COURT OF APPEALS DECISION DATED AND FILED

October 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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*** **§ 808.10 and RULE 809.62, STATS.**

Nos. 97-3860-CR
97-3861-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTICE C. GRANGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Justice C. Granger appeals from a judgment of conviction for causing injury by intoxicated use of a vehicle, contrary to § 940.25(1)(a), STATS., and for homicide by intoxicated use of a vehicle, contrary to § 940.09(1)(a), STATS. The first issue is whether Granger's constitutional right

against self-incrimination was violated when the inculpatory statements he made to the police at the scene of a car accident were used against him at trial. The police asked Granger whether he was the driver of the car involved in the accident, and whether there was anyone else in the car with him at the time. He responded that he was the driver and that he was alone. Granger asserts that his statement should have been suppressed because the police failed to advise him of his ***Miranda*** rights before questioning him. We conclude, as did the trial court, that Granger's statement that he was alone was admissible under the "public safety" exception. We disagree with the trial court's decision to admit Granger's response to whether he was the driver. However, based on the sequence of the questions, we are satisfied that it was harmless error to admit the statement.

The second issue is whether Granger's statement to police was coerced and involuntary based on the totality of the circumstances, and, therefore, should have been suppressed. We find no evidence of coercion other than the fact that he made the statement before being advised of his ***Miranda*** rights. Based on the totality of the circumstances, this alone was insufficient to characterize his responses as coerced or involuntary. The final issue is whether the trial court erred in excluding the testimony of Granger's expert, Dr. Boland. Dr. Boland apparently was prepared to testify about head injuries, and how they can affect a person's recollection, statements and conduct. The trial court concluded, and we agree, that because Granger did not first establish that he actually suffered a head injury as a result of this accident, there is no probative value in having an expert testify about the potential effects of head injuries. Accordingly, we affirm.

BACKGROUND

At approximately 2:22 a.m. on October 26, 1995, La Crosse police officers Thomas Walsh and Brian Puent arrived at a scene of what appeared to be a car accident. They saw car debris scattered along the road and a car door wrapped around the steel I-beam of a billboard sign. They also observed a tire lying on the road.

While surveying the scene, the officers observed a man come running up from an embankment. The man then began to run in an easterly direction, parallel to the officers. The officers yelled for the man to stop, but the man continued to run. The officers chased the man until he crashed through a fence and fell down. As the officers handcuffed the man, they noticed that he had cuts and some blood on him. They asked him if he was okay, and he stated that he was. The officers then escorted him to the squad car. Before reaching the car, the officers asked the man his name, and he responded that his name was Justice Granger. As Granger spoke, the officers smelled alcohol on his breath and believed that he might be intoxicated. The officers asked him whether he was the driver of the car and if anyone else was in the vehicle with him. Granger responded that he was the driver and that he was alone in the vehicle. The officers placed Granger in the back seat of the squad car.

Officer Walsh then went to look for the vehicle. He found the vehicle at the bottom of the embankment near a set of railroad tracks. He also found the bodies of two men, Ken Green and Mark Kast. Kast was unresponsive but breathing. Green, who was lying in the middle of the railroad tracks, was unresponsive and not breathing.

Walsh was concerned that there may have been other passengers in need of medical attention. But due to the rugged nature of the hillside, he was uncertain whether the police would find them. He therefore returned to the squad car and questioned Granger again on whether there were others in the car with him. Granger again stated that he was alone in the vehicle.

Lieutenant Marcou arrived shortly thereafter. He checked Green and Kast. Green was dead but Kast was still alive. Marcou performed CPR on Kast with the assistance of another officer. He then asked Granger if he was the driver. Granger indicated that he was. Marcou asked him if anyone else was in the car with him. Granger once again said that he was alone. Marcou then asked Granger what happened, and Granger responded "I couldn't see—I just couldn't see." None of these officers advised Granger of his ***Miranda*** rights before questioning him.

Kast and Granger were taken to the Emergency Room at Lutheran Hospital. Dr. Ben Wedro examined them and later testified at trial. He determined that Kast had a cerebral hematoma, a small fracture of his neck, and a broken hand. Dr. Wedro stated that Kast had a "decreased level of consciousness," which meant that he was not fully awake, and that his injuries were serious. Dr. Wedro also examined Granger. He performed a neurological exam and a CAT scan to determine if there was bleeding, bruising or swelling of the brain. The results of these tests did not indicate any neurological damage. In fact, Dr. Wedro testified that the results of additional tests indicated that Granger may have been faking his injuries. A blood alcohol content test was also administered, and it indicated that Granger had a BAC of .23 at the time of the accident.

The defense filed a motion to suppress Granger's statement to the police, and a hearing was held on December 18, 1995. The court denied the motion after concluding that the questions were asked for investigative purposes, custody was for investigative purposes only, and the handcuffing was for the officer's protection. The case was tried on October 30, 1996, resulting in a hung jury. On May 27, 1997, Granger filed a motion for reconsideration of the court's earlier ruling regarding the suppression of his statement to the police. The court again denied the motion.

A second trial was held, at which time Granger sought to present the testimony of Dr. Boland, a neuropsychologist. Dr. Boland apparently was prepared to testify on how a head injury could affect an individual's actions or statements. The State objected to Dr. Boland's testimony because there was no evidence that Granger actually sustained a head injury. The trial court agreed and excluded Dr. Boland's testimony. Granger renewed his motion and it again was denied. He was convicted of causing injury by intoxicated use of a vehicle, contrary to § 940.25(1)(a), STATS., and homicide by intoxicated use of a vehicle, contrary to § 940.09(1)(a), STATS. Granger appeals.

1. *Right Against Self-Incrimination*

The first issue is whether Granger was denied his rights under the Fifth Amendment of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution when the statement he gave to the police, prior to being advised of his ***Miranda*** rights, was used against him at his trial. Granger contends that the trial court erred in denying his motions to suppress this statement to the police. On review of an order denying a motion to suppress, we are bound by the trial court's findings of historical fact unless they are clearly erroneous. *See* ***State***

v. Kramar, 149 Wis.2d 767, 784, 440 N.W.2d 317, 324 (1989). However, whether a defendant's ***Miranda*** rights were violated is a constitutional fact that we determine *de novo*. *See* **State v. Ross,** 203 Wis.2d 66, 79, 552 N.W.2d 428, 433 (Ct. App. 1996).

In ***Miranda v. Arizona***, 384 U.S. 436 (1966), the Supreme Court concluded that where a defendant is subject to "custodial interrogation" certain procedural safeguards must be maintained to protect the defendant's constitutional privilege against self-incrimination. *See* ***Rhode Island v. Innis***, 446 U.S. 291, 297 (1980); ***State v. Leprich***, 160 Wis.2d 472, 476, 465 N.W.2d 844, 845 (Ct. App. 1991). The ***Miranda*** Court was primarily concerned with "incommunicado interrogation of individuals in a police-dominated atmosphere," ***Miranda***, 384 U.S. at 456, where the police actively sought to induce a defendant's confession. The court concluded that without certain warnings concerning the defendant's constitutional rights, a defendant's statements during police custodial interrogation are inadmissible to establish his or her guilt. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 429 (1984). The ***Miranda*** Court reasoned that the interaction of custody and official interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." ***Miranda***, 384 U.S. at 467. Therefore, if the police take a suspect into custody and ask him or her questions without giving ***Miranda*** warnings, the responses cannot be used to establish guilt. ***Leprich***, 160 Wis.2d at 476, 465 N.W.2d at 845 (*citing* ***Berkemer***, 468 U.S. at 429).

The ***Miranda*** Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Miranda***, 384 U.S. at 444; *see also* ***Leprich***, 160 Wis.2d at 476-77, 465 N.W.2d at 845. A

police officer, however, is not always required to advise an individual of his ***Miranda*** warnings before engaging in on-the-scene questioning. ***Leprich***, 160 Wis.2d at 477, 465 N.W.2d at 845. "When general on-the-scene questions are investigatory rather than accusatory in nature, the ***Miranda*** rule does not apply." ***Id.*** "The ultimate inquiry is whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." ***Leprich***, 160 Wis.2d at 477, 465 N.W.2d at 846 (quoted source omitted). In making this determination, we will consider the totality of the circumstances. ***Id.*** We look to the defendant's freedom to leave the scene and the purpose, place and length of the interrogation. ***Id.***

The State characterizes the stop in this case as investigatory, not custodial. Their stated objective was to find out what had happened, and whether others were involved in the accident. The trial court concluded at the suppression hearings that ***Miranda*** warnings were not necessary, because the questions were part of a "legitimate investigation" of a "chaotic, life-and-death situation." We disagree. A reasonable person in Granger's position would not have felt free to leave the scene. Granger was chased down, placed in handcuffs and escorted toward the squad car; there is little that separates this from a formal arrest. While the State offers several compelling arguments as to why this was only a ***Terry*** stop, our review of the objective facts in this case strongly suggests that a reasonable person in Granger's position would have viewed this as an arrest. We therefore conclude that Granger was in custody, and that the police failed to advise him of his ***Miranda*** rights prior to questioning him.

Evidence gathered in violation of a defendant's ***Miranda*** rights is not automatically suppressed. We have recognized two exceptions to ***Miranda***: the public safety exception and the private safety exception, also known as the

rescue doctrine. *See generally* ***State v. Kunkel***, 137 Wis.2d 172, 184-89, 404 N.W.2d 69, 74-76 (Ct. App. 1987). Both exceptions are premised on the concept that the police should not be forced to decide between "losing the opportunity to either protect the public or to save the life of one individual and losing the right to obtain evidence from a suspect in custody." ***Id.*** at 189, 404 N.W.2d at 76.

The "public safety" exception was announced in ***New York v. Quarles***, 467 U.S. 649 (1984). In ***Quarles***, police officers pursued an armed rape suspect into a supermarket, and upon locating him, noticed that his gun holster was empty. ***Id.*** at 652. Because the rape victim said her attacker had a gun, the police asked the suspect where his gun was, and he pointed in the direction of some cartons and said, "the gun is over there." ***Id.*** The court concluded that ***Miranda*** warnings were not required because the missing gun posed a threat to the public's safety, because the question asked was reasonably prompted by a concern for public safety, and because the question was not designed solely to elicit testimonial evidence. ***Id.*** at 656-59. The ***Quarles*** Court stated that:

> The need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as [the arresting officer] in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the ***Miranda*** warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Quarles, 467 U.S. at 657-58.

The second exception is the "private safety" exception, which is also referred to as the "rescue doctrine." ***Kunkel***, 137 Wis.2d at 184-89, 404 N.W.2d at 74-76. In ***Kunkel***, the police questioned the father of a nine-month-old child, missing for seventeen hours, when the father claimed the child was safe but refused to say with whom or where the child was. The court recognized this exception in situations such as the one in ***Kunkel*** when there is a possible imminent loss of life to a known and identifiable individual.

The State contends that the "public safety" exception applies in this case, and that Granger's statement therefore should not be suppressed. They argue that the officers asked Granger if he was alone to determine whether there were others that may have been in need of immediate medical attention. Their inquiry was an effort to save lives, not to further prosecution. The officers testified that they repeatedly asked Granger questions, because there may have been others in the car that still were unaccounted for, and he may not have initially understood what they were asking him.

Granger contends that the "public safety" exception is inapplicable because the police had no evidence that the public was at risk when they first encountered him at the scene. However, with the car debris and tire on the street and a door wrapped around an I-beam, there was evidence of an accident, and with car accidents there is often a risk of serious injury or death, particularly if immediate medical attention is not provided. And after Walsh discovered the car wreckage and the two bodies, this risk became a reality. We therefore conclude that the officers questioning of Granger about whether he was alone in the car is admissible, because it was for the purpose of possibly saving lives.

The more difficult question is whether the fact that the officers asked Granger if he was driving the vehicle before they asked him if he was alone, or the fact that they asked him the question at all, affects the admissibility of his statement. Because there was no public safety interest being served by asking this question, it should have been suppressed.

However, we are satisfied that admitting Granger's statement that he was driving the car amounts to harmless error. The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction." ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985); *see also* ***State v. Harris***, 199 Wis.2d 227, 252-56, 544 N.W.2d 545, 565-67 (1996). Granger was first asked whether he was the driver and then asked whether he was alone in the vehicle. He responded that he was the driver and that he was alone, which later turned out to be untrue. Had the officers asked him if he was alone, which would have been permissible under the public safety exception, and not whether he was the driver, the officers would have had the same information as if the statements occurred as they did. He would have responded that he was alone; hence, he would have been the driver. While the information as to who was driving should have been suppressed, there is no reasonable possibility that the admission affected the outcome because the jury would have inferred that he was the driver based on his response.

2. *Voluntary or Coerced Statement*

The second issue is whether Granger's statement to the police was coerced and involuntary. In deciding whether a statement or confession was voluntary, courts independently review the record and apply the totality of the

circumstances test. ***State v. Kiekhefer***, 212 Wis.2d 460, 569 N.W.2d 316, 323 (1997).

In determining whether a statement was voluntarily made, the critical inquiry is whether the statement was obtained by the police through the use of coercive or improper means. ***State v. Clappes***, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). "The presence or absence of actual coercion or improper police practices is the focus of the inquiry because it is determinative on the issue of whether the inculpatory statement was the product of a 'free and unconstrained will, reflecting deliberateness of choice.'" ***Id.*** (quoted source omitted).

When determining whether a statement was rationally and deliberately made, we must be satisfied that "the defendant was not the 'victim of a conspicuous unequal confrontation in which the pressures brought to bear on him by representatives of the state exceed[ed] the defendant's ability to resist.'" ***Id.*** (quoted source omitted). This determination is made based on examining the totality of the circumstances surrounding the statement. ***Id.*** "The ultimate determination of whether a confession is voluntary under the totality of the circumstances standard requires the court to balance the personal characteristics of the defendant against the pressures imposed on him by the police in order to induce him to respond to the questioning." ***Clappes***, 136 Wis.2d at 236, 401 N.W.2d 766. We consider the defendant's age, education, intelligence, physical and emotional condition, and his prior experience with the police. ***Id.*** These factors are then compared against the police pressures and tactics that were used to induce the admission, such as the length of the interrogation, any delay in arraignment, the general conditions under which the confession took place, any excessive physical or psychological pressure placed on the defendant, any

inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of his right to counsel and right against self-incrimination. ***Clappes***, 136 Wis.2d at 236-37, 401 N.W.2d at 766 (citations omitted).

Granger contends that his statement was coerced and involuntary based on the following factors: (1) he was in custody; (2) he was not advised of his ***Miranda*** warnings; (3) he was "overmastered" by the police officers; (4) he had suffered a "head injury;" (5) he needed emergency medical treatment and appeared to be in and out of consciousness; and (6) he was intoxicated. While we agree that Granger was chased, placed in handcuffs and not advised of his ***Miranda*** rights, we find no evidence that he was "overmastered" by the arresting officers. The officers simply inquired as to what occurred and who was involved so that they could better assess the situation. They did not ask accusatory questions; rather, they asked investigatory questions. There was no use of force or threats; the questioning was relatively short in duration; there was no excessive use of psychological or physical pressure; and the officers did not use any unusual questioning tactics. While we agree that the officers should not have asked Granger whether he was the driver, his untruthful response to whether he was alone in the vehicle would have given them the same incriminating information, *i.e.*, that he was the driver.

Granger contends that he had suffered a head injury and was intoxicated at the time he made the statement. We find no compelling evidence that Granger suffered a head injury. Dr. Wedro, the doctor that examined Granger at the hospital, stated that he conducted tests to determine if Granger had suffered any head trauma. The tests were negative. Furthermore, certain test results indicated that Granger was faking his injuries. And whether Granger was

intoxicated is irrelevant to whether his statement was voluntary. *See* ***Clappes***, 136 Wis.2d at 240, 401 N.W.2d at 767. We therefore conclude that Granger has not established that his statement was involuntary or the result of coercion.

3. *Expert Testimony*

The final issue is whether the trial court erroneously exercised its discretion in excluding the testimony of Dr. Boland, who was prepared to testify concerning the causation, symptoms, and effects of head injuries. The trial court in this case excluded Dr. Boland's testimony because Dr. Boland did not examine Granger, and the doctor who did examine Granger indicated that Granger did not suffer a head injury. In ***State v. Morgan***, 195 Wis.2d 388, 536 N.W.2d 425 (Ct. App. 1995), we addressed trial courts' discretion in deciding whether to admit or exclude expert testimony. We stated that:

> Expert testimony is admissible only if it is relevant. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. A trial court's determination on the relevancy of the proffered evidence is a discretionary decision. In addition, relevant expert evidence must also "assist the trier of fact to understand the evidence or determine a fact in issue." A trial court's determination on whether the evidence will assist the trier of fact is also a discretionary determination. We need not review a trial court's determination of whether the expert testimony would assist the jury, if we conclude that such evidence was irrelevant to an issue confronting the jury.

Morgan, 195 Wis.2d at 416-17, 536 N.W.2d at 435 (citations omitted.)

Granger argues that Dr. Boland's testimony was relevant to establish Granger's possible mental condition after the accident, and it therefore should

have been admitted. The trial court decided not to admit Dr. Boland's testimony because Granger had not established that he suffered a head injury. The trial court was concerned by the fact that Dr. Boland, who is a neuropsychologist and not a medical doctor, never examined Granger, yet he was prepared to offer testimony contradicting the testimony of those who did examine Granger. Dr. Boland's testimony would have been based solely on medical reports, accident reports, pictures of the scene and portions of hearing transcripts. He was prepared to testify that while he was uncertain whether Granger suffered a concussion, such an injury was possible based on the vehicle's speed and the probable position of Granger's body upon impact. His conclusions concerning Granger's "possible" concussion were also based on the fact that Granger, who was legally intoxicated at the time of the accident, had facial lacerations and contusions and was nauseous and vomiting after the accident. He also was prepared to offer several explanations as to why the tests conducted by Dr. Wedro did not indicate a head injury.

We conclude that based on the overall evidence concerning the basis of Dr. Boland's diagnosis, the trial court did not erroneously exercise its discretion in excluding his testimony. In reality, Dr. Boland could have only speculated as to Granger's condition. Dr. Wedro, however, examined and performed numerous tests on Granger soon after the accident. The trial court's decision to exclude Dr. Boland's testimony was based on these articulated factors. We therefore affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.