COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2751 **Cir. Ct. No. 2006JV14**

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

IN THE INTEREST OF BRENT S., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

BRENT S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Brent S. appeals an order adjudicating him delinquent for manufacturing and delivering less then 200 grams of THC with

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

intent to deliver or distribute on or near a school bus. Brent also appeals an order denying his postdisposition motion. Brent argues his confession should have been suppressed because he was in custody and not given ***Miranda***[2] warnings and because his statement was involuntary. He also alleges ineffective assistance of counsel. We disagree and affirm the orders.

BACKGROUND

¶2 A March 8, 2006 petition alleged Brent was delinquent on three different grounds relating to the manufacture, delivery, and possession of THC and the possession of drug paraphernalia. Brent denied the allegations and filed a motion to suppress his statement to police.

¶3 At the suppression hearing Detective Steve Bowers testified that he was called by officer Richard Burghaus to assist in a drug investigation at Medford Middle School. Bowers stated he arrived at principal Al Leonard's office at approximately 11:30 a.m., and observed Leonard asking Brent questions regarding drug activity at the school. Bowers stated he turned on a tape recorder when he entered the office. He initially interviewed Brent in the principal's office for approximately one hour. Brent was then sent out of the room while the officers spoke to another student. Bowers stated he then interviewed a third student while Burghaus interviewed Brent.

¶4 Burghaus testified that at 1:59 p.m. he went with Brent into a conference room adjoining the principal's office. Burghaus took a statement from Brent, and the interview lasted approximately ten minutes. Burghaus testified he

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

was unaware Brent suffered from Attention Deficit Hyperactivity Disorder. The court asked Burghaus if he had prior contact with Brent. Burghaus said he taught a Drug Abuse Resistance Education class when Brent was in the fifth grade, and Brent was in the class. Burghaus stated he never saw any indication that Brent was incapable of understanding standard conversation.

¶5 The trial court concluded that Brent was not in custody noting, "it was not law enforcement that had him come to the principal's office. The principal had done that. It is not law enforcement that made him remain there." The court also concluded Brent's statement was voluntary:

> Now, there's no question that law enforcement officers when they were talking with Brent were pretty hard-nosed, and they were confrontational, and they were basically ... unyielding ... in their refusal to accept what he was saying.
>
> In fact, they were confrontational to the point where they were telling him where they thought he was lying, and eventually, [Brent] did make statements. When confronted with those statements, law enforcement confronted him right back, and he kept changing his statement.
>
> There was questioning of the officers during the course of their testimony whether or not Brent was crying, and I don't find any evidence that Brent was crying.

The court then denied the suppression motion.

¶6 On January 16, 2007, Brent entered an admission to manufacturing and delivering less then 200 grams of THC with intent to deliver or distribute on or near a school bus. The other two counts were dismissed.

¶7 Brent subsequently moved the trial court to allow him to withdraw his admission or, in the alternative, to reconsider its decision to deny his suppression motion. He argued the trial court did not have sufficient evidence to decide the suppression motion due to the ineffective assistance of trial counsel

because trial counsel did not call Brent or any other witnesses at the suppression motion.

¶8 At the postdisposition hearing, trial counsel testified he made a strategic decision not to call Brent to testify because Brent's version of some events was contradictory to the school principal's. The trial court concluded Brent's counsel was not ineffective. The court also concluded Brent did not present a sufficient legal reason to revisit the suppression hearing issues stating, "He wants a do-over because he doesn't like the result. That's not the way the law works." The trial court denied both postdisposition motions.

DISCUSSION

I. Suppression

¶9 Brent argues that the court erred in denying his motion to reconsider the denial of his suppression motion. He bases much of his argument on additional evidence he presented at the reconsideration hearing. However, he makes no argument that the evidence was unavailable or unknown at the time of the original motion hearing. And he presents no authority for the circuit court or this court to consider evidence from a reconsideration hearing. A litigant is entitled to a hearing on a motion. However, a litigant is not entitled to successive hearings simply to add more evidence to the record. As the trial court correctly said, "He wants a do-over because he doesn't like the result. That's not the way the law works." Therefore, we confine our review to the original evidence.

¶10 Suppression issues involve mixed questions of fact and law. We will uphold the trial court's findings of historical fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2); *see also* ***State v. Phillips***, 218 Wis. 2d

180, 195, 577 N.W.2d 794 (1998). We will not overturn the trial court's credibility assessments unless patently incredible. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Applying those facts to the constitutional principles is a question of law we review independently. *See* ***Phillips***, 218 Wis. 2d at 195.

A. Custody

¶11 Brent first argues his statement should have been suppressed because he was in custody when officers interrogated him and he was not advised of his ***Miranda*** rights. To determine whether Brent was in custody, we examine whether a reasonable person would have considered himself or herself in custody. ***State v. Swanson***, 164 Wis. 2d 437, 446-47, 475 N.W.2d 148 (1991). A suspect is in custody when the "suspect's freedom of action is curtailed 'to a degree associated with formal arrest.'" ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1980). We consider the totality of the circumstances including the suspect's freedom to leave, the purpose, place and length of the interrogation, and the degree of restraint. ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

¶12 We agree with the trial court's conclusion that Brent was not in custody. To begin with, the interviews took place at school, not at a police station. The initial interview was in the principal's office. The officers had no part in Brent coming to the office; he was already there talking to the principal when the officers arrived. The initial interview lasted approximately one hour. According to Bowers' testimony, following the initial interview, Brent left the interview room while another student was interviewed. After that, Burghaus went into a conference room with Brent and took Brent's statement. That contact lasted only about ten minutes. Brent was not handcuffed at any time during the interviews.

Though he may not have been free to leave the school, any restriction resulted from the nature of the school environment and not police action. Brent's freedom, simply put, was not restricted "to a degree associated with formal arrest." ***Berkemer***, 468 U.S. at 440. In short, Brent was not in custody, and therefore ***Miranda*** warnings were not required.

B. Voluntariness of the Confession

¶13 A statement is not involuntary unless obtained by coercive police activity. ***State v. Kunkel***, 137 Wis. 2d 172, 191, 404 N.W.2d 69 (Ct. App. 1987). Our inquiry focuses on whether the police used actual coercion or improper police practices to compel the statement. ***State v. Albrecht***, 184 Wis. 2d 287, 301, 516 N.W.2d 776 (Ct. App. 1994).

¶14 The initial interview here lasted approximately one hour. That was followed by a period of time when Brent was not with the officers. Then Burghaus met with Brent for approximately ten minutes and took Brent's statement. The trial court noted that while the officers were "hard-nosed," they did not make any threats or promises and there was no unlawful duress or coercion. We agree.

II. Ineffective Assistance of Counsel

¶15 Claims of ineffective assistance are reviewed in a two-step process. ***State v. Johnson***, 2004 WI 94, ¶11, 273 Wis. 2d 626, 681 N.W.2d 901. First, we will uphold the circuit court's findings of historical fact unless clearly erroneous. ***State v. Wright***, 2003 WI App 252, ¶30, 268 Wis. 2d 694, 673 N.W.2d 386. Second, whether those facts amount to ineffective assistance is a question of law reviewed without deference to the circuit court. ***Id.***

¶16 To prove ineffective assistance, a defendant must show that "counsel's actions or inaction constituted deficient performance and that the deficiency caused him prejudice." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Because a defendant must establish both deficient performance and prejudice, we reject a claim of ineffective assistance of counsel if either one of these components is not established. *See* ***Johnson***, 273 Wis. 2d 626, ¶11.

¶17 Counsel's performance is deficient only if counsel's actions fall outside the "wide range of reasonable professional assistance." ***Strickland v. Washington***, 466 U.S. 668, 689 (1984). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" as deficient. ***Id.*** at 690. In reviewing counsel's performance, we give great deference to the attorney, making every effort to avoid determinations of ineffectiveness based on hindsight. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The defendant must overcome the "strong presumption that counsel acted reasonably within professional norms." ***Id.***

¶18 Brent first argues that trial counsel was deficient for failing to call Brent to testify at the suppression hearing. At the postdisposition motion hearing, trial counsel testified he had strategic reasons for not calling Brent. He explained that he reviewed the recording of the interview and the transcript of Brent's expulsion hearing and personally spoke with Brent. He noted inconsistencies between what Brent told him and what Brent said in the recorded interview and what principal Leonard said at the expulsion hearing. Thus, trial counsel reviewed the facts and made a strategic decision. We will not second guess counsel's choice. Counsel was not deficient for deciding not to call Brent at the suppression hearing.

¶19 Next, Brent argues counsel was deficient for failing to call principal Leonard as a witness at the suppression hearing. To preserve a claim of ineffective assistance of counsel, a defendant must ask counsel to explain his actions so this court can determine whether counsel's actions resulted from incompetence or deliberate trial strategies. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). At the postdisposition motion hearing, the focus was on counsel's decision not to call Brent to testify. Brent did not ask counsel why he failed to call Leonard. Absent such questioning, we will not conclude counsel's representation was deficient. ***Id.***

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.