COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2133-CR **Cir. Ct. No. 2006CF101**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILLIP K. SAEGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 BROWN, C.J. Phillip K. Saeger claims that, after he waived his privilege to remain silent and willingly talked to officers for a period of time, he then nonetheless unequivocally asserted his right to silence such that all further

interrogation should have ceased. He also claims that his confession was involuntary because police used an empty promise to get him to confess. But we hold that the assertion of his right to silence was equivocal and also hold that the promise made by the police was not an empty one but a commitment that the police had the power to enter into and, in fact, fulfilled. We affirm.

BACKGROUND

¶2 During an investigation into several burglaries in Washington and Fond du Lac counties the police executed a search warrant at a residence where Saeger claimed to be staying. Saeger was not at the residence but was later contacted by Illinois police and detained at the South Beloit police department. While at the South Beloit police department, Saeger was interviewed by two detectives, one from Washington county and one from Fond du Lac county. At the beginning of the interview, the detectives read Saeger his ***Miranda***[1] rights which he conceded he fully understood and voluntarily waived to speak with the detectives.

¶3 During the interview Saeger was questioned about his role in several burglaries that occurred in Washington and Fond du Lac counties. One detective testified that Saeger was giving numerous excuses or numerous lies and was uncooperative. At some point during the interview the detectives became aware that he was fearful of federal gun charges. Saeger testified that, after one detective received a phone call where he learned a gun was found at Saeger's girlfriend's house, it being the one stolen in a burglary in Fond du Lac county, they told him

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

that he could be charged federally and sentenced up to twenty-five years. Saeger and the detectives then argued over this point. He testified that he was scared and angry and said, interspersed with curses, "You … ain't listening to what I'm telling you. You don't want to hear what I'm saying. You want me to admit to something I didn't … do … and I got nothin[g] more to say to you. I'm done. This is over." Immediately after this statement, more negotiating took place and the detectives agreed that they would not bring federal charges against him or his girlfriend. This agreement culminated in a written statement, signed by the two officers at 11:30 p.m., indicating that neither county would charge him federally.

¶4 The interview continued with more truthful answers until 1:05 a.m. when one of the detectives started to write out a statement for Saeger. When the detective was finished at about 1:50 a.m., he went over the entire statement with Saeger and Saeger signed it. In the statement, he confessed to being a "point-man" and "backup" in several burglaries in Fond du Lac and Washington counties. Saeger was charged with four counts of burglary, party to a crime in Washington county, and five counts of burglary, party to a crime, as well as eight counts of theft in Fond du Lac county.

¶5 Saeger later moved to suppress his confession. At the hearing on the motion, both detectives testified that they did not recall Saeger saying, at any time, that he did not want to talk anymore or that he wanted an attorney. One testified that Saeger was an emotionally excitable guy and did not remain calm throughout the interview, becoming upset more than once. He further testified that all three were in an ongoing, unfolding conversation that took place over several hours. The circuit court denied the motion to suppress. Thereafter, Saeger pled no contest to one count of burglary, party to a crime, in each county. He now appeals.

DISCUSSION

¶6 Saeger challenges both the circuit court's ruling that he did not invoke his right to remain silent and the determination that his confession was involuntary because police coerced his statement by means of a false promise. We review these issues under a two-pronged standard. ***State v. Jennings***, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142. First, we will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** Second, we independently review the application of constitutional principles to the facts. ***Id.***

¶7 A suspect's right to remain silent has two distinct parts. ***State v. Ross***, 203 Wis. 2d 66, 73, 552 N.W.2d 428 (Ct. App. 1996). The first is the right to remain silent, prior to questioning, unless the suspect chooses to speak of his or her own will. ***Id.*** at 73-74. The second protection allows a suspect to cut off questioning by invoking his or her right to remain silent. ***Id.*** at 74. The first protection is not in question; Saeger voluntarily waived his ***Miranda*** rights prior to questioning and does not challenge that waiver. At issue is the right to remain silent after the interrogation has begun. To determine if a suspect has invoked the right to remain silent, we use what has become known as the "clear articulation" rule.

¶8 The clear articulation rule was developed by the United States Supreme Court in ***Davis v. U.S.***, 512 U.S. 452 (1994), and was originally used to determine whether or not a suspect had invoked the right to counsel. We adopted the clear articulation rule and applied it to the right to remain silent in ***Ross***. Ross was suspected of sexual assault of child. ***Ross***, 203 Wis. 2d at 71. Before the relevant questioning, a detective advised Ross of his ***Miranda*** rights and Ross stated that he understood them. ***Ross***, 203 Wis. 2d at 71. The detective testified

that Ross did not answer his questions; he only stared at the detective. ***Id.*** This went on until the detective asked if the victim was lying. ***Id.*** Ross said no. ***Id.*** at 72. The detective then asked if what his victim said was true and Ross replied, yes. ***Id.*** Ross was convicted of two counts sexual assault of a child. ***Id.*** at 73. On appeal he argued that his statement should be suppressed because he invoked his right to silence. ***Id.*** Applying the clear articulation rule we concluded that Ross did not invoke his right to remain silent. ***Id.*** at 78-79. We held that although a suspect could invoke the right to silence without using words at all, ***id.*** at 77, the suspect must make it sufficiently clear that he or she wants to cut-off questioning so that a "reasonable police officer in the circumstances would understand the statement to be an invocation of the right to remain silent." ***Id.*** at 78. We reasoned that, if the statement is ambiguous, the officer is not duty-bound to cease questioning or ask the suspect for clarification. ***Id.*** Ross's silence was ambiguous because he said nothing; therefore, he did not invoke his right to remain silent. ***Id.*** at 79.

¶9 A recent United States Supreme Court case teaches us that ***Ross*** is good law. In ***Berghuis v. Thompkins***, 130 S. Ct. 2250 (2010), Thompkins, a suspect in a murder investigation, was read his ***Miranda*** rights and was then interrogated. ***Thompkins***, 130 S. Ct. at 2256. At no time during the interrogation did he say that he wanted to remain silent, that he did not want to talk with the police or that he wanted an attorney. ***Id.*** For most of the interrogation, he was silent, with the exception of a few verbal responses. ***Id.*** Eventually one of the detectives asked Thompkins if he believed in God. ***Id.*** at 2257. Thompkins answer yes. ***Id.*** The detective followed up by asking if he prayed, and if he prayed for God to forgive him for "shooting that boy." ***Id.*** Thompkins again answered yes to both questions and the interrogation ended soon after. ***Id.*** The

jury found him guilty on several counts, including first-degree murder. ***Id.*** at 2258. On appeal, Thompkins asserted that his statements to the police were inadmissible because he had invoked his right to remain silent by not saying anything for a sufficient period of time and thus the interrogation should have stopped. ***Id.*** at 2259. The Court did not agree. ***Id.*** As in ***Ross***, the Court used the clear articulation rule and concluded that Thompkins' silence was ambiguous and therefore could not invoke his right to remain silent. ***Thompkins***, 130 S. Ct. at 2260.

¶10 In Wisconsin, a statement is equivocal as a matter of law when there are reasonable competing inferences to be drawn from it. ***State v. Markwardt***, 2007 WI App 242, ¶36, 306 Wis. 2d 420, 742 N.W.2d 546. In ***Markwardt***, the court ruled that when the suspect said, "[j]ust get me out of here" and "I don't want to sit here anymore," it was not an invocation of the right to remain silent because, in the context of the interrogation, it was reasonable to believe that the outburst was in reaction to being caught in a web of lies, which the officers laid bare. ***Id.***, ¶¶35-36.

¶11 Saeger's outburst is analogous. One detective interviewing Saeger testified that he was uncooperative and lied often. He also testified that his interviewing technique involved calling the suspect on his or her lies. Further, the detectives knew that Saeger was an excitable person, and just before his outburst, Saeger and the detectives were arguing about if he could be charged federally. It was during this argument that Saeger stated, "I'm done. This is over." Taken in context, it was reasonable for the detectives to conclude that his statement was merely a fencing mechanism to get a better deal—one that would free him of exposure to federal charges. We acknowledge that a reasonable person could also read his statement to mean that he actually wanted to invoke his right to remain

silent. Under ***Ross***, ***Berghuis*** and ***Marquardt***, however, since there are reasonable competing inferences that could be drawn from the statement, the statement is equivocal as a matter of law and is therefore insufficient to invoke the right to remain silent. Saeger's first issue fails.

¶12 The second issue is whether Saeger's statements to the police were involuntary because his confession was the result of police misconduct. Saeger contends that local police lack the power to promise no federal charges but that was the promise made to him in order to get him to confess. The Washington County Circuit Court held that there was no police misconduct rising to the level that the statement should be suppressed and therefore the motion to suppress the statement was denied. The Fond du Lac County Circuit Court also found that the statements were voluntary.

¶13 In ***State v. Owens***, 148 Wis. 2d 922, 924, 436 N.W.2d 869 (1989), the appellant argued that promises from a detective were coercive and therefore made his statements involuntary. Our supreme court declared that, for a court to find a statement involuntary based on police misconduct, "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***Id.*** at 931 (citing ***State v. Clappes***, 136 Wis. 2d 222, 239 401 N.W.2d 759 (1987)). The alleged improper police practice in ***Owens*** was the use of a promise in exchange for cooperation. ***Id.*** at 927. The court ruled that although a promise was made to the defendant, it was not improper police conduct because the promise was fulfilled. ***Id.*** at 931.

¶14 The same situation is present in this case. Saeger was bargaining to receive a deal that would free him of exposure to federal charges and he received what he bargained for. While the detectives did not have the authority to decide

whether to charge Saeger federally, they did have the option to refrain from referring his case to federal authorities. They did not refer the matter to the U.S. Attorney and Saeger was never charged with federal gun violations. The fact that the detectives kept their promise shows that there is no affirmative proof of improper police conduct, and therefore we conclude that the statement was voluntary. We affirm the circuit court's denial of the motion to suppress the statement.

By the Court.—Judgment affirmed.

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