COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP1921-CR
2007AP1922-CR

Cir. Ct. Nos. 2005CF587
2006CF30

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY S. HILLEBRAND,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Jeffrey Hillebrand appeals from judgments convicting him on six felony counts, all involving sexual activity with children. He also appeals from an order denying his motion for postconviction relief. The

issues are whether the trial court erred by denying his motion to suppress inculpatory statements he gave police, and by denying his motion for a reduced sentence. We affirm.

¶2 The Fort Atkinson Police Department received a report that Hildebrand's son had alleged that Hildebrand had sexually assaulted him and other children. An officer contacted Hildebrand and asked him to come down to the police station about his son, but without telling Hildebrand that it concerned his son's sexual assault allegations. When Hildebrand arrived an officer took him to an interview room where an officer and a social worker began questioning him about sexual contact with his son. During the interview Hildebrand implicated himself in sexual conduct with his son and other children. At one point Hildebrand became distraught, and a second police officer was summoned to the room. The State subsequently charged him with multiple felony counts on the basis of his admissions, and other evidence.

¶3 Hildebrand moved to suppress his inculpatory statements because he made them without the benefit of ***Miranda***[1] warnings. The trial court found that ***Miranda*** warnings became necessary only after the second police officer entered the interview room, because a reasonable person in Hildebrand's position would not have believed himself in custody until that point. Consequently, the court denied the suppression motion as it pertained to statements made before the second officer arrived, and granted it as to statements made after he arrived.

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

¶4 Hildebrand agreed to plead no contest to six counts in exchange for dismissal of all others. At sentencing he presented himself as suffering from alcoholism, depression and posttraumatic stress disorder. The trial court sentenced him to prison terms requiring him to serve thirty-two years of initial confinement followed by thirty-three years of extended supervision. He was thirty-nine years old when the sentences were imposed.

¶5 After his conviction Hildebrand moved for modified sentences, alleging new factors. At a hearing on his motion he presented evidence that in addition to the mental conditions referred to at sentencing, he also suffered from bipolar disorder and attention-deficit hyperactivity disorder. He contended that these new diagnoses improved his chances of successful treatment, thus reducing the likelihood he would reoffend. The trial court accepted the new diagnoses, but concluded that they did not constitute new factors. In the court's view, Hildebrand still posed a significant threat to the community even if his treatment potential was enhanced. The court concluded that "even if I was aware of these diagnoses at the time, it would not have altered my judgment on the sentencing issue.... Prognosis for treatment was not a substantial factor at the original sentencing, and it is not a substantial factor today."

MOTION TO SUPPRESS

¶6 Under ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966), police may not interrogate a suspect in custody without first advising the suspect of his or her constitutional rights. Statements obtained in violation of ***Miranda*** must be suppressed. ***Id.*** When reviewing a circuit court's decision on a motion to suppress, we will uphold the circuit court's findings of fact unless clearly erroneous. ***State v. Mosher***, 221 Wis. 2d 203, 211, 584 N.W.2d 553 (Ct. App.

1998). Whether those facts show a violation of ***Miranda*** is a question of law reviewed without deference. ***Mosher***, 221 Wis. 2d at 211.

¶7 Custody for ***Miranda*** purposes is evaluated from the perspective of a reasonable person in the suspect's position. ***State v. Pounds***, 176 Wis. 2d 315, 321, 500 N.W.2d 373 (Ct. App. 1993). A suspect is in custody when the suspect's freedom to act is restricted "to a degree associated with formal arrest." ***Berkemer v. McCarty***, 468 U.S. 420, 440 (1984) (citation omitted). Factors that bear on custody include the suspect's freedom to leave, the purpose, place, and length of the interrogation, and the degree of restraint. *See* ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

¶8 Hildebrand was not in custody until the second police officer arrived. Hildebrand came voluntarily to the police station. At the beginning of his interview he was told that he was not under arrest and did not have to talk.[2] Hildebrand responded that he understood. During the interview Hildebrand held his car keys in his hand. The discussion was described as casual, until Hildebrand became upset and the second officer entered the room. The non-custodial portion of the interview lasted approximately thirty to forty minutes. There was no restraint placed on Hildebrand, and the interview room door remained open. He was not searched when he entered the police station or at any time until he was formally arrested. Under these circumstances, Hildebrand's freedom was not restricted to a degree associated with formal arrest, and a reasonable person would have felt free to curtail the interview and leave the station.

[2] In his brief, Hildebrand relies on his own testimony that he was never told that he was not under arrest or free to leave. However, the interrogating police officer testified to the contrary, and the trial court expressly found the officer's testimony credible.

¶9 Hildebrand focuses much of his argument on what he describes as the improper deception used to summon him to the police station, when the officer told him only that the matter concerned his son, but without telling him that his son had accused him of sexual assaults. In other words, he contends that police used improper deception not by lying, but by withholding information. However, an officer's unarticulated knowledge has no bearing on whether a reasonable person in the defendant's position would have considered himself or herself to be in custody. *See* ***State v. Mosher***, 221 Wis. 2d 203, 219, 584 N.W.2d 553 (Ct. App. 1998).

¶10 Hildebrand also contends that his statements were the product of unlawful coercion, apart from the absence of ***Miranda*** warnings. A statement is coerced and therefore constitutionally inadmissible if police used actual coercion or improper police practices to compel the statement. ***State v. Owen***, 202 Wis. 2d 620, 641-42, 551 N.W.2d 50 (Ct. App. 1996). No aspect of Hildebrand's pre-arrest interview was even remotely coercive or improper according to the testimony the trial court deemed credible.

MOTION FOR RESENTENCING

¶11 A "new factor" is

> a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Stated otherwise, a new factor is a new fact or set of facts that frustrates the purpose of the sentence. *See* ***State v. Franklin***, 148 Wis. 2d 1, 14, 434 N.W.2d 609 (1989). Whether the

defendant has presented a new factor is a question of law which we review without deference to the trial court. ***State v. Michels***, 150 Wis. 2d 94, 97, 441 N.W.2d 278 (Ct. App. 1989). "Whether a new factor warrants a modification of sentence rests within the trial court's discretion." ***Id.***

¶12 Hildebrand's updated diagnoses did not present a new factor. The trial court noted that while Hildebrand attributed his behavior to poor impulse control, his crimes involved planning. Consequently, the court reasoned that even if the chances for successful treatment were improved, the prognosis remained uncertain and Hildebrand remained a danger to the community. Because the paramount concern was to protect the public from future sexual assaults the court concluded that its knowledge of the new diagnoses would not have affected the sentence. We therefore conclude that the diagnoses were not a new factor because they did not frustrate the purpose of the sentence, as articulated by the trial court.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).