COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP285-CR **Cir. Ct. No. 2004CF93**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAWN HARRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Shawn Harris appeals from a judgment of conviction and an order denying his postconviction motion. We affirm.

¶2 Harris pled guilty to one count of attempted robbery by use of force. The complaint alleged that Harris and an acquaintance entered a residence with the intent to rob a marijuana dealer, and that Harris's acquaintance fatally shot Lyvar Knox during the incident.

¶3 Harris argues that he should be allowed to withdraw his plea because the sentencing court failed to provide the oral explanation of his bifurcated sentence that is required by WIS. STAT. § 973.01(8) (2003-04).[1] We conclude that even if the court failed to comply with that requirement, Harris has not established that plea withdrawal is the proper remedy. Whether this information was provided at sentencing has no bearing on whether the guilty plea itself was entered knowingly, voluntarily, and intelligently. Harris has not provided any clear explanation of why later events at sentencing affect his earlier guilty plea.

¶4 Harris argues that the circuit court erred in denying his motion to suppress evidence of oral admissions that investigating detectives reported Harris had made. Harris argues that the evidence should be suppressed because his oral statements were part of the polygraph examination, and therefore are not admissible.

¶5 Although statements made during polygraph testing are inadmissible, statements made in postpolygraph interviews may be admissible:

> While some prior precedent from this court and the court of appeals may not have clearly or perhaps even properly articulated the underlying rationale for excluding statements made during honesty testing, the underlying rationale is simply that our state legislature has generally

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> precluded such a scenario under the plain language of Wis. Stat. § 905.065. Wisconsin Stat. § 905.065(2) states, "[a] person has a privilege to refuse to disclose and to prevent another from disclosing any oral or written communications during or any results of an examination using an honesty testing device in which the person was the test subject."
>
> Therefore, the legislature has decided that statements made during honesty testing are generally excluded, but if those statements are given at an interview that is totally discrete from the honesty testing, under the factors articulated in this opinion, and the statement was given voluntarily, then the statement is admissible. However, if the statements and examination are not totally discrete events but instead are considered one event, then the statements must be excluded by virtue of Wis. Stat. § 905.065.

State v. Davis, 2008 WI 71, ¶¶44-45, ___ Wis. 2d ___, 751 N.W.2d 332 (footnotes omitted).

¶6 Further, under ***Davis***,

> [w]hether a statement is considered part of the honesty test or a totally discrete event is largely dependent upon whether the voice stress analysis is over at the time the statement is given and the defendant knows the analysis is over. To make this determination, the following factors should be weighed and considered: (1) whether the defendant was told the test was over; (2) whether any time passed between the analysis and the defendant's statement; (3) whether the officer conducting the analysis differed from the officer who took the statement; (4) whether the location where the analysis was conducted differed from where the statement was given; and (5) whether the voice stress analysis was referred to when obtaining a statement from the defendant.

Id., ¶23 (citation omitted). We use a "totality of the circumstances" approach. ***Id.***

¶7 The State incorrectly asserts that we review the circuit court's decision for erroneous exercise of discretion. The case relied on by the State for that proposition concerns admissibility of other-acts evidence, and has no bearing

on this issue. Instead, in determining whether a defendant's statement is an admissible postpolygraph one, we review the evidentiary and historical facts using the "clearly erroneous" test. ***Id.***, ¶18; ***State v. Greer***, 2003 WI App 112, ¶¶9, 13, 265 Wis. 2d 463, 666 N.W.2d 518.

¶8 Beyond that, the standard of review appears to be de novo. As quoted above, in ***Davis*** the supreme court recently clarified that the inadmissibility of statements made during polygraph exams arises from a statutory source. Therefore, in reviewing whether a later interview is sufficiently discrete from a polygraph exam to be admissible, we are determining whether the later interview meets a statutory standard. However, the ***Davis*** opinion, in describing the standard of review it would apply, states: "[T]he application of *constitutional principles* to evidentiary or historical facts is a question of law that we review de novo. Here, we review the voluntariness of the statements considering the principles of due process. In addition, statutory interpretation is also an issue of law, which we review de novo." ***Davis***, 2008 WI 71, ¶18 (emphasis added, citations omitted). In this case, we are neither applying constitutional principles nor interpreting a statute, but are instead applying a statute to the facts. However, because the supreme court appears to have used de novo review for this purpose in ***Davis***, we will do so in this case.

¶9 At Harris's evidentiary hearing, the court heard testimony from the detective who conducted the polygraph examination and then also conducted the later interview in which Harris made the statements at issue. The circuit court ruled that the later interview was sufficiently separate from the polygraph exam.

¶10 On appeal, Harris may be disputing one historical fact. He asserts that he was not told that the polygraph test was over. However, the portions of the

testimony he cites to support that assertion do not address that point. Instead, a different part of the testimony shows that Harris signed a form acknowledging that the polygraph exam was over, and that any answers he may give to questions after that point were not part of the polygraph exam.

¶11 Beyond that, Harris does not appear to dispute any historical facts. He argues that several of those facts support a conclusion that the later interview was not sufficiently separate. These include the fact that it was conducted by the same person who did the polygraph exam; that the later interview began with the detective asserting that Harris had not passed the polygraph exam; that only a half-hour had passed since Harris was disconnected from the polygraph machine; that the subject matter of the later interview remained the same as during the polygraph examination; and that Harris was not re-informed of his ***Miranda***[2] rights before the later interview.

¶12 The State, in response, argues that a half-hour is sufficient separation, and it further relies on the fact that the later interview was conducted in a different room; and that, before the half-hour break, Harris signed the form acknowledging that the polygraph exam was over, and that any answers he may give to questions after that point were not part of the polygraph exam.

¶13 We conclude the separation was sufficient. In ***Greer***, we concluded that there was sufficient separation when the defendant had been moved to a different room, signed an acknowledgement similar to the one described above, and one hour had passed after the machine portion of the polygraph exam. ***Greer***,

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

265 Wis. 2d 463, ¶14. We rejected the argument that a connection with the polygraph exam was created by the fact that the later interview began with reference to the defendant failing the polygraph exam, because that failure was already implicit in the continued custody and interrogation of the defendant. ***Id.***, ¶¶14-17.

¶14 The only potentially significant difference we see between ***Greer*** and Harris's case is that a shorter time passed: a half-hour as opposed to a full hour. We conclude this difference is not significant. Both time periods are sufficient, in the context of the other facts, to demonstrate to a person in custody that the polygraph portion of the interview is over, and that a return to the previous mode of interrogation has occurred. Furthermore, in ***Davis*** the supreme court held that there was a discrete interview when the gap was merely five minutes. ***Davis***, 2008 WI 71, ¶¶10-11, 31.

¶15 And, also similar to the present case, in ***Davis*** the court relied on the fact that the polygraph exam was over and that the suspect was taken to a different room. ***Id.***, ¶¶10, 30-33. Accordingly, based on this case law and the totality of the circumstances in this case, we conclude that the later interview with Harris was not part of the polygraph exam, and therefore the circuit court was correct in ruling that statements he made during that interview were admissible.

¶16 Harris's next argument is based on the same factual situation. He argues that his statements in the postpolygraph interview must be suppressed because he was not again given a ***Miranda*** warning at the end of the polygraph examination or at the start of the interview a half-hour later. The core of his argument appears to be that a new ***Miranda*** warning was necessary at one of those points because, at the postpolygraph interview, any statements Harris made "were

no longer protected by the exam and would become admissible." In other words, the portions of the ***Miranda*** warning that Harris is most concerned about are his right to remain silent and the fact that any statements might be used against him. He argues that a repeat of these warnings was necessary because the rules changed at the time of the transition from polygraph exam to postpolygraph interview. However, Harris cites no case law that squarely addresses the issue of a new ***Miranda*** warning for a postpolygraph interview.

¶17 In response, the State first argues that Harris "reaffirmed" his waiver of his rights at the end of the polygraph exam, and that this was sufficient to satisfy any requirement of new warnings. This argument fails because, as discussed below, the reaffirmation was retrospective only, referring back to Harris's rights during the polygraph exam itself.

¶18 The written form that the State claims was a reaffirmation is not in the record. Although it was introduced as an exhibit at the hearing, the exhibits were not provided to us as part of the appellate record. We do, however, have a transcript of the detective reading a portion of that form. The form is written mostly in the past tense. The key part of it begins by stating that the person is reaffirming his "above agreement" made earlier, which appears to be an agreement covering the terms of the polygraph exam. It further says that "I knowingly, intelligently, continued to waive all my rights," including ***Miranda*** rights, and that "I willingly made all statements that I did make."

¶19 The form language then shifts to the future, advising the person that any questions asked after that time, and any answers given, are not part of the polygraph examination. However, as to future interviews, the form does not convey any ***Miranda*** rights or ask the person to affirm his understanding of them.

Nor does it point out that the legal rules of admissibility of statements after that point would change. Therefore, this form cannot be considered a ***Miranda*** warning, nor a reaffirmation of understanding those rights, as to the interview that followed.

¶20 The State's second response argument is that a defendant need not be informed again of his rights if it is clear that he knew them. In support of this assertion, the State cites two cases from 1975. However, neither of those cases concerned polygraph or postpolygraph interviews. They stand for nothing more than the proposition that "where the ***Miranda*** rights were properly administered and where there was then a break in the interrogation, under the totality of the circumstances, it was not necessary to re-administer the ***Miranda*** warnings when it was undisputed that the defendant understood them." ***Grennier v. State***, 70 Wis. 2d 204, 213, 234 N.W.2d 316 (1975). That holding does not squarely address Harris's contention that a new warning was required because there was not merely a "break in the interrogation," but that the applicable rules of admissibility changed at the end of the polygraph exam.

¶21 Although we have rejected the State's arguments, we also reject Harris's argument, for a reason not argued by the State. The core of his argument is that he should have been informed that the rules of admissibility of his statements changed between the polygraph exam, during which his statements were not admissible, and the postpolygraph interview, where his statements were admissible. The problem with this argument is factual: the record shows that Harris was never informed that his statements during the polygraph exam would be protected. The detective who administered the polygraph exam testified that before conducting the exam he orally went through a form with Harris that reaffirmed Harris's understanding of his ***Miranda*** rights, one by one. According

to the detective, he asked: "You realize you have the right to remain silent and that anything you say can and will be used against you in a court of law?" Harris answered "yes," according to the detective.

¶22 Therefore, the State established, without dispute at the hearing or now, that Harris was unaware there was a change in the rules of admissibility between the polygraph exam and the postpolygraph interview. With no evidence that Harris believed there was a change, there is no basis to conclude that a new warning was required to prevent him from mistakenly believing that the protected status of the polygraph exam was still in effect.

¶23 Harris does not argue that the various ***Miranda*** warnings he received earlier were deficient in some respect, or that the half-hour break, by itself, was sufficient to require new warnings. Accordingly, we conclude that the State established that Harris's statements were made with sufficient ***Miranda*** warnings.

¶24 Harris next argues that the court erred by denying his claim that his trial counsel was ineffective at sentencing. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

¶25 Neither party's briefs focus clearly on the only question that is before us with respect to this claim: whether the circuit court properly denied the

claim without first holding an evidentiary hearing.[3] A claim of ineffective assistance cannot be granted without an evidentiary hearing. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.").

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

¶26 Harris's postconviction motion alleged that counsel was ineffective by not presenting certain information at sentencing that Harris asserts would have been mitigating. The information includes alleged facts about his family relations, dyslexia, employment, and feelings about violence. We conclude that Harris failed to sufficiently allege prejudice as to these items. In denying the postconviction motion, the circuit court stated that even if these factors had been

[3] For example, Harris's brief arrives at that question only after several pages of argument that address the claim without reference to the legal principles that control denial without a hearing. Harris then cites applicable law, but follows it with the peculiar and erroneous assertion that, even though Harris was entitled to an evidentiary hearing, "the court need not have conducted a hearing because the absence of the facts in and of themselves established the deficiencies at sentencing and in [trial counsel's] performance." Similarly, the State first argues that Harris failed to "prove" ineffective assistance of counsel, which is obviously true, since no hearing was held at which proof could be presented. The State eventually arrives at the relevant question, and cites applicable case law, but erroneously asserts that denial of a motion without an evidentiary hearing is a discretionary decision that we review with deference.

presented at sentencing, they would not have affected the court's sentence, given the "egregiousness" of the crime and the read-in, and given the fact that the court's primary goal in sentencing was punishment, rather than considerations of the defendant's character.

¶27 Harris's postconviction motion also claimed that his attorney should have presented as a mitigating factor that Harris looked for a telephone to call help for the victim. The purpose of this would have been to counter the court's statement that there were no mitigating factors present. On this point, Harris failed to sufficiently allege deficient performance. He did not explain what question his attorney should have asked him to elicit this information.

¶28 As to sentencing, Harris argues that the court's explanation of its sentence was inadequate. The court imposed a term of five years' initial confinement and two years and six months of extended supervision. This was the maximum available term. The court's explanation was adequate. The court noted the severity of the crime, during which a man was killed. The court noted that, as a read-in offense, Harris had tried to talk a witness out of testifying. The court noted the need to protect the public, given Harris's prior record and the fact he was on probation at the time of this crime. The court said it saw few mitigating factors, and it noted the "sweetheart" plea deal the State had agreed to. Accordingly, the court concluded that "the only appropriate sentence here is the maximum," and that it must be consecutive because "the crime is too egregious."

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.