

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP2809-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF80

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. LONKOSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County:
MARK A. MANGERTSON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Matthew Lonkoski appeals a judgment convicting him of child abuse-recklessly causing great harm, and neglecting a child resulting in the child's death. After the circuit court denied Lonkoski's motion to suppress

statements he made to police, Lonkoski pled guilty to these offenses and, pursuant to WIS. STAT. § 971.31(10) (2009-10),¹ he challenges the order denying suppression. He argues that questioning continued after he unambiguously asked for an attorney and that all statements he made after that request should have been suppressed. Because we conclude that Lonkoski initiated the further conversation with police, effectively waiving his right to counsel, we reject his argument and affirm the judgment.

¶2 Lonkoski's ten-month-old daughter, Peyton, was found dead by her parents, Lonkoski and Amanda Bodoh. The autopsy determined that Peyton's blood and urine contained a large amount of morphine and hydromorphone, resulting in her death. Detectives asked Bodoh to come to the sheriff's department for an interview. Lonkoski drove her to the interview and waited in the lobby while Bodoh was interviewed. After speaking with Bodoh the officers sent her to another room and brought Lonkoski into the interview room. Detective Sara Gardner and lieutenant Jim Wood interviewed Lonkoski. The interrogation was video-recorded.

¶3 Wood informed Lonkoski that he was not under arrest and stated that he closed the door to the interview room so other people could not hear the interview. Lonkoski indicated that he believed the officers were investigating rumors that Bodoh had suffocated the baby. The officers eventually informed Lonkoski that Peyton died of an overdose of morphine. When Wood noted that Lonkoski had said he was "sorry" when they took Peyton away, Lonkoski

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

explained that he was “sorry for her passing away.” At that point the following conversation ensued:

Lt. Wood: There’s, there’s more to it. And that’s, and again Matt, it this is a very hard thing. A hard thing for you as a, as a pop, and, and, this is your baby, but you gotta, you got to dig deep inside yourself now. The autopsy knows what happened. We know what happened. What I need from you is I need you to look up and look in your heart and look up at Peyton and say, say okay, I can deal with it. I can, I can talk open

Mr. Lonkoski: Are you accusing me of giving my daughter morphine?

Det. Gardner: Matt, Matt, look at me. Every time you and I have talked, okay, and we go back a long way, all right, there’s been some rough stuff that you and I have dealt with

Mr. Lonkoski: I want a lawyer. I want a lawyer now. This is bullshit.

Lt. Wood: Okay.

Mr. Lonkoski: I would never do that to my kid, ever. I wasn’t even at the apartment at all except at night. Why are you guys accusing me?

Lt. Wood: I didn’t accuse you.

Det. Gardner: We were just asking.

Mr. Lonkoski: There is this is is is is is is is insane.

Lt. Wood: I have to stop talking to you though ‘cause you said you wanted a lawyer.

Mr. Lonkoski: Am I under arrest?

Lt. Wood: You are now.

Mr. Lonkoski: Then I’ll talk to you without a lawyer ... I, I don’t want to go to jail, I didn’t do anything to my daughter, I would not lie to you guys – this is in fact life or death.

Lt. Wood: Well, now you, now you complicate things.

Mr. Lonkoski: I just, I just want to leave here and go by my mom now because this is in- this is, this is insane.

Det. Gardner: Matt we can't, we can't talk to you just because you don't want to go to jail okay some things that we wanted to talk to you about were like Jim said – we know what happened to Peyton – we need to know a couple of the gaps to fill the gaps.

Mr. Lonkoski: All right

Det. Gardner: (Unintelligible).

Mr. Lonkoski: Ask those gaps.

Det. Gardner: That's what we want you to talk to us about.

Mr. Lonkoski: Ask those gaps.

Det. Gardner: But I don't want you to feel like we're accusing you.

Mr. Lonkoski: All right. I will calm down.

Det. Gardner: I don't – you don't have to talk to us – okay.

Mr. Lonkoski: Can can I can we go smoke a can I smoke a cigarette when we do this?

Lt. Wood: What we're gonna do is – I'm gonna come back and, and again you have to be careful what you say

Mr. Lonkoski: (Unintelligible).

Lt. Wood: If you want an attorney – you can have an attorney – we're gonna quit – what I'll do is I'll come back to you – go have a cigarette with Sara.

Mr. Lonkoski: Okay thank you.

Lt. Wood: Okay and I need to get more of the story.

Mr. Lonkoski: I will tell you everything I promise on my dead daughter's life and my (unintelligible) right now.

Lt. Wood: What I'm, what I'm gonna do is I'm gonna come back and I'll read you a *Miranda*²card which is I'll read you your rights

¶4 Lonkoski was eventually escorted from the room to smoke a cigarette and use the bathroom. When Lonkoski, Gardner and Wood returned to the room, Wood read Lonkoski his *Miranda* rights and Lonkoski agreed to answer further questions. Over approximately two additional hours of interview, Lonkoski made incriminating statements. He was again interrogated four days later and made more incriminating statements. Lonkoski sought suppression of all of these statements on the ground that, upon his request for an attorney, the interrogation had to cease and all subsequent statements were inadmissible. He contends that he was in custody for *Miranda* purposes at the time he requested counsel because his arrest was “imminent.” We need not decide whether Lonkoski properly invoked his right to counsel because he later initiated further conversation with the police, effectively waiving that right.

¶5 When a suspect invokes his right to counsel, “the interrogation must cease until an attorney is present.” *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). When an accused has invoked his right to counsel, validity of waiver of that right is not established by showing only that the accused responded to further police-initiated custodial interrogation even if he has been advised of his rights. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). However, further interrogation is permitted when the State shows that the accused, rather than the police, initiated further communication, exchanges or conversations and that, after initiating communication, the accused made a knowing, voluntary and intelligent waiver of

² *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

the right to counsel. *Id.* at 483-85; *State v. Hambly*, 2008 WI 10, ¶¶69-70, 308 Wis. 2d 98, 745 N.W.2d 48.

¶6 Lonkoski argues that his waiver of the right to counsel was not voluntary because it was brought about by continued interrogation and that the interrogation never ceased after he invoked his right to counsel. He contends that Wood’s statement that he was under arrest “now” was the functional equivalent of interrogation, meant to illicit an incriminating response and a waiver of the right to counsel. He compares Wood’s statements to those in *Collazo v. Estelle*, 940 F.2d 411, 413, (9th Cir. 1991), where, after the defendant requested counsel, one of the interrogating officers told him that things “might be worse” for him if he talked with a lawyer. The *Collazo* court held the statements inadmissible because the officer’s statement “attempted to impose a penalty” on the exercise of the defendant’s right to counsel. *Id.* at 417.

¶7 Contrary to Lonkoski’s argument, the transcript of the interrogation shows a clear break in the discussion after Lonkoski requested counsel. Wood specifically said “We’re gonna quit” and “I don’t want to talk to you at this point. Let’s take a little break.” They then took a cigarette and bathroom break before resuming the interview, creating a clear break in the interview process after Lonkoski invoked his right to counsel. When they returned from the breaks Wood asked, “And you are initiating that you want us to talk to you?” Lonkoski responded, “Yes.” Wood then read Lonkoski his *Miranda* rights.

¶8 After Lonkoski said he wanted a lawyer, neither Wood nor Gardner asked any further questions until Lonkoski reinitiated the interview. They merely explained that they were not accusing him. They explained that they could not continue the interview if the only motivation for Lonkoski to waive his right to

counsel was to avoid jail. The officers' declaratory statements did not call for any response. Their responses to his questions are not interrogation because they did not call for a response and were not designed to illicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980); *see also United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001); *United States v. Conley*, 156 F.3d 78, 83 (1st Cir. 1998); *United States v. Benton*, 996 F.2d 642, 643-44 (3rd Cir. 1993); *United States v. Taylor*, 985 F.2d 3, 6 (1st Cir. 1993); *United States v. Jackson*, 863 F.2d 1168, 1172 (4th Cir. 1989). The officers' statements that they must stop talking to Lonkoski because he invoked his right to counsel did not constitute the functional equivalent of interrogation. *See State v. Hampton*, 2010 WI App 169, 330 Wis. 2d 531, ¶¶10-14, 793 N.W.2d 901.

¶9 Lonkoski argues that the statement, "You are now" conveyed that he was under arrest *because* he asked for an attorney rather than merely after he asked for one. Wood's statement did not make that connection, and Gardner soon after disclaimed any linkage between Lonkoski's invocation of his right to counsel and his arrest when he explained, "we can't talk to you just because you don't want to go to jail," correcting any misimpression Lonkoski may have had about the linkage. The statement "You are now[]" merely placed Lonkoski under arrest, which does not constitute further interrogation. *Innis*, 446 U.S. at 301.

¶10 The record shows that Lonkoski voluntarily, knowingly and intelligently waived his *Miranda* rights. *See Hambly*, 308 Wis. 2d 98, ¶¶70, 91. Lonkoski reinitiated the dialog after having his *Miranda* rights read to him and after Gardner reiterated that Lonkoski did not have to talk to the detectives. The record shows no intimidation, coercion or deception and no threats, promises or concessions by the police related to Lonkoski's decision to proceed with or without counsel.

By the Court.—Judgment affirmed.

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

