STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No 2020AP000056-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. REJHOLEC,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Sheboygan County Circuit Court, the Honorable Rebecca Persick, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Officer Edson's Reid-style interrogation which included lies about what evidence police possessed and misinformation and lies about the legal process and the consequences of Mr. Rejholec invoking his right to counsel rendered Rejholec's self-incriminatory statements coerced and involuntary in violation of Mr. Rejholec's right to due process.

As forecast the state does not cite any case with facts remotely close to those at bar with a police interrogator lying about the legal process where a court has ruled a resulting confession to have been freely and voluntarily given. Instead, the state attempts to deflect by claiming Rejholec for the first time on appeal raises a *Miranda* issue,[1] and argues it perfectly proper for the government to obtain a confession through trickery and deceit to deprive a person of his liberty. The state is wrong on its first point and not exactly right on the second. Rejholec does not argue police failed to read *Miranda* warnings; he argues statements Edson extracted during custodial interrogation were involuntary and coerced and thus obtained in violation of Rejholec's right to due process. He further argues consistent with *Frasier v. Cupp*, 394 U.S. 731 (1969), Edson lying about evidence is relevant to the voluntariness

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

issue, but that what is dispositive is Edson's lies to Rejholec about the legal process and consequences of Rejholec invoking his right to counsel.

In *Miranda v. Arizona*, the SCOTUS famously imposed a rule requiring police to recite a list of procedural safeguards relating to a detained suspect's constitutional rights. *Miranda*, 384 U.S. at 444-45. Failure to recite the list renders any subsequent statement inadmissible. *Id.* Here Edson read the warnings beginning at the 4:05 mark of the interrogation video and the state's argument notwithstanding, Rejholec in the circuit court and on appeal never claimed otherwise. But *Miranda* involves more than just a bright-line rule; the decision goes into great detail about how police tactics such as those utilized here can coerce a confession rendering it constitutionally involuntary. That is what Rejholec argued in the circuit court and now argues on appeal.

The state choosing in its brief to focus on Edson's testimony rather than the video depicting what actually occurred is understandable given the content of the video amounts to what could be a training tool for extracting a false confession. Edson in his testimony understandably attempted to minimize what he did. The state at p. 4 notes Edson testified he accused Rejholec of lying "maybe two or three times"—the video shows it to be at least ten (113: at 43:30, 44:50, 48:11, 52:49, 57:40, 1:00:30, 1:04:26, 1:05:30 & 1:06:32). Other examples such as the frequency with which Edson lied about forensic

evidence which did not exist can be found throughout Rejholec's brief-in-chief. Another is the state at p. 6 quoting Edson explaining how he moved into Rejholec's space when pressing him "so that maybe he didn't have to talk so loud" [in the eight-by-eight room] and that he "just found in life in general that when you're talking about serious things like that that it's nice for people to be a little bit closer," which would be comical if not so serious. The state does not, because it cannot, dispute the accuracy of the lengthy quotes from the video reproduced in Mr. Rejholec's brief and basically chooses to selectively edit or ignore them.

In claiming at pp. 10 & 22 that the record contains only an audio recording of the interrogation the state appears to suggest either Judge Persick lied in stating "when I ultimately watched the video, I watched the whole thing" (103:2) or that the video file on the DVD somehow was deleted while in the clerk's possession. Neither is true. The state, as Wis. Stat. § 968.073(2) requires, created a video recording of the interrogation and the prosecutor in the circuit court stated "I will ask that a copy be made today" and "will personally bring it at least to the JA so the court can get it." (100:45). The state possesses the video (having delivered only a copy), and claiming it hampered by having only an audio version and it being somehow the defense's fault is disingenuous. This court on March 10, 2020, entered an order directing the clerk to supplement the record with the DVD (not an audio recording) of the Edson's interrogation. If in fact the clerk sent an audio file,

the court is asked to direct the clerk to send the video or that failing, to direct the parties to provide a copy for the record. The court watching the video is critical to understanding the issues presented and reaching a just result by granting suppression.

The state cites the correct legal standard for determining whether a confession was coerced and involuntary, but then promptly proceeds to ignore it. That is, at pp. 9-10 the state accurately states "A court determines the voluntariness of a defendant's statements under the *totality* of circumstances, balancing a defendant's characteristics with the pressures that the police imposed." (emphasis added). Rather than confront the totality of what occurred, state throughout its brief proceeds to argue by isolating and dismissing each coercive factor as individually insufficient. For example, state at pp. 13-14 posits that police use of lies to induce a confession is a common and not improper interview technique. That it is common does not mean it is not coercive. The same holds for other aspects of the Reid-style interrogation such as isolating the accused and shutting down hard any protestation of innocence.

Regarding "the defendant's characteristics," the state at p. 22 claims the defense to have mislead the court by falsely asserting Rejholec was unemployed and uneducated. The court's attention is directed to the interrogation video at 7:37 where Edson asks "Are you working anywhere right now?" and Rejholec responds "No." (113: at 7:37-7:39). SEEK Services

referenced in the state's brief is a temp agency where Rejholec was registered. Rejholec was not an employee; he was not working. Regarding education, it is true Rejholec 35 years earlier limped across the high school finish line as a "slow learner" and he can, as the PSI writer indicated, read and write with "spelling errors." (59:13-14). The point is that Rejholec does not possess knowledge or education sufficient to disentangle or see through Edson's sophisticated lies about non-existent DNA evidence proving Rejholec's guilt or, more importantly, lies about the legal process and consequences of Rejholec invoking his right to counsel.

It is not clear what point the state is trying to make at p. 6 in stating Edson was familiar with the Reid technique of interrogation but not specifically trained in it. The state at p. 8 acknowledges from *Miranda* the characteristics of a Reid or Reid-style interrogation, a technique which is not designed to ascertain truth but to confirm a prejudged conclusion. It is beyond dispute from the video that Edson engaged in a Reid-style interrogation. That is, Edson isolated Rejholec, check; Edson projected certainty of guilt, check; Edson falsely projected empathy, check; Edson engaged in aggressive victim-blaming, check; Edson aggressively shut down protestations of innocence, check; and Edson lied about evidence, again, check. That this type of government inquisition is not forbidden in the United States as it is in other countries does not alter the fact it is coercive, or a form of coercion.

The state at p. 10 appears to argue that because the Kassin article on police-induced confessions referenced in Rejholec's brief was not cited in the circuit court it cannot be considered on appeal. By that logic then presumably the court would not be able to consider cases cited in the state's brief which the state did not cite in the circuit court. In so arguing the state betrays a fundamental misunderstanding of the appellate process and role of advocate appellate counsel. The Kassin article builds on the points discussed at length in *Miranda* which were argued in the circuit court. That the state chooses to ignore rather than rebut the points made is telling.

The state spilling ink at pp. 23-24 and n. 14 to explain why Rejholec's case is distinguishable from *State v. Hoppe*, 2003 WI 43, 261 Wis. 2d 294, 661 N.W.2d 407 is curious given Rejholec acknowledged as much at p. 32 of his brief. Rejholec cited *Hoppe* to make the point that for an acutely vulnerable person the coercive nature of a Reid-style interrogation can itself be enough to render a confession involuntary, but acknowledged in Rejholec's case it alone was not sufficient. However, for the state to deny such tactics or tools are coercive is to ignore *Miranda* and deny reality. To argue Edson's Reid-style interrogation irrelevant because it was insufficient in and of itself to render Rejholec's confession involuntary is to ignore the controlling legal standard which states the issue turns on the *totality* of circumstances.

Rejholec cites Kassin, *Hoppe*, and *Miranda* to make the point that the Reid-style interrogation laid a foundation for the more decisive blows to come. That is, by analogy to the sweet science (or these days MMA), Edson's Reid-style interrogation worked as body blows to wear Rejholec down, Edson's lies about DNA and computer evidence proving guilt staggered him, and Edson's lies about the legal process and consequences of Rejholec invoking his right to counsel knocked him out—i.e. rendered Rejholec's confession involuntary and violated his right to due process.

The state argues at pp. 6, 12 & 21-22 that Rejholec ignores the circuit court's factual findings. On the contrary, Rejholec embraces them. Rejholec does not dispute that Edson spoke in a calm voice and utilized a tactic of projecting false empathy, both of which are part of the Reid interrogation technique. Rejholec does not claim being sleepy played any role and nor was Rejholec confused by what Edson was telling him—though what Edson told Rejholec was contrary to and confused Rejholec about the nature of his constitutional rights. Rejholec was alert and receptive to Edson telling Rejholec he had DNA and computer evidence from which a jury would find Rejholec guilty. Rejholec was alert and receptive to Edson telling him if he did not express remorse now it would be "too late." Rejholec was alert and receptive to Edson telling him only he (Edson) could help him and that only he was on Rejholec's side. Rejholec was alert and receptive to Edson telling him if he invoked his right to counsel a jury would never

hear his side of the story and could then only conclude that he lied and was not sorry, and that he would then get "hammered" at sentencing.

It is not clear what point the circuit court and state at pp. 6 & 21 are trying to make when stating "[t]his wasn't a situation like you see on TV with the good cop/bad cop. There were no threats made." True enough; but life does not generally fit the three act prologue/conflict/denouement entertainment format of a police procedural. But, as noted in Rejholec's opening brief, the SCOTUS has made clear "the blood of the accused is not the only hallmark of unconstitutional inquisition"[2] and that "'custodial interrogation by its very nature, isolates and pressures the individual,' and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed."[3] For a useful TV reference, however, the 2017 Netflix series The Confession Tapes, a true-crime documentary series about false confessions, is suggested.

It is true as the state posits that Rejholec, at the heart of his argument regarding Edson's lies about the legal process cites primarily federal and out-of-state cases. But that is so because what the video shows Edson to have done to induce Rejholec's self-incriminating statements is so extreme, so beyond the pale, that instances reaching an appellate

[2] *Miranda v. Arizona*, *Id.* 384 U.S. at 448.
[3] *Corley v. U.S.*, 556 U.S. 303, 320-21 (2009).

court and not being suppressed by motion in the circuit court are relatively rare. Regarding *United States v. Anderson*, 929 F.2d 1059 (10th Cir. 1991), the state argues "Edson in no way indicated that, if Rejholec did not confess to him at that moment, he would 'forfeit forever' a chance to cooperate with him or the police," as occurred in *Anderson*. Except, Edson as quoted from the video at pp. 12-14 & 34-36 of Rejholec's brief did exactly that—he told Rejholec "once we're done talking, you and I are not going to have another chance to talk" so "you're not going to get the chance to tell your story….So the jury is never going to hear your side of the story," when we "you know, part ways, you and I will never have a chance to talk again. And I won't be able to help to advocate for you," and "I'm just trying to give you an opportunity to tell your side of the story before it's too late to be able to do that."

The state's attempt to distinguish *Hart v. Attorney General of State of Fla.*, 323 F.3d 884 (11th Cir. 2003), is similarly puzzling. The state posits at p. 17 when the detective in *Hart* discussed the "pros and cons" of Hart invoking his right to counsel "the detective told him the 'disadvantage' of having a lawyer was that the lawyer would tell him not to answer incriminating questions," and that "honesty wouldn't hurt him" which the court concluded showed Hart did not understand the nature of his rights. Again, the video here as quoted at p. 13-14 & 35-36 of Rejholec's brief proves Edson did exactly that. When Rejholec specifically asked "So what about having a lawyer involved or, ah, what you're saying can be

used in a court?" Edson told him if he invoked his right to counsel "you and I are done talking" and "I'm just trying to give you the opportunity to tell your side of the story before it's too late to be able to do that" because "I'm just here to get the facts and to support your end of this, and to tell your story" and "you know right now, I'm the one that's going to be able to help you the most, I think, by telling your story, especially if you tell me that you're, you're, you know, sorry for what happened, that it was a mistake."

With regard to *Commonwealth v. Baye*, 967 N.E.2d 1120 (MA 2012), the state ignores the striking similarities between the two cases and at p. 19 posits simply *Baye* is distinguishable because in *Baye* the police "dissuaded the defendant…from speaking with an attorney by 'clearly implying' that his statements would not be used against him." Here Edson's improper dissuasion was a variation of that and was worse than what happened in *Baye* in that Edson convinced Rejholec he was his advocate, that things would get worse if he invoked his right to counsel, and that he would not be allowed to testify so the jury would never hear his side of the story that what happened was not his fault and he was sorry. Thus, the state's claim at p. 20 that "Rejholec was not deceived about 'the nature of his rights and consequences of abandoning them'" is simply wrong.

The state seems to be attempting some sort of an end-justifies-the-means argument by focusing at p. 7 and 24-25, on this somehow not being a false confession case because of Rejholec's statements at sentencing. The argument is nonsense. Once a defendant's false confession is ruled admissible, a defendant is left with little practical choice but to mitigate damage, which defense counsel would urge by accepting a plea deal and expressing regret at sentencing, and fight the erroneous suppression ruling on appeal.

Finally, with regard to remedy, the state has not developed a harmless error argument because it cannot. Consequently, there is no need to remand the case for a hearing on plea withdrawal. *See State v. Agnello*, 2004 WI App 2, 269 Wis. 2d 260, 674 N.W.2d 594. This court on the basis of the coerced and involuntary confession should vacate the plea and resulting judgment and sentence.

CONCLUSION

For the above-stated reasons, the court is asked to rule that the circuit court erred by not granting Rejholec's motion to suppress his coerced and involuntary statements. The court is asked to vacate the judgment and sentence and return the case to the point where the error occurred and direct that the circuit court enter an order suppressing the evidence.

Dated this 12th day of October, 2020.

Respectfully submitted,

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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 2756 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 12th day of October, 2020.

Signed:

Electronically signed by Joseph N. Ehmann
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