

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2003

Cornelia G. Clark
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. 01-3444-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00 CF 5575

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT E. TUCKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Robert E. Tucker appeals from a judgment of conviction entered after he pled guilty to one count of first-degree intentional homicide, as a party to a crime. See WIS. STAT. §§ 940.01(1)(a) and 939.05

(1999–2000).¹ He argues that the trial court erred when it denied his motion to suppress two statements that he gave to the police because, he claims, the statements were tainted by his allegedly illegal arrest. Tucker also argues that his second statement to the police should have been suppressed because, he contends that: (1) the police did not inform him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966); and (2) the statement was involuntary. We affirm.

I.

¶2 On November 3, 2000, police officers found Robert L. Banks in the living room of his house with a knife in his back. An autopsy showed that Banks had been dead for at least twelve hours. The police determined that Banks’s house had an alarm system, but there had been no calls of service to the alarm company within the previous forty-eight hours. The police further observed that there was no evidence of a forced entry into Banks’s house, although there was some ransacking.

¶3 Robert E. Tucker became a suspect in Banks’s murder after the police interviewed several citizens and discovered Tucker’s fingerprint on a Pepsi soda can in Banks’s living room. The police went to Tucker’s house on November 4, 2000, to arrest him for Banks’s murder based upon the information from the citizen interviews and the physical evidence. A police officer outside of Tucker’s house saw Tucker and a woman, later identified as Jennifer Hennings, walking towards Tucker’s house. The police officer called Tucker over after

¹ All references to the Wisconsin Statutes are to the 1999–2000 version unless otherwise noted.

Tucker and Hennings began to walk away from Tucker's house. Two detectives who were inside Tucker's house came outside and told the officer to arrest Tucker.

¶4 Tucker gave two statements to the police. He gave the first statement on November 4, 2000, after his arrest. In that statement, he told the police that his girlfriend, Jennifer Hennings, killed Banks. Tucker gave a second statement to the police on November 5, 2000. According to the complaint, on that day Tucker told the police that he and Hennings went to Banks's house on November 2, 2000, between 5:30 and 6:00 p.m., to ask Banks for money. Tucker said that Hennings picked up an extension cord, wrapped the cord around Banks's neck, and began to strangle him. Tucker then went over to Banks and held the extension cord while Hennings pulled out drawers in another room and went through them for money. According to Tucker, Hennings then brought a butcher knife over to him and he used the knife to stab Banks twice in the back. Tucker told the police that he stabbed Banks to put him out of his misery because Banks was in pain and was having a hard time breathing.

¶5 Tucker filed a motion to suppress both statements. He claimed that his warrantless arrest was illegal because the police did not have probable cause to arrest him. He thus alleged that the statements were inadmissible under the fruit-of-the-poisonous-tree doctrine because they were tainted by the illegal arrest. *See Wong Sun v. United States*, 371 U.S. 471, 484–486 (1963). Tucker also filed a motion to suppress the November 5, 2000, statement because: (1) the police

allegedly did not inform him of his *Miranda* rights; and (2) the statement was involuntary.²

¶6 The trial court held a hearing on Tucker's probable-cause-to-arrest claim. Detective Gilbert Hernandez relied upon police reports to testify about the information that the police had prior to Tucker's arrest. According to Hernandez, Valerie Banks, the wife of Robert Banks's nephew, told the police that she and Robert Banks talked on the phone and that she visited his house three-to-four times per week. Robert Banks told her that he was having "trouble" with a man named "Robert." Robert Banks told her that "Robert" used drugs and that he had to "put Robert out ... of [his] house" about a month before. Valerie Banks also told the police that "Robert" begged for money and drugs.

¶7 Hernandez testified that Robert Tucker's ex-girlfriend, Rosemarie Williams, told the police that Robert Tucker carried a knife. She also told the police that Robert Tucker had a drug problem and that he became violent when he used drugs. Hernandez also testified that the police knew that Robert Tucker had prior "contacts" with the police, including: operating a vehicle without the owner's consent, possession of drugs, theft, burglary, armed robbery, public drinking, disorderly conduct, carrying a concealed weapon, resisting an officer, escape, armed robbery with a knife, and attempted first-degree intentional homicide.³

² Tucker conceded that the police informed him of his *Miranda* rights before the November 4, 2000, statement and does not challenge the voluntariness of that statement.

³ Not all of these "contacts" with the police led to convictions.

¶8 According to Hernandez, Connie Banks, Robert Banks's daughter, told the police that her father was very careful about whom he let into his house. He only let people in with whom he was comfortable or whom he knew. Hernandez testified that when Robert Tucker was interviewed prior to his arrest, Robert Tucker told the police that he and Robert Banks were "good friends." Robert Tucker also told the police that he was home all night on November 2, 2000, and that he had not entered Robert Banks's house that day. Hernandez further testified that Lucille Tucker, Robert Tucker's mother, told the police that Robert Tucker was at home the entire evening of November 2, 2000. She later told the police that Robert Tucker and Hennings left her house after supper and that she had lied to the police because she did not want her son to be angry with her.

¶9 Hernandez further testified that an identification technician found Robert Tucker's fingerprint on a Pepsi soda can found in Robert Banks's living room. The police were unable to recover any fingerprints from the knife that was used to kill Robert Banks.

¶10 Finally, Sergeant Steven Braunreiter testified about the circumstances surrounding Robert Tucker's arrest. Braunreiter told the court that he was outside Robert Tucker's house when he saw Robert Tucker and a woman, whom he later learned was Hennings, walking toward the house. According to Braunreiter, when Robert Tucker and the woman saw him they started to walk away from the house. Braunreiter then called out to Robert Tucker and Robert Tucker walked over to him. Braunreiter arrested him shortly thereafter.

¶11 The trial court found that the police had probable cause to arrest Robert Tucker:

If you look at all the evidence ... whether it be the print, the information [the police] gathered based upon all those witnesses that were interviewed from the mother, to the defendant himself, to Williams, to what ... Hernandez had said ... there's more than mere suspicion, and there certainly was based upon the totality of the circumstances reasonable grounds to believe that the defendant committed the offense, and there's certainly reasonable grounds and probable cause ... to arrest [the defendant].

¶12 The trial court also held a hearing to determine whether Tucker's statement to the police was voluntary. *See State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 262, 133 N.W.2d 753, 762 (1965) (a trial court holds a hearing to determine whether any statement the suspect made to the police was voluntary). Robert Tucker claimed that the detectives did not advise him of his *Miranda* rights before he gave the November 5, 2000, statement. Robert Tucker also claimed that he gave the November 5, 2000, statement because a detective told him that he "wouldn't be charged for nothing [sic] that bad." When asked by his attorney, Robert Tucker testified that a detective told him that his fingerprint was found on the knife used to kill Robert Banks. During cross-examination, Robert Tucker admitted that he knew what his *Miranda* rights were.

¶13 Two detectives also testified. Detective Gregory Schuler testified that he advised Robert Tucker of his *Miranda* rights before Robert Tucker gave the November 5, 2000, statement. Schuler further testified that Robert Tucker appeared to be coherent and that neither he nor anyone in his presence made any threats or promises to Robert Tucker or told Robert Tucker that his fingerprint was found on the knife.

¶14 Detective John Andrews testified that Schuler read Robert Tucker's *Miranda* rights to him from a card and that Robert Tucker indicated that he understood his rights and agreed to make a statement. When asked by the State,

Andrews testified that neither he nor Schuler told Robert Tucker that they found his fingerprint on the knife.

¶15 The trial court found that Robert Tucker “was in fact advised of his Miranda warnings ... [h]e stated he understood his rights and that he would make a statement.” The trial court also found that “based upon the totality of the circumstances and based upon the Court’s observations and assessment of credibility, ... the defendant was not credible when testifying.” Thus, it concluded: “the statement of the defendant that was in fact given was a voluntary product of free and unconstrained will reflecting deliberateness of choice. Certainly not coerced or the product of any improper police practice.”

II.

¶16 First, Robert Tucker alleges that the trial court erred when it denied the motion to suppress his November 4, 2000, and November 5, 2000, statements because the statements were tainted by his allegedly illegal arrest. He claims that the arrest was illegal because the information possessed by the police at the time of his arrest was insufficient to establish probable cause to arrest him. We disagree and affirm the admission of Robert Tucker’s statements because the arrest was supported by probable cause.

¶17 Probable cause to arrest exists when the totality of the circumstances would lead a reasonable police officer to believe that the person to be arrested has committed or is committing a crime. *State v. Koch*, 175 Wis.2d 684, 701,

499 N.W.2d 152, 161 (1993); *see also* WIS. STAT. § 968.07(1)(d).⁴ “[P]robable cause eschews technicality and legalisms in favor of a ‘flexible, common-sense measure of the plausibility of particular conclusions about human behavior.’” *State v. Secrist*, 224 Wis. 2d 201, 215, 589 N.W.2d 387, 393 (1999) (quoted source omitted).

It is not necessary that the evidence giving rise to such probable cause be sufficient to prove guilt beyond a reasonable doubt, nor must it be sufficient to prove that guilt is more probable than not. It is only necessary that the information lead a reasonable officer to believe that guilt is more than a possibility, and it is well established that the belief may be predicated in part upon hearsay information.

State v. Paszek, 50 Wis. 2d 619, 625, 184 N.W.2d 836, 839–840 (1971) (citations omitted).

¶18 The police had sufficient information prior to Robert Tucker’s arrest to believe that it was “more than a possibility” that Robert Tucker murdered Robert Banks. *See id.*, 50 Wis. 2d at 625, 184 N.W.2d at 840. First, the police had reason to believe that Robert Banks knew the person who murdered him. Robert Banks’s home had an alarm system, yet there were no calls of service to the alarm company and there was no evidence of a forced entry into Robert Banks’s house. Moreover, Connie Banks, Robert Banks’s daughter, told the police that Robert Banks was very careful about whom he let into his house—he only let in people with whom he was comfortable or whom he knew.

⁴ WISCONSIN STAT. § 968.07(1)(d) provides: “A law enforcement officer may arrest a person when: ... (d) There are reasonable grounds to believe that the person is committing or has committed a crime.”

¶19 Second, the police had information that Robert Banks and Robert Tucker knew each other and that Robert Banks had had problems with a “Robert” in the past. Valerie Banks, Robert Banks’s nephew’s wife, told the police that Robert Banks had problems with a “Robert” and that Robert Banks had to “put Robert out ... of [his] house” about a month before. Valerie Banks also told the police that “Robert” would beg for money and drugs. Furthermore, Robert Tucker told the police that he and Robert Banks were “good friends.”

¶20 Third, the police knew that Robert Tucker had a history of violent behavior and drug problems. Rosemarie Williams, Robert Tucker’s ex-girlfriend, told the police that Robert Tucker carried a knife and became violent when he used drugs. The police also knew that Robert Tucker had violent “contacts” with the police in the past, including armed robbery with a knife and attempted first-degree intentional homicide.

¶21 Fourth, the police had evidence that Robert Tucker had lied to them about his whereabouts on the night Robert Banks was murdered. When the police interviewed Robert Tucker, he told them that he had been at home on the night of Robert Banks’s murder. Robert Tucker’s mother also told the police that Robert Tucker was home all evening, but changed her story and admitted that he left the house the night Robert Banks was murdered. The police also had physical evidence that Robert Tucker was in Robert Banks’s living room—Robert Tucker’s fingerprint was on a Pepsi soda can in Robert Banks’s living room.

¶22 Finally, Robert Tucker’s conduct before his arrest bolstered the officer’s suspicions that Robert Tucker was guilty. Braunreiter testified that Robert Tucker started to walk away from his [Robert Tucker’s] house when he saw Braunreiter. See *State v. Cheers*, 102 Wis. 2d 367, 391–392, 306 N.W.2d

676, 686–687 (1981) (retreat from officer prior to arrest “‘is a factor to be considered in determining whether probable cause exists’”) (quoted source omitted). Thus, the combination of the citizen interviews and the physical evidence established probable cause to arrest Robert Tucker. Accordingly, Robert Tucker’s statements were not “tainted” by an unlawful arrest.

¶23 Robert Tucker also alleges that the trial court erred when it denied his motion to suppress his November 5, 2000, statement because the police allegedly failed to inform him of his *Miranda* rights. Robert Tucker also claims that his statement was involuntary because the police allegedly: (1) improperly promised that he would receive lesser charges if he confessed; and (2) misrepresented to him that his fingerprint was found on the knife used to kill Robert Banks. Again, we disagree.

¶24 When the State seeks to admit a defendant’s custodial statement into evidence, it must show by a preponderance of the evidence that: (1) the defendant was informed of his or her *Miranda* rights, understood them, and knowingly and voluntarily waived them; and (2) the defendant’s statement was voluntary. *State v. Santiago*, 206 Wis. 2d 3, 18–19, 29, 556 N.W.2d 687, 692–693, 697 (1996).

We ... will not set aside the [trial] court’s findings of fact unless they are “clearly erroneous.” We must give “due regard” to the [trial] court’s opportunity to observe the witnesses and determine their credibility. The determination of whether the facts in this case meet the appropriate legal standards presents a question of law which we may decide independently of the [trial] court.

State v. Armstrong, 223 Wis. 2d 331, 352–353, 588 N.W.2d 606, 615–616 (1999) (citations and quoted sources omitted).

¶25 The evidence presented at the *Miranda-Goodchild* hearing supports the trial court’s finding that the police informed Robert Tucker of his *Miranda* rights before he gave the November 5, 2000, statement. Schuler and Andrews testified that Schuler read *Miranda* warnings to Robert Tucker. The only evidence that Tucker presents to the contrary is his self-serving testimony that the detectives did not read his *Miranda* rights to him. The determination of witness-credibility, however, is left to the trial court, *Dejmal v. Merta*, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980), and where conflicting testimony is presented, it is for the trial court to determine whose testimony should be relied upon, *State v. Lee*, 119 Wis. 2d 355, 360, 351 N.W.2d 755, 758 (Ct. App. 1984). As we have seen, the trial court found incredible Robert Tucker’s testimony. Tucker has not shown how this finding is clearly erroneous. Accordingly, the facts support the trial court’s conclusion that Robert Tucker was advised of his *Miranda* rights.

¶26 The *Miranda-Goodchild* hearing evidence also supports the trial court’s conclusion that Robert Tucker’s statement was voluntary. “In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured [through] coercive means or whether it was the product of improper pressures exercised by the police.” *State v. Clappes*, 136 Wis. 2d 222, 235–236, 401 N.W.2d 759, 765 (1987). We look to the totality of the circumstances to determine whether a confession is voluntary, balancing the personal characteristics of the defendant against the coercive or improper police pressure. *State v. Pheil*, 152 Wis. 2d 523, 535, 449 N.W.2d 858, 863 (Ct. App. 1989). “However, we do not reach this balancing unless there is some improper or coercive conduct by the police.” *Id.*

¶27 Here, Schuler testified that Robert Tucker appeared to be coherent and that he did not make any threats or promises to Robert Tucker or tell Robert Tucker that that his fingerprint was on the knife. Andrews also testified that neither he nor Schuler told Robert Tucker that his fingerprint was on the knife. The only evidence of police coercion that Robert Tucker presents is his testimony that: (1) a detective told him that he was not going to be charged “for nothing [sic] that bad”; and (2) a detective told him that his fingerprint was found on the knife used to kill Robert Banks. Again, the trial court found incredible this testimony and, again, Robert Tucker has not shown how this finding is clearly erroneous.⁵

⁵ Indeed, it appears that Robert Tucker had to be prompted by his attorney to remember that the police told him that his fingerprint was on the knife:

Q. Did the conversation about a fingerprint not [sic] being on the knife come up?

A. No. It wasn't nothing mentioned about no [sic] fingerprint on a knife.

Q. Okay.

A. As a matter of fact, yeah, he did. He said the fingerprint was found on the knife. Excuse me.

Q. He did say that?

A. Yes, he did.

Q. Did he say whose fingerprint it was?

A. Mine. I would put my hand on the Bible on that. We got your fingerprint on the knife, so come on, we got you.

By the Court.—Judgment affirmed.

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

