COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP497-CR **Cir. Ct. No. 2004CF1012**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN D. RODGERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Dykman, P.J., Higginbotham and Bridge, JJ.

¶1 PER CURIAM. John Rodgers appeals from a judgment of conviction. The issue is whether a statement he made was voluntary. We affirm.

¶2 Rodgers moved to suppress a statement he made to police while in the hospital. Testimony at the suppression hearing showed that Rodgers had been administered morphine sulfate, oxycodone, lorazepam, and scopolamine, which is sometimes referred to as a "truth serum." The circuit court denied the motion.

¶3 As we read the briefs, the parties agree that the degree of the defendant's physical or mental impairment at the time of the interrogation is a factual determination, which we accept unless clearly erroneous. However, whether the degree of that impairment rises to the level of being involuntary is a legal question that we review *de novo*. This distinction is crucial in this case.

¶4 The essence of the circuit court's factual findings was that Rodgers was not significantly impaired. Although Rodgers presented expert testimony about the mental state that would be expected to occur from the doses of the drugs Rodgers had been given, the court chose instead to rely on the testimony of the interrogating police detective about the actual experience of being with Rodgers at that time.

¶5 Based on the detective's testimony, the court found that Rodgers was able to communicate information, appeared responsive and alert, and withheld information from the detective when he chose to do so. The court found that he appeared to understand that the detective may not have been believing his statement. The court noted that his family members who were with Rodgers at times surrounding the interview did not testify to him having the degree of impairment suggested by Rodgers' expert.

¶6 On appeal, Rodgers' arguments mainly do not confront this analysis by the circuit court. He argues that the circuit court erred by accepting the observations of the detective over the expert's opinion. He argues that the

impairment would not necessarily be discernable by a layperson such as the detective. However, Rodgers does not point to any authority or evidence showing that such impairment would necessarily be *concealed* from a layperson, either. Rodgers argues that the detective was not an expert in these drugs, had no demonstrated experience recognizing signs of impairment, and did not see Rodgers attempt to walk or conduct any sobriety test. While these may all be true, and reasonably go to the weight the fact-finder might place on the detective's testimony, there is nothing about these points that compels us to conclude that the court's finding about the degree of impairment was clearly erroneous.

¶7 To the extent Rodgers argues that the supreme court held in ***Townsend v. Sain***, 372 U.S. 293 (1963), that the presence of "truth serum" necessarily renders the confession involuntary, we disagree. In ***Townsend*** the Court was deciding whether an evidentiary hearing should have been held in a habeas corpus proceeding. To do that, it first considered whether Townsend's allegations, if proved, would establish the right to his release. ***Id.*** at 307. The Court concluded on that issue that a confession "brought about by a drug having the effect of a 'truth serum'" would likely be involuntary. ***Id.*** at 307-08. However, the court did not hold that the confession in that case was, in fact, brought about by the drug; instead it remanded for an evidentiary hearing. ***Id.*** at 322. Nor did ***Townsend*** conclude that presence of such drugs necessarily renders all statements involuntary.

By the Court.—Judgment affirmed.

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