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State of Wisconsin
Court of Appeals
District 1

State of Wisconsin,

Plaintiff-Respondent,

v. Case No. 2013AP1901

Eduardo Ivanez,

Defendant-Appellant.

Appellant's Supplemental Brief

Argument

I. The state failed to prove beyond a reasonable doubt that Ivanez was not impelled to testify by the erroneous admission of his confession to police.

On appeal of an "Anson-Harrison" finding is a question of constitutional fact. Thus, the court of appeals pays no deference to the conclusion of the circuit court. Rather, the court of appeals must review the entire record and make its own determination of constitutional fact.

Here, the record offers numerous reasons to believe that the erroneous admission of his confession impelled Ivanez to testify. Firstly, Ivanez moved to suppress the confession to police. This is nearly conclusive proof that Ivanez did not intend to testify at trial. If he succeeded in suppressing the confession, but then testified, the confession would have been spread before the jury on cross-examination. In his opening statement, Ivanez's attorney did not tell the jury that Ivanez would testify; and in closing argument the lawyer told the jury that the only reason Ivanez testified was because the confession only told half the story.

A. The standard of review

In, *State v. Anson*, 2005 WI 96, 282 Wis. 2d 629, 644-45, 698 N.W.2d 776, 784-85 the supreme court held that a *Harrison* review is limited to the record, that the parties may not introduce new evidence, and the judge may not rely upon his personal observations of the trial. Rather, the court must make findings of historical fact based on the record. From there, the court must determine whether, under those facts, the state has proved beyond a reasonable doubt that the defendant's testimony was not impelled by the erroneous admission of his confession.

Significantly, the court also discussed the standard of appellate review of Anson/Harrison findings. The court wrote:

> The . . . question is whether the State's introduction of Anson's illegally obtained confession "impelled" him to testify at trial. *Id.* at 224, 88 S.Ct. 2008. The purpose of this inquiry is to determine whether Anson's testimony was the "fruit" of the State's unconstitutional procurement and use of Anson's confession to the California authorities, *see id.* at 222, 88 S.Ct. 2008,[2] or whether the "testimony was obtained 'by means sufficiently distinguishable' from the underlying illegality 'to be purged of the primary taint.' " *Id.* at 226, 88 S.Ct. 2008 (quoting *Wong Sun,* 371 U.S. at 488, 83 S.Ct. 407).
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> 34 ¶ 18 The question of whether evidence is the fruit of a prior constitutional violation or whether "the evidence was sufficiently attenuated so as to be purged of the taint" is one of constitutional fact. *State v. Hajicek,* 2001 WI 3, ¶ 25 n. 7, 240 Wis.2d 349, 620 N.W.2d 781 (citing *State v. Anderson,* 165 Wis.2d 441, 447–48, 477 N.W.2d 277 (1991)). "When we review a question of constitutional fact, we adopt the circuit court's findings of historical fact, unless they are clearly erroneous, but we independently apply those facts to the constitutional standard." *State v. Tomlinson,* **785 2002 WI 91, ¶ 39, 254 Wis.2d 502, 648 N.W.2d 367.

Id.

In its practical application, though, this formulation of the standard of review proves to be exceedingly unhelpful.

For example, in this case, rather than making his own findings of fact, the circuit judge instead wholly adopted the state's proposed findings of fact. Those "findings of fact"

may be properly described as the state's cherry-picked catalogue of the trial testimony that supports the state's position that Ivanez was not impelled to testify.[1] Absent from the proposed findings is any of the testimony presented at trial that would suggest that Ivanez was impelled to testify. In other words, the findings adopted by the circuit judge tell only that half of the story that supports state's position.

On appeal of the judge's conclusion that Ivanez was not impelled to testify, then, is court of appeals limited to the written "findings of fact" signed by the judge; or may the court refer to the entire record? Certainly, the circuit judge ought not be able to, in effect, erase testimony from the record by not including that testimony as a "finding of fact".

How do we determine which are findings are findings of historical fact subject to the clearly erroneous standard? Where the review is limited to the record, the court may not receive any new evidence, and the judge may not rely upon his personal impressions, is there any logic to applying the "clearly erroneous" standard to any of the findings of fact? It seems that the appellate court is able to review the record as well as the circuit judge can.

Therefore, it is Ivanez's position that on appeal of the circuit court's Anson-Harrison finding, there are no findings of historical fact that are reviewed under the clearly erroneous standard. On appeal, Ivanez may refer to anything in the record. Whether those facts in the record establish beyond a reasonable doubt that Ivanez was not impelled to testify is a question of constitutional fact. The court of appeals pays no deference to the lower court on questions of constitutional fact.

B. A review of the record does not permit the conclusion that, beyond a reasonable doubt, Ivanez would have testified even if his statement had been suppressed.

As Ivanez set forth in greater detail in his brief before the circuit court, a review of the complete record does not permit the conclusion that, beyond a reasonable doubt, Ivanez would have testified even if the court had suppressed his statement.

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[1] The proposed findings of fact were drafted by the assistant district attorney. These "findings" were plainly written in an adversarial manner. The "findings" include none of the testimony in the record that would seem to suggest that Ivanez was, in fact, impelled to testify. Those facts were set forth in the defendant's proposed findings of fact.

Firstly, if Ivanez had intended to testify there was no reason to seek suppression of his statement to police. If the statement were suppressed, and Ivanez then testified, the confession to police would have been spread before the jury on cross-examination.

Secondly, in his opening statement defense counsel did not tell the jury that Ivanez would testify. In fact, defense counsel did not even mention self-defense. The theory of defense at that point was that the state could not prove intent to kill.

Finally, in his closing argument, defense counsel told the jury that the only reason Ivanez testified was because the confession introduced by the state only told "half the story."

For these reasons, the court of appeals should find as a matter of constitutional fact that the state has failed to prove beyond a reasonable doubt that Ivanez was not impelled to testify by the erroneous denial of his motion to suppress his statement.

Dated at Milwaukee, Wisconsin, this 6th day of November, 2014.

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Dated this 6th day of November, 2014:

Jeffrey W. Jensen