STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2022AP1373-CR; 2022AP1374-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KALE K. KEDING,

Defendant-Appellant.

On Appeal from the Judgments of Conviction in the Wood County Circuit Court, the Honorable Nicholas J. Brazeau, Jr. Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court apply the wrong standard when considering Keding's motion to suppress statements Keding made to law enforcement after he was formally arrested and had just invoked his right to counsel?

The circuit court, after finding that Keding had invoked his right to counsel and that law enforcement's questioning needed to stop, determined that Keding's statements were nevertheless admissible because they were voluntary and not in response to investigative questioning. This Court should find that the circuit court applied the wrong standard.

2. Should the above statements that Keding made to law enforcement after his arrest be suppressed?

The circuit court answered no. This Court should reverse and grant suppression of the stationhouse statements because the State did not meet its burden of proof to show that Keding validly waived the right he had just invoked—his right to counsel—because the officers never administered *Miranda* warnings to Keding.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as Keding anticipates that the briefing will fully address the issue presented. Publication is not requested as the appeal involves the application of well-settled law to the facts of the case.

STATEMENT OF THE CASES

On June 16, 2021, the State filed a single-count complaint in Wood County charging Keding with possession of cocaine, a misdemeanor violation of Wis. Stat. § 961.41(3g)(c). (R1.2).[1] The allegations stemmed from a traffic stop on May 30, 2021 that resulted in Keding's arrest. (R1.2; 21:12; App. 27). He was booked for the offense and released soon thereafter, and he remained out of custody on a signature bond until his second arrest on November 7, 2021. (R1.5; 19:2–3).

On November 8, 2021, the State filed a second complaint in Wood County alleging Keding violated the conditions of his bond the night before. (R2.2). The single-count complaint charged Keding with misdemeanor bail jumping, in violation of Wis. Stat.

[1] "R1" refers to the court record in 2022AP1373, Wood County circuit court case no. 21-CM-318; "R2" refers to 2022AP1374, Wood County circuit court case no. 21-CM-617. Where the records are duplicative (i.e. where the same filing appears in both records), a single site to "R1" is used for simplicity.

§ 946.49(1)(a). (R2.2). Keding was again released on a signature bond. (R2.5; 16:3–4).

On November 11, 2021, the circuit court held an evidentiary hearing on Keding's motion to suppress statements he made to law enforcement during the May 30th traffic stop and at the stationhouse following his arrest. (R1.21; 10; App. 3–13, 16–40). Two officers testified at the hearing (R1.21:4–10; 11–21; App. 19–25, 26–31), and the parties played portions of Officer Able's body camera footage, which was admitted into evidence. (R1.11; 21:6–9, 14–17; App. 21–24, 29–32). (Keding's motion also cites to sections of the officer's body camera recording). (R1.10:2–4; App. 4–6).

At the conclusion of the hearing, the circuit court granted the motion in part. The court ruled that Keding's statements to officers during the traffic stop were inadmissible. (R1.21:22–23; App. 37–38). Keding's stationhouse statements, however, would not be suppressed, per the court's ruling, and would be otherwise admissible at trial. (R1.21:21–23; App. 36–38).

Shortly after the suppression ruling, the parties reached a plea agreement resolving both cases. (R1.12; R2.8). On November 18, 2021, the circuit court held a plea and sentencing hearing. (R1.22). In exchange for Keding's agreement to enter no-contest pleas to both of the charged misdemeanors, the State agreed to amend the drug offense from possession of cocaine to possession of a controlled substance. (R1.22:2). The parties clarified that the agreement included a joint

recommendation for a year-long period of probation, with the assessment of court costs and any counseling deemed necessary as conditions thereto. (R1.22:2, 7–8).

The circuit court accepted Keding's pleas, adjudicated him guilty of both offenses, and entered judgment on the convictions. (R1.22:7). The court then withheld sentence, adopting the joint recommendation in full. (R1.22:9).

On November 24, 2021, Keding filed timely notice of his intent to pursue postconviction relief. (R1.16; R2.12). On December 23, 2021, appellate counsel was appointed and requested the court record in each case, including the preparation of hearing transcripts. On August 11, 2022, Keding filed notice of appeal in both cases. (R1.28; R2.20). On September 21, 2022, the circuit court transmitted the record on appeal. On October 7, 2022, upon Keding's motion, this Court consolidated both of Keding's cases, and this appeal follows.

STATEMENT OF FACTS

On May 30, 2021, Keding and another passenger were getting a ride home after a night out when the three of them were pulled over for a defective brake light shortly before 4:00 A.M. (R1.2:1; 21:4; App. 19). During the course of the stop, law enforcement searched the car and its three occupants, and then questioned the occupants extensively about a small

amount of cocaine that the officers found in the driver's side door. (R1.11.25:30–36:00[2]).

The officers initially decided to release and charge all three suspects for the offense, since none of the occupants were willing to admit ownership. (R1.11.48:55–49:15). The driver then told the officers that he knew Keding had used cocaine earlier that night. (R1.11.52:55–53:40).

Throughout the stop, Keding steadfastly denied all knowledge of the cocaine the officers found in the car. (R.1.11.39:25-40:30; 56:50–1:05:50). However, he did acknowledge past issues with substance abuse, and eventually confessed to relapsing on a different substance that night. (R1.11.39:25–44:03; 1:00:40–1:06:45). Eventually, the officers decided to arrest Keding and turn everyone else loose. (R1.11.1:10:39–1:13:45).

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[2] The audio-recording admitted at the suppression hearing, record 1 item 11, is one hour, fifty minutes and twenty seconds in length. Citations to the recording appear in the following format: "R1.11." followed by an initial timestamp, and an ending timestamp, where appropriate. Thus, the citation "R1.11.25:30–36:00" refers to the time between the twenty-fifth minute and thirty second mark, and the thirty-sixth minute in the video.

It is undisputed (and the circuit court would later find) that Keding was not provided with his *Miranda*[3] warnings at any point during the stop, or during his subsequent arrest. (R.1.21:9, 18, 21-22; App. 24, 33, 36–37).

While being booked, Officer Able told Keding that she had more questions for him, but that she first needed to read him his *Miranda* rights:

> OFFICER ABLE: [B]ecause you're in custody, I'd have to read you your *Miranda* rights. Do you think you'd be willing to answer questions or are you thinking no already?
>
> KEDING: Seeing as how I got arrested, I'm going to need a lawyer.
>
> OFFICER ABLE: So you're wishing to remain silent?
>
> KEDING: I don't want to but I guess I'm going to have to.

(R1.11.1:31:33–1:32:05).

Officer Able later testified that she never finished reading Keding his *Miranda* rights. (R1.21:9; App. 24).

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[3] In *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), the United States Supreme Court established a set of procedural warnings in order to protect the Fifth Amendment rights of an accused from the pressures of a custodial interrogation conducted by the police.

Less than one minute later, after seeing Keding throw something into the waste-bin, Officer Scheppler asked Keding what it was that he threw away. (R1.11.1:32:35–1:32:40; R1.21:12; App. 27).

> OFFICER SCHEPPLER: What did you toss in there?
>
> KEDING: A Kleenex. It might have some residue for you.
>
> OFFICER SCHEPPLER: Alright. [Approximately 40 seconds pass[4].] So, you were saying some residue might be on the Kleenex or what?
>
> KEDING: In the snot. There's going to be a little cocaine in there.
>
> OFFICER SCHEPPLER: Some cocaine?
>
> KEDING: Yeah, I did some at the bar. I forgot about it… ."

(R1.11.1:32:35–1:32:45; 1:33:23–1:33:37).

Officer Scheppler later testified that he had not asked Keding what he had thrown away for the purpose of gathering evidence related to the possession charges. (R1.21:13; App. 28). However, the officer also acknowledged that he repeated Keding's statements back to him because he was "curious what the Kleenex might have tested for when [Keding] said residue." (R1.21:13–14; App. 28–29). Officer Scheppler

[4] The dialogue is difficult to understand during these 40 seconds as several people were speaking at once.

admitted that he was trying to initiate a conversation with Keding about the cocaine by asking these questions. (R1.21:15, 17–18; App. 30, 32–33).

At the suppression hearing, body camera footage of Keding's statement invoking his right to counsel to Officer Able, as well as Officer Scheppler's subsequent questioning about the Kleenex, was played for the court. (R1.21:6–9, 14–17; App. 21–24, 29–32).

Keding argued that suppression of his stationhouse statements was warranted because his rights had been violated when Officer Scheppler reinitiated questioning after Keding unambiguously invoked his right to counsel without ever providing Keding with the *Miranda* warnings. (R1.10:7–11; App. 9–13).

The circuit court found that the officers failed to give the *Miranda* warnings. (R1.21:21; App. 36). The court found that Keding invoked his right to counsel, and at that point, there could be no more interrogation after that time. (R1.21:21; App. 36). Further, the circuit court found that Officer Scheppler was not doing an investigation when he asked Keding what it was that he threw away. (R1.21:21-22; App. 36–37).

Just a few days before the suppression hearing was held, on November 7, 2021, Keding was arrested for a second time by the Marshfield police. (R2.2).

According to the Complaint in the second case on appeal, an officer responded to a local tavern after a bartender complained that Keding was refusing to leave. (R2.2:1). Keding smelled like alcohol, according to the officer, and appeared to have had several drinks based on his speech, his glossy eyes, and according to the complaining bartender, who told the police he had served Keding earlier that night. (R2.2:1). The officer learned that Keding had been released on bond while facing possession charges and that his conditions of release included absolute sobriety. (R2.2:1-2; R1.5:1). Following his arrest, the State charged Keding with misdemeanor bail jumping the following day. (R2.2).

ARGUMENT

I. The circuit court erred when it denied Keding's motion to suppress the statements Keding made to law enforcement immediately after he invoked his right to counsel.

A. Standard of Review and Applicable Law

"'Ordinarily, a guilty plea waives all non-jurisdictional defects and defenses.'" *State v. Conner*, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267 (quoting *State v. Hampton*, 2010 WI App 169, ¶23, 330 Wis. 2d 531, 793 N.W.2d 901, *rev denied*, 2011 WI 29, 332 Wis. 2d 279, 797 N.W.2d 524). "However, 'a narrowly crafted exception to this rule exists,' 'which permits appellate review of an order denying a motion to suppress

evidence, not withstanding a guilty plea.'" *Id*; *see also* Wis. Stat. § 971.31(10).

This Court reviews a denial of a suppression motion under a two-part standard of review: findings of fact will be upheld unless they are clearly erroneous, but it reviews *de novo* whether those facts warrant suppression. *Conner*, 344 Wis. 2d 233, ¶15 (citing *Hampton*, 330 Wis. 2d 531, ¶23).

In *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), the Supreme Court established a set of procedural warnings in order to protect the Fifth Amendment rights of an accused from the "inherently compelling pressures" of custodial interrogation. *State v. Harris*, 199 Wis. 2d 227, 237-38, 544 N.W.2d 545 (1996); *State v. Markwardt*, 2007 WI App 242, ¶23, 306 Wis. 2d 420, 742 N.W.2d 546. These rights include both the suspect's right to remain silent, and the right to legal counsel. *Markwardt*, 306 Wis. 2d 420, ¶¶23-24.

The right to counsel, when invoked, expresses the "[suspect's] desire to deal with the police only through counsel." *Conner*, 344 Wis. 2d 233, ¶16. "The police must immediately cease questioning a suspect who clearly invokes the *Miranda* right to counsel at any point during custodial interrogation." *State v. Jennings*, 2002 WI 44, ¶26, 252 Wis. 2d 228, 647 N.W.2d 142; *see also McNeil v. Wisconsin*, 501 U.S. 171, 176-77, (1991) ("In *Edwards v. Arizona*, 451 U.S. 477 (1981), we established a second layer of prophylaxis for the *Miranda* right to counsel: Once a suspect asserts the right, not only must the current

interrogation cease, but he may not be approached for further interrogation 'until counsel has been made available to him.'").

To determine whether suppression is warranted on right to counsel grounds, this court must first determine whether a suspect unequivocally invoked his right to counsel. *Conner*, 344 Wis. 2d 233, ¶16 (citing *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966)). If the right to counsel was invoked, this court must then determine whether the suspect (1) initiated subsequent, further discussions with the police, and (2) knowingly, intelligently, and voluntarily waived the right which he had previously invoked. *Conner*, 344 Wis. 2d 233, ¶16 (citing *Edwards v. Arizona*, 451 U.S. 477, 486 n.9 (1981)).

The sufficiency of the invocation of right to counsel–as well as whether the suspect initiated further communication with police, and whether he knowingly, intelligently, and voluntarily waived his Fifth Amendment *Miranda* right to counsel–are all reviewed under the same two-pronged standard: this court will uphold the trial court's findings of fact unless they are clearly erroneous, but it independently reviews the application of constitutional principles to those facts. *Conner*, 344 Wis. 2d 233, ¶17 (citing *State v. Jennings*, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142; *State v. Hambly*, 2008 WI 10, ¶71, 307 Wis. 2d 98, 745 N.W.2d 48).

B. The circuit court correctly found that Keding unequivocally invoked his right to counsel.

"In order to invoke the Fifth Amendment right to counsel, a suspect is required to 'articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *State v. Hampton*, 2010 WI App 169, ¶29, 330 Wis. 2d 531, 793 N.W.2d 901 (citing *State v. Jennings*, 2002 WI 44, ¶30, 252 Wis. 2d 228, 647 N.W.2d 142).

The request must be unambiguous; a mere reference to an attorney is not sufficient to invoke the right. *Hampton*, 330 Wis. 2d 531, ¶29. Conditional or equivocal statements such as "maybe I should talk to a lawyer," or a suspect's query as to whether she should have a lawyer during questioning, are not clear and unequivocal requests for counsel. *Id.*; *State v. Ward*, 2009 WI 60, ¶43, 318 Wis. 2d 301, 767 N.W.2d 236.

Rather, a suspect must actually request an attorney to validly invoke the Fifth Amendment *Miranda* right to counsel. *See Hampton*, 330 Wis. 2d 531, ¶29 (citing *Davis v. United States*, 512 U.S. 452, 461 (1994)); *See also, State v. Conner*, 2012 WI App 105, 344 Wis. 2d 233, 821 N.W.2d 267 (suspect's statement, "I want to consult with a lawyer and talk to the lawyer, ok?" was clear and unequivocal request for attorney). A successful invocation of the right

requires a suspect to "'articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *State v. Hampton*, 2010 WI App 169, ¶29, 330 Wis. 2d 531, 793 N.W.2d 901 (citing *State v. Jennings*, 2002 WI 44, ¶30, 252 Wis. 2d 228, 647 N.W.2d 142).

Here, Keding's request is neither ambiguous, nor is it conditioned on the occurrence of some hypothetical future event. It cannot be reasonably disputed that Keding made an unambiguous, clear, and unequivocal request for counsel: "Seeing as how I got arrested, I'm going to need a lawyer." (R1.11.1:31:50–1:31:55).

Moreover, Officer Abel and Officer Scheppler both understood Keding's request to be an invocation of the right to counsel. During cross examination, Officer Abel stated that it was her understanding that Keding had invoked his right to counsel at the time he made the statement. (R1.21:9; App. 24). Officer Scheppler stated that he was aware that Keding had invoked his right to an attorney when he reinitiated contact after seeing Keding throw the tissue in the wastebasket. (R1.21:15; App. 29).

As to when the suspect may invoke the Fifth Amendment *Miranda* right to counsel, the Wisconsin Supreme Court has upheld an in-custody suspect's request for counsel even when it was made prior to police interrogation and before *Miranda*

warnings were provided. *State v. Hambly*, 2008 WI 10, ¶¶3, 43-44, 307 Wis. 2d 98, 745 N.W.2d 48.

In *Hambly*, the defendant successfully argued that he invoked his right to counsel by requesting a lawyer after he was taken into custody but before he was interrogated. *Hambly*, 307 Wis. 2d 98, ¶2. The court found that law enforcement had made it clear to the suspect that the officer intended to question them. *Id.*, ¶35. The court further found that it was reasonable for the suspect to conclude that the officer would continue to attempt to interrogate him in a custodial setting should he refuse to speak. *Id.*, ¶35. Further, the court found that at the time the request for counsel was made, the discussion between the suspect and law enforcement centered on whether the defendant would permit the officer to interview him. *Id.*, ¶36.

The *Hambly* court found that these circumstances of impending interrogation demonstrated that the defendant, unlike the suspects in several cases relied upon by the State, had "expressed a desire for the assistance of an attorney '*in dealing with custodial interrogation by the police*'". *Id.*, ¶37 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 179, (1991) emphasis in original). "Because the defendant was in custody and had a reasonable belief that interrogation was imminent or impending, his request for counsel was an effective invocation of his Fifth Amendment *Miranda* right to counsel under both the 'anytime in custody' standard and the

'imminent or impending interrogation' temporal standard[5]." *Id.*, ¶43.

The circumstances in this case, like those in *Hambly*, demonstrate that Keding invoked his right to counsel to assist with custodial interrogation by the police. As in *Hambly*, Keding had a reasonable belief that interrogation was imminent or impending when he requested counsel. Immediately prior to Keding's request for counsel, Officer Abel asked Keding whether he would be willing to answer questions:

> OFFICER ABLE: [B]ecause you're in custody, I'd have to read you your *Miranda* rights. Do you think you'd be willing to answer questions or are you thinking no already?

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[5] The *Hambly* court was evenly divided on whether it was necessary for the court to adopt a temporal standard to determine whether a suspect in custody had effectively invoked the right to counsel. *Hambly*., 307 Wis. 2d 98, ¶¶4, 32. Three justices concluded that a suspect could effectively invoke the right to counsel as long as the suspect was in custody, and the suspect made an unequivocal request to speak with an attorney, even if the request was made before interrogation was imminent or impending (the so-called "anytime in custody" temporal standard). *Id.* The advocates of the "anytime in custody" standard concluded that adopting a temporal requirement of "impending or imminent interrogation" would contravene Miranda. *Id.* The remaining three justices (Justice Ziegler did not participate), including the author of the opinion, concluded that it was not necessary to choose between the "anytime in custody" standard and the "imminent or impending interrogation" standard, because the defendant's request for an attorney satisfied both standards. *Id.*, ¶¶5, 33.

> KEDING: Seeing as how I got arrested, I'm going to need a lawyer.

(R1.11.1:31:33–1:31:55).

The circuit court, thus, correctly determined that "[Keding] invoked his right to an attorney and that there could be no more interrogation after that time… ." (R1.21:21; App. 36). But the court erred in allowing continued questioning, violating the rule in *Edwards*: "'[A]n accused…having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *State v. Conner*, 344 Wis. 2d 233, ¶16 (quoting *Edwards v. Arizona*, 451 U.S. 477, 784-85 (1981)).

C. The circuit court applied the wrong standard in determining the admissibility of Keding's statements, impermissibly shifting the burden of proof onto the defense.

Here, the circuit court erred when it determined that despite Keding's valid invocation of counsel—and the court's statement "that there could be no more interrogation after that time"—Keding's responses to Officer Scheppler's questions were nevertheless admissible at trial because they were voluntary statements. The court found the statements voluntary because they were "not elicited by the questioning of the officer." (R1.21:21-22; App. 36-37). The circuit

court cited no authority for its determination, which contravenes the rule in *Edwards*.

The court applied the wrong standard in considering the voluntariness of his statements. "[O]nce a defendant has invoked the right to counsel, police interrogation must cease unless the accused initiates 'further communication, exchanges or conversations with the police' after the right has been invoked." *State v. Turner*, 136 Wis. 2d 333, 346, 401 N.W.2d 827 (1987) (citing *Edwards v. Arizona*, 45 U.S. at 484-85). However, "[e]ven after a suspect in custody asks to speak with a lawyer, thereby requiring that 'all interrogation must cease until a lawyer is present,' a suspect may waive his or her Fifth Amendment *Miranda* right to counsel." *State v. Hampton*, 2010 WI App 169, ¶40, 330 Wis. 2d 531, 793 N.W.2d 901 (citing *State v. Hambly*, 2008 WI 10, ¶67, 307 Wis. 2d 98, 745 N.W.2d 48)). The burden is on the State to demonstrate that the suspect initiated further communication with the police *and* the suspect's subsequent waiver was knowing, intelligent, and voluntary. *Id*. (citing *Hambly*, 307 Wis. 2d 98, ¶¶68-70).

There are two applicable questions that the circuit court needed to ask after finding that Keding invoked his right to counsel. The first was: Did Keding initiate further contact with law enforcement after he invoked his right to counsel? The second was: If so, did Keding knowingly, intelligently and voluntarily waive his right to counsel a second time. *Hambly*, 307 Wis. 2d 98, ¶¶69-70.

1. Keding did not initiate contact with Officer Scheppler by throwing a tissue into the trash therefore Officer Scheppler was precluded from further questioning Keding.

Here, under either standard established in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), discussed below, Keding did not initiate further communication with the police after he invoked his right to counsel.

In *Bradshaw*, a four-justice plurality held that questions or statements that, under the totality of the circumstances, "evinced a willingness and a desire for a generalized discussion about the investigation" were sufficient to constitute "initiation." *Bradshaw*, 462 U.S. at 1045–46. Those relating to routine incidents of the custodial relationship," however, were not. *Id*. The four-justice dissent supplied its own test, which focused on a suspect's communication or dialogue with law enforcement about the subject matter of the criminal investigation. *Id*., 1053.

In *State v. Hambly*, 307 Wis. 2d 98, ¶75, the Wisconsin Supreme Court concluded that it was free to choose either test but that it need not make the choice under the facts of that case, as its analysis and conclusion would not differ under either test. *Id*.

Similarly, here, it is unlikely that the analysis and conclusion would yield different results under either test. It cannot be credibly argued that Keding's conduct after he invoked his right to counsel—standing up and throwing away a tissue—constitutes

further communication with law enforcement. There is nothing in the record to suggest that Keding intended to communicate anything to anyone by throwing his trash into the wastebasket. Therefore, Officer Scheppler was wrong to reinitiate questioning.

The undisputed record shows that Officer Scheppler interrogated Keding only moments after Keding had invoked the right to counsel, questioning Keding about the presence of cocaine residue on a tissue that he witnessed Keding throw away:

> OFFICER SCHEPPLER: What did you toss in there?
>
> KEDING: A Kleenex. It might have some residue for you.
>
> OFFICER SCHEPPLER: Alright. [Approximately 40 seconds pass.] So, you were saying some residue might be on the Kleenex or what?
>
> KEDING: In the snot. There's going to be a little cocaine in there.
>
> OFFICER SCHEPPLER: Some cocaine?
>
> KEDING: Yeah, I did some at the bar. I forgot about it… ."

(R1.11.1:32:35–1:32:45; 1:33:23–1:33:37).

In *State v. Hambly*, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48, after finding that the defendant had effectively invoked his right to counsel, the court then looked to whether the subsequent interaction between the defendant and a police officer constituted interrogation. *Hambly*, 307 Wis. 2d 98, ¶¶44-45. The *Hambly* court looked to *Rhode Island v. Innis*, 446 U.S. 291 (1980), where the United States Supreme Court held that interrogation under *Miranda* refers to express questioning, as well as "the functional equivalent of express questioning." *Hambly*, 307 Wis. 2d 98, ¶46 (citing *Rhode Island v. Innis*, 446 U.S. at 301).

Express questioning, however, does not encompass every inquiry directed at the suspect; rather, it covers only questions "designed to elicit incriminatory admissions." *State v. Harris*, 2017 WI 31, ¶15, 374 Wis. 2d 271, 89 N.W.2d 663 (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 602, n.14, (1990)). Similarly, the functional equivalent of express questioning means "'any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response.'" *Hambly*, 307 Wis. 2d 98, ¶46 (citing *Rhode Island v. Innis*, 446 U.S. at 301).

Thus, "[i]t is the nature of the information the question is trying to reach…that determines whether it is inquisitorial. If that information has no potential to incriminate the suspect, the question requires no

Miranda warnings." *Harris*, 374 Wis. 2d 271, ¶9 (citing *Doe v. United States*, 487 U.S. 201, 211 (1988)).

Lastly, the Wisconsin Supreme Court has stated its agreement that "a court should be wary of viewing a suspect's every statement or question as an invitation to interrogation." *Hambly*, 307 Wis. 2d 98, ¶99.

Here, Officer Scheppler asked Keding three direct questions related to the possession charge at issue in this case. First, after seeing Keding throw something into the trash, he asked Keding to identify what it was that he had just thrown away. When Keding responded that it was a Kleenex that "might have some residue," Officer Scheppler followed up with another direct question: "So, you were saying some residue might be on the Kleenex or what?" Keding then made an admission, stating that there would be a little cocaine "in the snot" on the Kleenex. Officer Scheppler then repeated Keding's admission back to him in the form of a question: "Some cocaine?" Keding then made another admission, stating that he had done some cocaine earlier that night at the bar. (R1.11.1:32:35–1:32:45; 1:33:23–1:33:37).

Officer Scheppler's second and third questions ("So, you were saying some residue might be on the Kleenex or what?" and "Some cocaine?") were designed to elicit incriminating responses. Officer Scheppler acknowledged that he was aware that Keding had just invoked his right to counsel when he began questioning him about the tissue, its residue, and

Keding's admission regarding cocaine. (R1.21:15; App. 30). When asked on direct why he had repeated Keding's statements back to him in the form of questions, Officer Scheppler admitted that he did so because he was curious about what a test of the residue on the Kleenex would show. (R1.21:13-14; App. 28–29). Officer Scheppler admitted further on cross-examination that he was trying to have a conversation with Keding about the cocaine (R1.11:32:15), even though Officer Scheppler was well-aware that Keding was in custody following an arrest for possession of cocaine.

At no point did Keding initiate further communication with the police after invoking his right to counsel, neither by throwing away a tissue or by responding to the officer's direct questions. *See Conner*, 344 Wis. 2d 233, ¶28 (where the suspect's willingness to answer questions the morning after he had invoked his right to counsel did not establish that the suspect reinitiated contact with police). And because it was the police that initiated the subsequent encounter, in the absence of counsel and with no break in custody, Keding's "'statements are ***presumed involuntary and therefore inadmissible as substantive evidence at trial***…'" *State v. Cole*, 2008 WI App 178, ¶25, 315 Wis. 2d 75, 762 N.W.2d 711 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (emphasis added)). Thus, it was error for the circuit court to determine otherwise.

2. Even if Keding reinitiated contact, the State failed to meet its burden of proving by a preponderance of the evidence that Keding knowingly and voluntarily waived his right to counsel.

Even if this Court determines that Keding initiated further communication after invoking his right to counsel, the State must *still* prove a knowing and voluntary waiver before it can rely on Keding's statements in its case in chief. *Cole*, 315 Wis. 2d 75, ¶27. Because the undisputed record clearly shows that Keding was never provided with his *Miranda* rights, (R1.11.1:31:35–1:33:37; R1.21:9, 18, 21-22; App. 24, 33, 36–37), there is no basis upon which to find a valid waiver. *Id*. Without establishing a valid waiver, Keding's statements are inadmissible. *Id.*, ¶25.

"When the State seeks to introduce an accused's custodial statements into evidence, it has the burden of proving by a preponderance of the evidence that the defendant received and understood the *Miranda* warnings, and knowingly and intelligently waived the rights protected by the *Miranda* warnings." *Id.*, ¶27 (citing *State v. Jiles*, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798). "The State also has the burden of proving the statement was voluntary." *Id*.

To meet its burden, this Court has required the State to furnish evidence and establish a prima facie case for waiver and voluntariness. *State v. Cole*, 2008 WI App 178, ¶27, 315 Wis. 2d 75, 762 N.W.2d 711 (citing *State v. Santiago*, 206 Wis. 2d 3, 18-19,

556 N.W.2d 687 (1996)). If the evidence does not establish a prima facie case, the State does not meet its burden of persuasion. *Id*.

Here, the State did not make a prima facie case because, as argued, the circuit court applied the wrong standard and impermissibly shifted the burden of proof onto Keding to prove that his statements were inadmissible.

To establish a valid waiver of the Fifth Amendment *Miranda* right to counsel, the State must meet two criteria: first, the State has the burden to show as a preliminary matter that the suspect initiated further contact with the police. *Hambly*, 307 Wis. 2d 98, ¶¶68-69. With regard to this first requirement, the Wisconsin Supreme Court has stated that the criterion does not go toward the validity of the waiver but is instead "a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers." *Id*., ¶69 (internal citation omitted).

Second, the State has the burden to show that the suspect waived the right to counsel voluntarily, knowing and intelligently. *Id*., ¶70. "That is, the waiver of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege," a fact-specific inquiry unique to each case. *Id*. (internal citation omitted). For a *Miranda* waiver to be knowing and intelligent, it must have been made with ***a full awareness of both the nature of the***

right being abandoned and the consequences of the decision to abandon it. *Id*., ¶91 (citing *Santiago*, 206 Wis. 2d at 18-19 (emphasis added)).

If the defendant has initiated further communication, law enforcement may proceed with custodial interrogation ***if the accused again is given a Miranda warning and again waives his Miranda rights.***" *State v. Stevens*, 2012 WI 97, ¶52, 343 Wis. 2d 157, 822 N.W.2d 79 (citing *Bradshaw*, 462 U.S. at 1044) (emphasis added). Again, "[o]nce the right to counsel has been invoked, a waiver of that right is acceptable if and only if the suspect initiates communication with police." *Stevens*, 343 Wis. 2d 157, ¶53 (citing *Solem v. Stumes*, 465 U.S. 638, 644, 646 (1984)).

Here, it is undisputed that Keding was never informed of his *Miranda* rights. Without being informed of his rights, it cannot be said that Keding had "a full awareness of both the nature of the right being abandoned, and the consequences of the decision to abandon it." *See Hambly*, 307 Wis. 2d 88, ¶91; *Stevens*, 343 Wis. 2d 157, ¶52.

Moreover, the State *cannot* make a prima facie case on this record, where it is undisputed that Keding was never Mirandized. *See State v. Conner*, 2012 WI App 105, ¶¶26, 34, 344 Wis. 2d 233, 821 N.W.2d 267 (citing *State v. Harris*, 199 Wis. 2d 227, 250-51, 544 N.W.2d 545 (1996)).

Officer Abel confirmed that while she attempted to provide Keding with his *Miranda* rights, Keding invoked his right to counsel before she could do so. (R1.21:5, 9; R1.11.1:31:18–1:32:00; App. 20, 24). Officer Scheppler confirmed that he did not provide Keding with his *Miranda* rights before interrogating him about the tissue and its residue (or at any other point in the proceedings). (R1.21:15, 18; R1.11.1:32:00–1:33:32; App. 30, 33). This comports with the circuit court's finding—which is the bottom line in this case—the officers "failed in their duty to give *Miranda*." (R1.21:21; App. 36).

Because the State cannot establish that Keding validly waived his right to counsel, the circuit court was wrong in determining that his statements at the stationhouse were admissible. Rather than partially granting Keding's suppression motion, the circuit court should have granted it in full, and deprived the State of its ability to use those statements in its case in chief.

CONCLUSION

For the reasons above, Keding respectfully requests that this court reverse the circuit court's determination that Keding's stationhouse statements were admissible. Keding asks that this Court remand the cases with directions to grant Keding's suppression motion in full.

Dated this 17th day of January, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,663 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 17th day of January, 2023.

Signed:
Electronically signed by
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