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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appellate Case No. 2020AP345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

Anne E. Streckenbach,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT II FOR OUTAGAMIE COUNTY

The Honorable Emily I. Lonergan, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

QUESTIONS PRESENTED

Did Streckenbach allege sufficient facts to entitle her to an evidentiary hearing of her motion to suppress before the trial court?

Did the trial court abuse its discretion when denying Streckenbach's suppression motion without an evidentiary hearing?

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not seek oral argument or publication in this matter.

STATEMENT OF THE CASE

For the purposes of the issues presented, the state accepts the factual synopsis provided by Streckenbach. Clarifications and distinctions will be made where appropriate.

STANDARD OF REVIEW

Whether the facts under which Streckenbach's motion were would entitled her to relief if true, and whether the record demonstrates that she is not entitled to relief are questions of law subject to de novo review by the Court. State v. Sulla, 2016 WI 46, ¶23, 369 Wis.2d 225, 880 N.W.2d 659.

If the relevant standards are met, the trial court's discretionary decision of whether to allow a hearing is subject to the deferential erroneous exercise of discretion standard. Id. When reviewing a decision under this standard, the Court is permitted to search the record for reasons to sustain the trial court's determination. Id.

ARGUMENT

1. Deficiency of the Pleadings and the Trial Court's Denial of an Evidentiary Hearing.

Streckenbach seeks to have the Court decide on the underlying motion on its merits. In doing so, she skips an important step in the analysis. To be entitled to an evidentiary hearing, a defendant must plead specific facts necessary to raise a factual dispute. State v. Radder, 2018 WI App 36, ¶ 18, 382 Wis. 2d 749, 765, 915 N.W.2d 180, 188. That an evidentiary hearing is needed is a burden that the movant bears. Radder at ¶ 15. In addition, "if the record conclusively demonstrates that the defendant is not entitled to relief, then the circuit court has discretion to deny the motion without a hearing. Id. at 11.

The trial court's decision to deny Streckenbach's motion without hearing is subject to review for erroneous exercise of discretion. Id. The trial court properly exercises its discretion where it examines the relevant facts, applies the proper legal standard, and engages in a rational decision-making process. Id.

The question of whether Streckenbach alleged sufficient facts to entitle her to an evidentiary hearing is intertwined with the question of whether the trial court abused its discretion.

2. Application of the Right Against Self-Incrimination.

Streckenbach specifically references the Wisconsin Constitution, Article 1, § 8 when discussing the defendant's right against self-incrimination. While it is possible for the state to afford greater protections than those afforded by the US Constitution, there does not appear to be "any meaningful difference between the state and federal constitutional protections against compulsory self-incrimination…" State v. Jennings, 2002 WI 44, ¶ 42, 252 Wis. 2d 228, 249, 647 N.W.2d 142, 152.

The Wisconsin Supreme Court recently conducted a relevant analysis of the applicability of the right against self-incrimination in State v. Dobbs, 2020 WI 64. The Court stated that "custody is a necessary prerequisite to Miranda protections." Dobbs, 2020 WI 64 at ¶ 53. The Court went on to state that a person is in custody for the purposes of Miranda when there is either a formal arrest,

or restrictions of movement to a degree that would typically be associated with formal arrest. Id.

In evaluating whether an individual is "in custody" for Miranda purposes, the Court noted multiple considerations such as the degree of restraint including whether the individual is handcuffed, whether officers weapons are drawn, whether a frisk is performed, if the individual is moved to a new location, and the number of officers involved. Id. at ¶ 54. In evaluating an investigative detention, the Court also noted the need to consider the totality of the circumstances with a focus on "the reasonableness of the officer's actions in the situation facing them." Id. at ¶ 57.

In Dobbs, the Court ultimately found that the defendant's rights had been violated. It noted that the defendant was subject to restrictions akin to formal arrest based on the fact that his vehicle had been blocked by officers, he was promptly removed from his vehicle and handcuffed, then placed into a locked squad car and / or guarded by an armed officer. Id. at ¶ 61. While these facts do not correspond to the facts of the instant case, the counter-factual posited by the Court is instructive.

"This was not like a routine traffic stop where if Dobbs had successfully performed the field sobriety tests, he would have been free to leave." Id.

Dobbs may be one of the most recent cases to apply these standards to the very same questions before the Court, but it is hardly the first. The United States Supreme Court noted that people temporarily detained as part of ordinary traffic stops are not considered "in custody" for the purposes of Miranda protection. Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317 (1984). The circumstances of a stop can change so as to invoke "the full panoply" of Miranda protections. Berkemer v. McCarty, 468 U.S. 420 at 440. However, the Court noted that a single police officer asking the defendant a "modest" number of questions, and a request to perform a simple balance test at a location visible to passing motorists "cannot be fairly characterized as the functional equivalent of formal arrest." Id. at 442.

A similar issue was on review in Wisconsin in 1985 in Village of Menominee Falls v. Kunz. 126 Wis. 2d 143, 149, 376 N.W.2d 359, 362 (Ct. App. 1985). While this case did note that Miranda does not apply to civil actions, that did not stop the Court of Appeals from addressing the issue of

whether the OWI defendant in that matter was "in custody" for Miranda purposes. Specifically referencing that the facts were similar to Berkermer, the Court of Appeals agreed with the trial court's ruling that the defendant was not "in custody" as contemplated by Miranda.

3. "Focusing on the Issues Presented."

In the section of her brief entitled "Focusing the Issue Presented," Streckenbach addresses the factual finding that the trial court made that the questioning of Streckenbach was not unnecessarily prolonged. This is a factual finding that the trial court made based upon the facts as pled by Streckenbach. It is the responsibility of the moving party to plead "specific facts showing that a hearing is necessary to resolve a factual dispute." Radder, 2018 WI App 36, ¶ 18. Streckenbach did not do so in this case.

4. The Officer's Questioning of Streckenbach Did Not Exceed a Permissible Scope.

A. The Law

In Section II of her brief, Streckenbach cites the Berkermer decision emphasizing the "moderate number of

questions" that an officer is allowed to ask to attempt to confirm of dispel a suspicion. This citation is made devoid of the surrounding context which the state has provided above which notes that a typical traffic stop is not sufficient to trigger Miranda protections.

Citing State v. Knapp, Streckenbach further cites the strong language that courts have rightfully employed in upholding Constitutional protections for suspects. However, Streckenbach puts the cart before the horse in this instance by failing to acknowledge that the strong language in Knapp comes in the context of an undisputed Miranda violation. State v. Knapp, 2005 WI 127, ¶ 82, 285 Wis. 2d 86, 129-30, 700 N.W.2d 899, 921. The only question before the Court was whether physical evidence obtained based upon that violation ought to be suppressed. Id. This language was not employed in the context of determining whether there was a violation to begin with.

Streckenbach cites Missouri v. Seibert for the proposition that the deliberate practice of questioning prior to giving applicable warnings is a means of making an "end-run" around a suspect's Constitutional protections. However, the facts in Seibert render its analysis completely irrelevant to the instant matter.

In Seibert, police woke the defendant at 3 AM at a hospital where a family member was being treated for burns. Missouri v. Seibert, 542 U.S. 600, 604, 124 S. Ct. 2601, 2606, 159 L. Ed. 2d 643 (2004). The arresting officers followed specific instructions not to advise the defendant of her Miranda rights. Id. The defendant was then transported to the police station and left alone in an interview room for approximately 15 to 20 minutes. Id. The defendant was then questioned for 30 to 40 minutes about her knowledge that a family member was intended to die in the fire under investigation. Id. at 605. During this period of questioning, an officer pressed her, "squeezing her arm and repeating 'Donald was also to die in his sleep.'" Id.

When the defendant admitted she knew "Donald was meant to die in the fire," officers gave her a 20 minute break for coffee and cigarettes. Id. When that was completed, the officers resumed questioning the defendant. Id. At that time they activated at tape recorder and advised the defendant of her rights. Id. Questioning then resumed with the officers confronting the defendant with the statements she made prior to her Miranda warnings being given. Id. The purpose of the second round of questions

was specifically to get the defendant to provide the same answers she had already provided, to render Miranda warnings, ineffective. Id. at 606, 611. While it would be difficult to defend the interrogation tactics utilized in Seibert, that is not the state's task.

B. Application of the Law

For Streckenbach's rights to have been violated as alleged, she must have been subject to "custodial interrogation." She was not. She was subject to a number of questions as part of the preparation for the administration of Standardized Field Sobriety tests (SFSTs). She was subject to the same questions that everyone investigated for OWI by the Appleton Police Department is subject to as part of their routine OWI investigations. It is not asserted that she was removed from the scene of the stop. It is not asserted that she was handcuffed or locked in a squad car. It is not asserted that any officer present had a drawn weapon. It was a bog standard OWI investigation, "a routine traffic stop where if [Streckenbach] had successfully performed the field sobriety tests, [s]he would have been free to leave." Dobbs at ¶ 61.

It is Dobbs, Berkemer, and Kunz, that provide relevant instruction in this matter.

Streckenbach's argument rests disproportionately upon the number of questions that she was asked prior to administration of the SFSTs. She does this while ignoring the fact that the questions are brief and require brief answers, typically "yes" or "no." She questions the relevance of several of the questions in an attempt to eat her cake and have it too. It does not seem possible for a question to both be intended to prompt an incriminating response and also be irrelevant at the same time.

It is Streckenbach's assertion that "a few" questions about whether she consumed any intoxicating beverages and, if so, how many, how large and when would be enough to confirm or dispel suspicion of impaired driving. This logic is faulty for two primary reasons. First, it would require a suspect to be honest about her consumption to the officer. Second, the purpose of the pre-SFST questions goes hand-in-hand with the SFSTs themselves.

One need only apply basic logic and a scant amount of experience with intoxicants to understand the purpose of the pre-SFST questions. There is nothing *inherently* incriminating about the majority of the pre-SFST questions

at issue in this case. Taken as a whole, it is unmistakable that the questions are intended to inform the officer of potential explanations for their observations during the course of administration of the SFSTs. Some of the potential explanations are innocent. Some are not. One's level of education can assist an officer in determining if an individual's inability to follow verbal instructions might have other explanations.

The same is true for one's level of rest. Someone lacking their normal level of rest could very easily be expected to perform worse on tests of concentration, balance, and dexterity such as those utilized in the SFSTs. Dental treatments, prescription medication and myriad other things can influence observations made during SFSTs. Were a subject to do poorly on such testing, there might be no shortage of after-the-fact rationalizations that they could offer that an officer would have no reason to believe in the moment. By obtaining relevant information prior to the test, the subject is providing it without prior knowledge of their performance and the officer is able to consider that information in evaluating the subject's performance.

Appellant then provides what is effectively a doomsday, slippery slope scenario "if the Court permits the

kind of interrogation" in this case, lamenting all of the other kinds of questions that the police could ask prior to "formal custody." In doing so, Streckenbach fails to resolve the conflict between questions that are purportedly not relevant and also somehow still intended to prompt an incriminating response.

C. Streckenbach's "Additional Considerations"

Appellant asserts that the procedure in the instant case is "designed specifically to do nothing more than avoid the risk of an individual exercise their Miranda rights." Appellant's Brief at 11. This is an equation to the Knapp and Seibert cases which are discussed and distinguished above. In making this assertion, Streckenbach continues to ignore the more relevant case law based upon analysis contemplating situations closely related to the one before the Court.

In making this accusation, Strechenbach rests strongly upon the fact that the pre-SFST questions are the same as on the Alcohol Influence Report. This is irrelevant. For the reasons discussed above, Streckenbach is not entitled to Miranda warnings at the time of the pre-SFST questions, as she is not "in custody" for Miranda purposes. Further,

the purpose of the pre-SFST questioning is to determine (with the aid of the actual SFSTs) if an arrest is proper.

Defendant concedes that "[p]erhaps" a different outcome (from the one sought by Streckenbach) would be appropriate if the pre-SFST questions weren't "precisely" the same and in the "exact" same order as on the Alcohol Influence Report." Appellant's Brief at 12. Appellant gives the game away here. The form and order of the questions is irrelevant to the actual issue in this case, whether Streckenbach was subject to a "custodial interrogation" under Miranda. If Streckenbach argues that the form and order of the questions can influence the outcome of this matter, then she ignores the substance of this matter.

Streckenbach goes on to ask largely rhetorical questions about the Appleton Police Department's OWI investigation practices and their potential stance on the adequacy of those of other departments. Appellant's Brief at 12. This is a red herring. The issue before the Court is what the law provides for. The comparative merits of one police department's practices versus another one are not at issue (insofar as they are permitted by law, of course). There is nothing that requires a police agency to

investigate "only just enough" to meet whatever the relevant legal standard is in a particular situation, though this appears to be something that Streckenbach is advocating for.

5. Detention, "Miranda Custody," and Formal Custody.

The concept of "Miranda custody" occupies a space in between and overlapping with investigative detentions and formal custody or arrest. The distinctions between these categories are discussed above.

Contrary to Streckenbach's assertion, the Kunz court did not limit its analysis and findings only to civil citations. Appellant's Brief at 13. Streckenbach attempts to rely solely on that court's findings related to the applicability of Miranda requirements to civil forfeiture cases. Appellant's Brief at 13. Only by ignoring nearly half of the Kunz court's written opinion can such a narrow interpretation be defended.

The analysis in Kunz did not stop upon the finding that Miranda did not apply to civil forfeiture cases. The court continued, "[i]n addition, we agree with the trial court that Kunz was not 'in custody' within the meaning of

Miranda." Kunz at 149. The court then compared the facts to those in Berkemer in considering whether the traffic stop and OWI investigation at issue constitute custody under Miranda.

The Kunz court noted the investigating officer's questioning of Kunz was intended to confirm or dispel suspicion of intoxication. Id. at 150. Citing Berkemer, the Kunz court concluded that Kunz was not "in custody" for Miranda purposes.

Knapp and Seibert do not overrule or alter the standards articulated in Kunz and Berkemer, as Streckenbach is inviting the Court to find. Knapp involved an uncontested Miranda violation and therefore only examined the applicability of the exclusionary rule to certain evidence derived from the violation. State v. Knapp, 2005 WI 127. Further, the Miranda violation in Knapp occurred after Knapp was told that the arresting officer had a warrant for his arrest on a parole violation but prior to Miranda warnings being given. Id. at 90. Knapp is not even minimally instructive for the purpose of deciding upon the existence of a Miranda violation. The facts in Knapp would not lend themselves to a particularly helpful

analysis of the issue presently before the Court even if the existence of a Miranda violation had been in dispute.

Comparison to the procedures on display in Seibert is also wholly unwarranted. As noted above, the facts of Seibert are rife with relevant distinctions from the instant case. From the circumstances of police contact, to the location, duration and nature of questioning, Seibert can in no way be equated to a routine traffic stop and OWI investigation.

Contrary to Streckenbach's assertions, it is she who seeks to avoid application of the relevant legal principles, and largely to avoid addressing the relevant legal question of whether the pre-SFST questions were a "custodial interrogation" under Miranda. Knapp provides absolutely no guidance on this question. Seibert provides no guidance relevant to the facts of this case. Berkermer and Kunz both address the issues before the Court.

Dobbs actually engages in the relevant analysis in a current context as well. In finding that Dobbs' rights were violated, the Court not only reviewed factual considerations that contrast mightily from the facts before this Court, but then went on to explicitly distinguish that matter from what we have here, a routine traffic stop where

Streckenbach would have been free to leave upon successful completion of the SFSTs.

Appellant erroneously assert that the trial court's original ruling was based upon a misapplication of the law in that it required formal custody for a "custodial interrogation" to take place. There is nothing to suggest this is the case. The trial court found that the questioning did not arise "to a custodial interrogation." R.32 9:21-22. The finding that there was no "custodial interrogation," is consistent with the language utilized in Dobbs (at 52, 53), Seibert (at 608), Kunz (at 149), Berkemer (at 440, 442), and numerous other cases in the "Miranda" progeny. It is disingenuous *at best* to assert that the trial court meant anything other than what countless other courts have meant when utilizing the same language and the same case law to address the same issues as in the instant case. There is nothing in the record to suggest that the trial court conflated "Miranda custody" a requirement for with formal custody.

The trial court accepted Streckenbach's recitation of the facts for the purpose of the motion. It is not disputed that the officer in this matter was within his rights to administer SFSTs. The officer followed his

department's standard procedure for administering said tests, which includes asking several questions that aid in the assessment of a suspect's performance on the test. This is not some half-baked shortcut intended to coerce suspects. They are self-evidently relevant to the assessments of one's balance, coordination and concentration. Even noting that the questions are "*probably*" more extensive than most (emphasis by the state), they are the types of questions that officers routinely ask during traffic stops and prior to SFSTs in OWI investigations. R.32 9:10-21. Even if the trial court had found differently, it would not have found that results of the SFSTs and the blood test should be suppressed. R.32 10:1-4.

CONCLUSION

Even under the facts as pled by Streckenbach, it is clear that no custodial interrogation took place in this matter. What occurred was a routine traffic stop and OWI investigation, akin to any other typical investigative detention. There were no intervening circumstances involved to elevate this from an investigative detention to "Miranda custody." Streckenbach's motion lacked basis in law or fact when filed and it lacks basis now. It seeks to

create law rather than to apply it. The trial court examined the relevant facts as pled by Streckenbach, applied the proper legal standards, and engaged in a rational decision making process. The trial court properly denied the motion without an evidentiary hearing.

Should this Court disagree with the state's position that the facts pled by Streckenbach merit denial of her motion, the relief sought by Streckenbach is inappropriate. The proper remedy in such a situation is for the trial court to hold an evidentiary hearing to complete the factual record and decide the original motion. The state's argument at the original hearing was that even accepting the facts as pled by the defendant, no relief was proper. This arguendo assumption ceases to be applicable if Streckenbach was entitled to a hearing. In the event that the trial court were to find a violation after an evidentiary hearing, it would then need to determine what remedy, if any, were appropriate under the circumstances.

However, for the reasons stated above, the state respectfully request that the Court uphold the trial court's decisions and reject Streckenbach's requests in their entirety.

STATE OF WISCONSIN - VS - Anne E. Streckenbach

Respectfully submitted this 23rd day of July, 2020.

By: _____

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STATE OF WISCONSIN - VS - Anne E. Streckenbach

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 21 pages.

Dated: July 23, 2020

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CERTIFICATION OF THIRD-PARTY COMMERICIAL DELIVERY

I certify that on July 23, 2020, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: July 23, 2020
Signature: _____

STATE OF WISCONSIN - VS - Anne E. Streckenbach

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 23rd day of July, 2020.

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