020.

Signed:

SUZANNE L. HAGOPIAN
Assistant State Public Defender