STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2024AP1976-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

JEREMY A. SOBOTIK,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH V, THE HONORABLE PRESIDING J. ARTHUR MELVIN, III, TRIAL COURT CASE NO. 23-CT-160

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. FOR PURPOSES OF DETERMINING WHETHER MR. SOBOTIK'S RIGHTS WERE VIOLATED UNDER ARTICLE I, § 8 OF THE WISCONSIN CONSTITUTION, THE PREVAILING COMMON LAW DOES NOT REQUIRE THE FORMAL CUSTODY WHICH THE STATE SUPPOSES.

The State's lead rebuttal argument in this matter is that Mr. Sobotik was not "in custody" for purposes of determining whether his right to be free from self-incrimination under Article I, § 8 of the Wisconsin Constitution was violated. State's Response Brief, at pp. 6-8 [hereinafter "SRB"].[1] In proffering its reasoning, however, the State misapprehends the law.

More particularly, the State asserts that because there was no "custody" in this case, the lower court reached the correct conclusion. In support of its position, the State proffers:

> When determining the custody issue, the Court of Appeals indicated that relevant factors include the defendant's freedom to leave the scene and the purpose, place, and length of the interrogation. *State v. Leprich*, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991). More relevant factors outlined in *State v. Gruen*, 218 Wis. 2d 581, 582, 582 N.W.2d 728 (Ct. App. 1998) are,
>
> (1) whether the defendant was handcuffed;
> (2) whether a gun was drawn on the defendant;
> (3) whether a *Terry* frisk was performed;
> (4) the manner in which the defendant was restrained;
> (5) whether the defendant was moved to another location;
> (6) whether the questioning took place in a police vehicle; and
> (7) the number of police officers involved.

[1] The State has misnumbered the pages of its brief. The State begins numbering the pages of its brief on its second page with the notation that it is page "i," and then continues sequentially therefrom using lower case Roman numbers until it reaches its actual page five where it begins its Arabic sequence. The State's numbering format is contrary to § 809.19(8)(bm) which requires "**sequential [Arabic] numbering starting at '1' on the cover**." Wis. Stat. § 809.19(8)(bm) (2023-24)(emphasis added). Given this discrepancy, Mr. Sobotik will refer to specific pages of the State's brief not by the erroneous page numbering it employed, but rather, by the page's actual cardinal position if the cover of its brief had been treated as page one (1) as it should have been.

SRB at pp. 6-7. The State contends that because the foregoing factors are not present in Mr. Sobotik's case, he did not enjoy the right to be free from self-incrimination. However, the State's argument overlooks the fact that the same factors were **not** present in *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, yet the *Knapp* court still found that a violation of Knapp's rights had occurred. *Id.* ¶¶ 73, 83. The State has hoisted itself on its own petard because it forwards an argument which applies factors the *Knapp* court did **not** consider central to the outcome of its decision. Instead, the *Knapp* court focused on the detective's **intention** to "keep the lines of communication open" with Knapp when the detective interrogated him and seized physical evidence from his bedroom. *Id.* ¶¶ 15, 81-83.

Rather than addressing whether the elements of custody were present when Knapp was interrogated and his clothes seized, the *Knapp* court's decision focused on the detective's intentions. At the time Mr. Knapp's bloody clothing was seized and he was questioned, Mr. Knapp was in his *bedroom*, had *not* been handcuffed, *no* weapon had been drawn on him, he had *not* been frisked, he had *not* been restrained, he remained *in his home* when evidence was seized rather than being removed to another location, he was *not* questioned in a police vehicle, and only *one* officer was involved in his detention, yet the *Knapp* court found that his right to be free from self-incrimination had been violated. *Knapp*, 2017 WI 127, ¶¶ 7-8. If this laundry list of factors sounds familiar, it is because it is precisely the same list the State describes in its brief and uses to support its argument that Mr. Sobotik was not in custody, and therefore, there can be no violation of the *Knapp* holding. SRB at p.7. This is what renders the State's custody argument a *non sequitur*: If one adopts the State's reasoning, then because all the custody factors which it claims are absent in this case were also absent in *Knapp*, the *Knapp* court could not have reached the conclusion it did. The State's "logic" is thus fatally faulty because it is inconsistent with the facts underlying *Knapp*.

Instead of focusing on the custody factors to which the State draws attention, the *Knapp* court focused on the detective's conduct in interrogating Mr. Knapp and seizing his clothing, finding it "especially repugnant" because it was "intentional." *Knapp*, 2005 WI 127, ¶ 75 (internal quotation marks omitted; citation omitted). That is, the *Knapp* court recognized that "the physical evidence here was obtained as a direct result of an **intentional** violation of *Miranda*." *Id.* ¶ 83 (emphasis added).

Based upon this intentional violation of *Miranda*, the *Knapp* court emphatically admonished:

> It is not too much to expect law enforcement to respect the law and refrain from intentionally violating it. When law enforcement is encouraged to intentionally take unwarranted investigatory shortcuts to obtain convictions, the judicial process is systemically corrupted. To guard against this danger, fair play requires the players to play by the rules, especially those players who enforce the rules.

Knapp, 2005 WI 127, ¶ 81 (footnotes omitted).

Attention may now be turned to whether an intentional violation of the *Miranda* Rule occurred in Mr. Sobotik's. As Mr. Sobotik identified in his initial brief, the record irrefutably demonstrates that:

> Officer Bublitz testified that he was aware that Wisconsin's restricted controlled substance law did not require proof of impairment, but merely that marijuana was in Mr. Sobotik's system. R25 at 35:8-11. Moreover, Officer Bublitz freely admitted that it was ***after*** discovering marijuana in Mr. Sobotik's vehicle, he confronted Mr. Sobotik with a glass marijuana container he discovered during the search and questioned him about the timing of his marijuana use. R25 at 12:4-20; 31:22-24; 32:17-23. In addition to interrogating Mr. Sobotik about the timing of his marijuana use, Officer Bublitz also asked Mr. Sobotik how the marijuana got into his vehicle (R25 at 33:5-11); how frequently he smokes marijuana (R25 at 37:2-4); how much marijuana he smoked that day specifically (R25 at 37:5-6); whether the amount he smoked that day was a "normal" amount for him (R25 at 37:7-8); whether he "felt high at the moment" (R25 at 37:9-10); how much time had elapsed between his marijuana use and the time he drove (R25 at 37:11-14). Notably, every one of these questions was put to Mr. Sobotik ***after*** Officer Bublitz: (1) smelled an odor of marijuana on Mr. Sobotik; (2) observed an odor of marijuana emanating from the Sobotik vehicle; and (3) found the glass container containing marijuana in his vehicle. Since Officer Bublitz knew he did not need to establish impairment to arrest Mr. Sobotik once he found the marijuana in his vehicle and smelled it on his person, the entire interrogation which came thereafter was nothing more than the officer's deliberate effort to avoid *Mirandizing* Mr. Sobotik.

Defendant-Appellant's Initial Brief, Section I.B., at p.13.

The foregoing facts conspire to tell an interesting tale. Since Officer Bublitz knew that the controlled substances law did not require proof of impairment, and further, since he "immediately noticed an odor of marijuana coming from Mr. Sobotik"[2] and found a glass jar containing marijuana in his vehicle, there was no reasonable universe in which Mr. Sobotik was simply going to be allowed to be "on his way." It strains credulity to think that Officer Bublitz would overlook these multiple violations of the law and not arrest Mr. Sobotik. With this knowledge, *i.e.*, the knowledge that he would be taking Mr. Sobotik into custody, Officer Bublitz elected not to take the "high road" and *Mirandize* Mr. Sobotik before interrogating him, but rather, sought to circumvent *Miranda* by "question[ing] first, then giv[ing] the warnings." *Knapp*, 2005 WI 127, ¶ 44. This is exactly the type of conduct which evoked the *Knapp* court's consternation, and which the *Knapp* court chastened.

Nevertheless, the State offers a rebuke of Mr. Sobotik's contention that there has been a violation of the *Knapp* rule by attempting to draw a distinction between "the detective's intentions to violate *Miranda*" in *Knapp* rather than Officer Bublitz's mere "intention to arrest" Mr. Sobotik. SRB at p.7. This is a distinction without a difference as it is nothing more than a straw-man argument. Mr. Sobotik's point in this regard can be gleaned from positing a few rhetorical questions: How is an officer's conduct any less egregious than that censured in *Knapp* if the officer knows he will be taking a suspect into custody, but delays that very custody for the purpose of interrogating the individual without the benefit of first providing *Miranda* warnings? Is not an officer under these circumstances engaging in precisely the same conduct as the detective in *Knapp*, *i.e.*, making an effort to "keep the lines of communication open" based upon the fear that, if the person is *Mirandized*, the officer's questions will go unanswered? If one can agree that, under the factual scenario existing in the instant case, Mr. Sobotik's arrest was inevitable and inexorable, where is the harm in ensuring that he be made aware of his right to be free from self-incrimination? Are not the greater ends of justice served by informing an individual of his constitutional rights rather than seeking to carve out slight deviations and small encroachments thereon for the purpose of facilitating the the law enforcement officer's job?

[2] R25 at 23:24 to 24:1; 24:8-11.

Mr. Sobotik contends that the State's effort to rebut his argument by drawing an ephemeral distinction premised upon an "intention to arrest" rather than an "intention to circumvent *Miranda*" is nothing more than a wolf in sheep's clothing because the latter follows from the former. That is, an officer cannot have an "intention to circumvent *Miranda*" **unless** the officer first has an "intention to arrest" a suspect. In the absence of an intention to arrest, there can be no intention to circumvent *Miranda*. Since an intention to arrest is a precursor to a *Knapp* violation, the State's attempt to draw a distinction between the two misses the mark and should be rejected.

II. MR. SOBOTIK'S STATEMENTS WERE NOT VOLUNTARILY MADE.

The State's attention next turns to the alleged "voluntariness" of Mr. Sobotik's statements. SRB at pp. 8-10. Interestingly, the State's voluntariness argument is the *same* argument the State made in *Knapp*, and which was resoundingly rejected by the court. More specifically, in *Knapp* "[t]he State contend[ed] that . . . neither the Fifth Amendment nor *Miranda* require suppression of physical evidence derived from a **voluntary statement** given without *Miranda* warnings." *Knapp*, 2005 WI 127, ¶ 55 (emphasis added). In rebuffing the State's position, the Wisconsin Supreme Court noted that Knapp was arguing that "policy reasons" existed which justified departing from strict adherence to the federal interpretation of *Miranda* and instead merited a Wisconsin Constitution based approached—an approach which ultimately focused not on voluntariness, but rather, on the detective's intentional circumvention of *Miranda*. *Id*. ¶¶ 56, 81-83. In weighing the parties' positions against one another, the *Knapp* court summarily stated "[w]e agree with Knapp,"[3] and, for the remainder of its decision, did not concern itself with the State's "voluntariness" argument presumably because it found that "a cynical indifference to the state's obligations should not be judicial policy" when it comes to *Miranda*. *Id*. ¶ 69, quoting *Hoyer v. State*, 180 Wis. 407, 417, 193 N.W. 89 (1923).

Based upon the foregoing, it is the significance of the taint caused by Officer Bublitz's conduct which renders any "voluntariness" rebuttal moot. Just as the *Knapp* court rejected the State's voluntariness position, so too should this Court.

[3] *Knapp*, 2005 WI 127, ¶ 56.

Moreover, the State's position is premised upon what it characterizes as an "implicit[]" finding of voluntariness by the circuit court. SRB at p.8. Put in plainer terms than the State did, there was **no** express finding by the circuit court upon which it rejected Mr. Sobotik's argument that involved the "voluntariness" of his statements. The State's exploration of, and exposition on, the common law authority relating to what constitutes coercion for voluntariness purposes is irrelevant since Mr. Sobotik never proffered that he was *coerced* into giving the statements he did. Mr. Sobotik's position throughout the lower court's proceedings was that Officer Bublitz's interrogation violated the *Knapp* rule and nothing more. Thus understood, the State's foray into the law relating to voluntariness is a non-starter.

CONCLUSION

The State's failure to acknowledge that formal custody is no longer the *sine qua non* of establishing a violation of Article I, § 8 of the Wisconsin Constitution post the decision in *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, betrays the inherent flaw in its position, and therefore, its argument should be rejected and this Court should reverse the judgment of the circuit court and remand this case with directions to grant Mr. Sobotik's motion.

Dated this 25th day of February, 2025.

Respectfully submitted:

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Electronically signed by:
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CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,396 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 25th day of February, 2025.

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