COURT OF APPEALS
DECISION
DATED AND RELEASED

December 11, 1996

NOTICE

No. 95-3252-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. WIENKE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Washington County: JAMES B. SCHWALBACH, Judge. *Order affirmed; judgment reversed and cause remanded with directions*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Steven A. Wienke appeals from a judgment of conviction for twelve counts of first- and second-degree sexual assault of a child and one count of causing mental harm to a child. He also appeals from an order denying his postconviction motion for resentencing. The issues are whether Wienke's initial custodial statement should have been suppressed because police questioned him after he invoked his right to counsel, whether items seized from his residence should have been suppressed, and whether the trial court erroneously exercised sentencing discretion by considering the sentencing

desires of the victim. We conclude that sentencing discretion was properly exercised and affirm the order denying the postconviction motion. We also conclude that Wienke's statement was admissible. However, the trial court did not undertake the necessary fact-finding on whether valid consent was given for the search of Wienke's residence, and we reverse the judgment of conviction and remand that issue to the trial court for consideration.

On September 17, 1993, Rebecca M. appeared at the Washington County Sheriff's Department to report that Wienke had sexually assaulted her thirteen-year-old son, Ed M. Wienke accompanied Rebecca to the station and waited while a deputy spoke to Rebecca about the allegations. After Rebecca left, Wienke was taken into the interview room and advised that he could be arrested for first-degree sexual assault. The deputy read Wienke his ***Miranda*** warnings. Ultimately Wienke gave a statement confirming a pattern of sexual contact and sexual intercourse with Ed over several months. He provided the same information in a subsequent interview with a detective that evening.

Wienke was initially charged with a total of thirty-seven counts of sexual assault and one count of causing mental harm. After the denial of his motions to suppress statements and evidence, he entered a no contest plea to thirteen of the thirty-eight counts. The net effect of his sentence is that he must serve two consecutive fifteen-year prison terms and a ten-year consecutive period of probation.

The first issue is whether the trial court properly denied Wienke's motion to suppress his initial confession. Wienke argues that he unequivocally requested counsel and accordingly questioning should have ceased.

In ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981), the Supreme Court established a bright-line rule requiring law enforcement officers to immediately stop questioning once a suspect has invoked his or her right to counsel. In ***Davis v. United States***, 512 U.S. ___, 114 S. Ct. 2350 (1994), the Supreme Court resolved whether ambiguous statements or equivocal requests are sufficient to invoke the right to counsel and to obligate officials to cease questioning and clarify an equivocal request. *See* ***State v. Long***, 190 Wis.2d 386, 394, 526 N.W.2d 826, 829 (Ct. App. 1994). The Court held that the request for counsel must be sufficiently clear so that "a reasonable police officer in the

circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, ***Edwards*** does not require that the officers stop questioning the suspect." ***Davis***, 512 U.S. at ___, 114 S. Ct. at 2355. The validity of a confession made after a request for counsel involves questions of constitutional fact which are subject to independent appellate review and require an independent application of constitutional principles involved to the facts as found by the trial court. ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832-33 (1987).

The trial court found that Wienke asked whether there was an attorney located in the sheriff's department immediately available. It concluded that this statement was ambiguous as to whether the right to an attorney was being invoked. The court also found that after Wienke's question, the sheriff deputy explicitly, and on more than one occasion, told Wienke that no questions would be asked if he invoked his right to counsel. Wienke then asked for and was given time to think about whether to proceed. Upon further review of the ***Miranda*** rights, Wienke indicated that he would answer questions.

"A statement is equivocal when, in light of the circumstances, a reasonable police officer understands only that the suspect might be invoking the right to have counsel present." ***Long***, 190 Wis.2d at 397, 526 N.W.2d at 830. We agree with the trial court's ultimate conclusion that Wienke's inquiry about the immediate availability of an attorney was equivocal and did not invoke the right to counsel. "A request for counsel is a statement in which the person, `express[es] his desire to deal with the police only through counsel.'" ***State v. Jones***, 192 Wis.2d 78, 94, 532 N.W.2d 79, 85 (1995) (quoting ***Edwards***, 451 U.S. at 484). Wienke made no indication that he wanted to terminate police contact for the purpose of obtaining counsel.[1] His statement, at best, reflected indecision and uncertainty as to whether he might want an attorney. The deputy was not required to stop the interview. We affirm the trial court's refusal to suppress the confession because Wienke did not unequivocally invoke his right to counsel.

[1] Wienke argues that the fact that he spent the minutes waiting to be interviewed telephoning attorneys from the lobby of the sheriff's department is extremely relevant, if not dispositive, that he wanted an attorney present. There is no indication that the deputy was informed that Wienke had attempted to retain an attorney.

Wienke argues that if his statement was equivocal, under ***State v. Walkowiak***, 183 Wis.2d 478, 486-87, 515 N.W.2d 863, 867 (1994), the deputy had an obligation to resolve the ambiguity before questioning. In ***Davis***, the Supreme Court rejected a rule that would compel officers to ask clarifying questions when faced with an ambiguous request for counsel. ***Long***, 190 Wis.2d at 395-96, 526 N.W.2d at 829-30. Wisconsin courts have recognized that ***Davis*** and not ***Walkowiak*** represents the law on this issue. *See* ***Jones***, 192 Wis.2d at 111, 532 N.W.2d at 92 (Abrahamson, J., dissenting); ***Long***, 190 Wis.2d at 395-96 n.1, 526 N.W.2d at 829-30. Even if clarification was required before questioning, the deputy here gave Wienke an opportunity to clarify his request and made clear that no questions would be asked if Wienke sought counsel. Thus, the confession was admissible even under the standards of ***Walkowiak***.

We next turn to the sentencing issue and leave for final resolution that issue on which it is necessary to set aside the judgment of conviction. Wienke claims that his due process rights were violated by inclusion of the victim's sentencing recommendation in the presentence report and by the trial court's consideration of that recommendation. The presentence report stated that Ed thought an appropriate sentence was twenty years' imprisonment without parole and a lifetime of probation. At sentencing, the trial court's comments reflected consideration of Ed's thoughts on the appropriate sentence.[2]

Sentencing is a discretionary act and this court presumes that the sentencing court acted reasonably. ***State v. Scherreiks***, 153 Wis.2d 510, 517, 451 N.W.2d 759, 762 (Ct. App. 1989). Inherent in the sentencing court's exercise of discretion is a consideration of numerous factors. The primary ones to be considered are the gravity of the offense, the character of the offender, and the need to protect the public. ***Id.*** The court may consider a number of other

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[2] The trial court stated:

> I was thinking over the sentence I was going to impose in this matter the last few days, I noted that I think at least confirms [sic] to some respects with the desires of the victim who said he would like to have him incarcerated until about the age of 60, and the sentence I impose is going to place MR date somewhere out around 60. So to some extent the request of the victim has been heard by this court. The rest of the requests of the victim whether heard or not heard, I couldn't accomplish in any case.

factors as well. *See* ***State v. Harris***, 119 Wis.2d 612, 623-24, 350 N.W.2d 633, 639 (1984). The trial court may erroneously exercise its discretion if it places too much weight on any one factor in the face of contravening considerations. ***State v. Spears***, 147 Wis.2d 429, 446, 433 N.W.2d 595, 603 (Ct. App. 1988). However, the weight to be accorded to particular factors is solely for the trial court to determine. ***Id.***

State v. Johnson, 158 Wis.2d 458, 465, 463 N.W.2d 352, 356 (Ct. App. 1990), holds that the sentencing court may consider the comments and even the "wishes" of the victim. A sentencing court does not erroneously exercise its discretion when it considers statements and recommendations from victims. ***Id.*** at 466, 463 N.W.2d at 356.

Wienke attempts to distinguish ***Johnson*** by characterizing the victim's comment here as much more inflammatory than that offered in ***Johnson***.[3] He also contends that his case is different from ***Johnson*** because the trial court expressly referenced the victim's recommendation.[4] ***Johnson*** is not limited to the facts before it. Despite the factual differences Wienke musters, ***Johnson,*** and its holding that the trial court may consider the victim's sentencing recommendation, governs. Consideration of the victim's thoughts about sentencing is consistent with § 950.04(2m), STATS., and art. I, § 9m of the Wisconsin Constitution, both of which contemplate victim input at sentencing. *See* ***State v. Voss***, Nos. 95-1183-CR and 95-1184-CR, slip op. at 3 (Wis. Ct. App. Oct. 23, 1996) (ordered published Nov. 21, 1996). That input properly comes before the court either by the presentence report or victim allocution at sentencing.[5]

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[3] The reported comment of the victim was that Wienke "is a sick demented parasite without any consideration for children. He should never see another child again. If it were left up to me, this would have happened in Texas so he would get a turn at the electric chair. No way in hell would I wish this onto anyone but him. He is the only person in the world that I truly hate."

[4] The concurring opinion in ***State v. Johnson***, 158 Wis.2d 458, 471, 463 N.W.2d 352, 358 (Ct. App. 1990) (Sundby, J., concurring), indicates that "[t]here is no evidence that the trial court considered any of the victims' views as to the appropriate sentence for Johnson."

[5] Wienke argues that § 972.15(2m), STATS., does not permit the presentence report to include the victim's sentencing recommendation because it limits the contents of the report to the economic,

We reject Wienke's claim that the victim's emotionally-charged opinion in this case injected too much prejudice and passion into the sentencing proceeding. As recognized in ***Johnson***, the trial court does not rubber stamp a recommendation. ***Johnson***, 158 Wis.2d at 465, 463 N.W.2d at 355. The trial court is able to remove itself from the bias and personal interest possibly motivating a victim's statement. Although the trial court made reference to the victim's recommendation for a sentence and acknowledged that it was, to some extent, satisfying the victim's wishes, it was not the sole factor driving the sentence. The trial court considered other appropriate factors, including Wienke's culpability, his manipulation of a position of trust and his need for treatment. The sentence was a proper exercise of discretion.

The final issue is whether evidence seized from Wienke's residence should have been suppressed. A search warrant was issued September 21, 1993, which permitted police to seize from the residence Wienke shared with Rebecca and his car "photographs, clothing, written communications and other possible physical evidence belonging to Steven A. Wienke and/or E.M.W.[sic]" The trial court ruled that the warrant was invalid as overbroad. It suppressed all items seized from Wienke's car but refused to suppress items from the residence on the ground that Wienke lacked standing to object to a search of the home owned by Rebecca.[6]

The questions are whether Wienke had a reasonable and legitimate expectation of privacy and whether Rebecca's consent was valid. The

(..continued)

physical and psychological impact of the crime on the victim. This potential argument was raised in the concurring opinion in ***Johnson*** and implicitly rejected by the majority. ***Johnson***, 158 Wis.2d at 471-72, 463 N.W.2d at 358 (Sundby, J., concurring). We likewise reject the claim as inconsistent with the need to consider the rights and interests of the public in imposing a particular sentence. *See* ***Johnson***, 158 Wis.2d at 465, 463 N.W.2d at 356.

[6] Neither party delineates what items were seized from the house and the car. Rebecca had removed Wienke's possessions from the house and placed them in his car. Inventory sheets indicate that numerous items were seized and "secured" in the trunk of Wienke's car and we assume those were items found in the car. The inventory of items that could have been seized from either the car or house included: white mattress pad, orange bed sheet, pink top bed sheet, contents of wastepaper basket, a Charlotte Hornet's jacket, boxes of photos, personal papers and slides, men's clothing, briefcase, jewelry, binoculars, camera equipment and videotapes. The prosecutor acknowledged that some of the clothes had been seized from the house and were intended to be introduced as evidence.

State concedes that the trial court's ruling that Wienke lacked "standing" to object to the search was wrong since Wienke was an invited guest in Rebecca's home. *See* ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 424, 351 N.W.2d 758, 763 (Ct. App. 1984) (overnight guests have a legitimate expectation of privacy in the home of their hosts). The State contends, however, that Wienke waived the argument that he had exclusive control over the portions of the house that were searched because he never raised an objection to the scope of the search or to Rebecca's authority to give consent. We do not impose waiver because the record demonstrates that by its ruling the trial court preempted Wienke from making the argument.[7]

Ownership alone is not determinative of privacy interest to be protected by the Fourth Amendment. ***State v. Dixon***, 177 Wis.2d 461, 468 n.5, 501 N.W.2d 442, 445 (1993). Nor does ownership establish authority to give consent to search the belongings of another.

> The authority which justifies the third-party consent does not rest upon the law of property ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the

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[7] The following exchange occurred at the motion hearing:

> THE COURT: As to any items that might have been gotten out of the house, they didn't need a warrant for that. He has no standing to object to any search of the house. He wasn't there. He might have earlier on had standing to object to a search of his room, for instance, if he had a room there. But --
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> DEFENSE COUNSEL: He had lived there for a year and did have a room there, as a matter of fact, judge. I don't know what came out of the room and what came out of the house.
>
> THE COURT: Well, sir, I [sic] wasn't there to object to it anyway. The person who was in charge of the possession of the house certainly can consent to a search of the house. There is no need for a search warrant for the house. Wasn't his house.

> risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171-72 n.7 (1974).

The totality of the circumstances is the controlling standard. ***Dixon***, 177 Wis.2d at 469, 501 N.W.2d at 446. The factors most likely to be relevant here are whether Wienke had complete dominion and control and the right to exclude others from the area searched within Rebecca's house, whether he had taken precautions customarily taken by those seeking privacy, and whether the property was put to some private use. *See* ***id.*** Whether an expectation of privacy exists is a question of mixed fact and law. ***State v. Rewolinski***, 159 Wis.2d 1, 17, 464 N.W.2d 401, 407 (1990), *cert. denied*, 500 U.S. 909 (1991). Here, the trial court made no findings as to the historical or evidentiary facts as to the items seized from the home, the location of those items, the nature of Wienke's relationship with the home's owner, and Wienke's right, if any, to exclusive use of portions of the home. In essence, the trial court's ruling is not supported by any evidence in the record. Therefore, we set aside the judgment of conviction and remand the issue for consideration.

Our reversal is conditional and with the following instructions. On remand the trial court should conduct an evidentiary hearing on Wienke's motion to suppress evidence seized from the residence. If the trial court finds that Rebecca's consent was sufficient and affirms its original ruling denying suppression, it should reinstate the judgment of conviction. If the trial court determines that the evidence should be suppressed, it must provide Wienke the opportunity to move to withdraw his no contest plea under relevant standards. *See* ***State v. Pounds***, 176 Wis.2d 315, 324-25, 500 N.W.2d 373, 378 (Ct. App. 1993) (plea withdrawal is the appropriate remedy because only the defendant is in the position to evaluate the impact of the erroneous refusal to suppress evidence on the decision to enter a plea). If the plea is not withdrawn, the trial court shall reinstate the judgment of conviction.

By the Court.—Order affirmed; judgment reversed and cause remanded with directions.

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