COURT OF APPEALS DECISION DATED AND FILED

September 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2009AP2596-CR

Cir. Ct. No. 2007CF4268

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT ALLEN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CARL ASHLEY, Judge.[1] *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Robert Allen, Jr., appeals from a judgment of conviction entered after he pled guilty to second-degree reckless homicide,

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[1] The Honorable Martin J. Donald presided over the suppression motion that is the focus of this appeal. The Honorable Carl Ashley presided over the plea and sentencing hearings and entry of judgment.

contrary to WIS. STAT. § 940.06(1) (2007-08).[2] On appeal, Allen challenges the trial court's denial of his motion to suppress. He argues that he did not re-initiate communication with police following a request for counsel and that his subsequent statements should have been suppressed. We disagree and further conclude that Allen freely and knowingly waived his rights prior to giving his statements and that there was no violation of his right to silence when the detectives resumed questioning of him. Accordingly, we affirm.

I. BACKGROUND.

¶2 The pertinent facts are supplied by the suppression hearing testimony of three detectives. Allen did not testify. Other facts, included only to provide background information, are set forth in the complaint, which Allen's attorney allowed the trial court to rely on during Allen's plea hearing.

¶3 This appeal arises out of a shooting that occurred on July 26, 2007, in the city of Milwaukee. When police arrived at the scene, they found Jimmy Jones, who had been shot in the chest. Jones was transported to Froedtert Hospital where he later died.

¶4 According to the criminal complaint, police received information that Allen was involved in the shooting. A witness relayed that Allen intended to rob Jones, but that a struggle ensued, at which point, Allen pulled out a gun and shot Jones.

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[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶5 Allen was charged with first-degree reckless homicide while armed and felon in possession of a firearm. He subsequently sought to suppress his statements to police. What follows is a summary of the testimony presented during the suppression hearing.[3]

August 29, 2007

¶6 Detective Billy Ball testified during the hearing that on August 29, 2007, he warned Allen of his constitutional rights pursuant to ***Miranda***.[4] Upon being read his rights, Allen requested an attorney. At that point, Detective Ball relayed that he "closed down the interview. [Allen] stated that he wanted an attorney, and I turned the tape off, got ready to bring him upstairs." Detective Ball recapped what he did once he turned off the recording and terminated the interview:

> A. I stood up, told him, okay, let's go upstairs. He said, where you going? I said, we're going upstairs. You wanted a lawyer. He said he wants to know what's going on. I said, I can't tell you. You asked for a lawyer, at which time he stated that he wanted to speak to me without a lawyer present. I explained to him that I'd have to re-advise him, and I would say that, you know, I'm not initiating this. Is this something that you wish?
>
> Q. Go ahead.
>
> A. Is this something that you—are you sure you want to do? He said, yes. I then turned the tape on to— We had a long discussion about how the process

[3] The recordings of Allen's interviews are not part of the appellate record.

[4] The warnings required by ***Miranda v. Arizona***, 384 U.S. 436 (1966), are specific: an in-custody defendant must be warned that he or she has the right to remain silent, that anything he or she says may be used against him or her in court, that he or she has the right to an attorney, and that an attorney will be appointed if he or she cannot afford one. ***Id.*** at 478-79.

> came that we're back on the recording; that he requested a lawyer, and in his own words he stated to me that he did want a lawyer, at which time, I re-advised him. I'm sorry—that he did not want a lawyer and that he was re-initiating the interview, at which time I re-advised him of his constitutional rights.

Allen agreed to answer Detective Ball's questions. Allen did not, however, make any incriminating statements during the interview that followed, and ultimately, Allen terminated it.

August 30, 2007

¶7 Allen was re-interviewed on August 30, 2007, this time by Detective Mark Peterson. Detective Peterson testified that after allowing Allen to use the bathroom, smoke cigarettes, and drink a soda,

> Mr. Allen was making general questions, asking me what should he do…. I told Mr. Allen that he needed to do the right thing; that we were only trying to get to the truth. Mr. Allen indicated that he was going to do the right thing, but he wanted to think about it. I explained to Mr. Allen there was going to be a line-up, and Mr. Allen said that he wanted to think about it, and I took him back upstairs.

No statement was recorded, and Allen was not advised of his constitutional rights.

August 30 or 31, 2007

¶8 Detective Dolores Applegate interviewed Allen.[5] Detective Applegate read Allen his ***Miranda*** rights, following which he denied involvement

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[5] There appears to have been some confusion during the hearing as to when Detective Applegate questioned Allen. Despite initially testifying that she interviewed Allen on September 3, 2007, Detective Applegate later testified during the hearing that she may have interviewed Allen on August 31, 2007. It seems more likely that the interview occurred on this date or possibly on August 30, 2007, as Detective Ball believed, given that Allen provided an inculpatory statement the morning of August 31, 2007.

in the homicide. Allen then told Detective Applegate that he wanted to be returned to his cell, and she complied.

August 31, 2007

¶9 Detectives Peterson and Ball also met with Allen on August 31, 2007. Detective Peterson advised Allen of his ***Miranda*** rights, following which Allen provided an inculpatory statement within the first five minutes. According to Detective Peterson, Allen did not request an attorney during the interview nor did he assert his right to remain silent.

¶10 When it denied Allen's motion, the trial court explained:

> Based on the Court's review of the disk as well as the testimony that has been elicited in this case, I do find that the defendant was in fact given his ***Miranda*** warnings, that he in fact did in essence ask for an attorney and that the interview was in fact terminated.
>
> I also find that the defendant did re[-]initiate the request to continue with the interview. He was re-***Mirandized*** and that he understood those warnings and that in fact he even asserted that he could terminate [the interview] at any time.
>
> When I look at those facts, I find that there is no indication of any coercion or deception on the part of the police that somehow would defeat the voluntariness of the re[-]initiation. The defendant freely and voluntarily gave up his rights to at least request an attorney and given that the Court finds he was given his ***Miranda*** warnings, that he did waive those warnings and that he freely made a statement … the Court is going to deny the motion to suppress the statement.

¶11 The State subsequently filed an amended information charging Allen with second-degree reckless homicide and felon in possession of a firearm. That same day, Allen pled guilty to second-degree reckless homicide pursuant to a plea agreement. The felon-in-possession-of-a-firearm charge was dismissed and read

in for sentencing purposes. Allen now appeals the trial court's denial of his motion to suppress. Additional facts relevant to the issues he raises on appeal are discussed below.

II. ANALYSIS.

¶12 Ordinarily, a guilty plea waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). A narrowly crafted exception to this rule exists in WIS. STAT. § 971.31(10), which permits appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. ***Smith***, 122 Wis. 2d at 434-35. We review the denial of a motion to suppress under a two-part standard of review, upholding the trial court's factual findings unless clearly erroneous but reviewing *de novo* whether those facts warrant suppression. *See* ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404.

¶13 The issue on review is whether the trial court erred in denying Allen's motion to suppress inculpatory statements he made to detectives while he was in custody. Allen raises three arguments supporting suppression of his statements: (1) his statement to Detective Ball "to know what's going on" did not amount to a re-initiation of communication with police following his request for counsel; (2) he did not freely and knowingly waive his rights to counsel and to silence; and (3) even if we conclude that he did re-initiate communication with the detectives, his termination of subsequent interviews was the equivalent of exercising his right to silence.

Re-initiation of communication.

¶14 Allen argues that his statement to Detective Ball, "to know what's going on," cannot be considered a sufficient re-initiation of communication with police following a request for counsel and that consequently, any subsequent statements should be suppressed. Allen argues that the aforementioned statement "cannot constitute a willingness and a desire for a generalized discussion about the investigation. Rather, Mr. Allen's statement is one where he is simply inquiring why he is in custody, rather than wanting to discuss the investigation." We disagree.

¶15 "Even after a suspect in custody asks to speak with a lawyer, thereby requiring that all interrogation must cease until a lawyer is present, a suspect may waive his or her Fifth Amendment ***Miranda*** right to counsel." ***State v. Hambly***, 2008 WI 10, ¶67, 307 Wis. 2d 98, 745 N.W.2d 48 (citing ***Edwards v. Arizona***, 451 U.S. 477, 485 (1981); internal quotation marks and one citation omitted). To prove that a suspect waived the ***Miranda*** right to counsel, the State must demonstrate: (1) "as a preliminary matter that the suspect 'initiate[d] further communication, exchanges, or conversations with the police,'" ***Hambly***, 307 Wis. 2d 98, ¶69 (quoting ***Edwards***, 451 U.S. at 485; brackets in ***Hambly***), and (2) that the suspect waived his or her ***Miranda*** rights voluntarily, knowingly and intelligently, *see* ***id.***, ¶70.

¶16 As our supreme court has explained, ***Oregon v. Bradshaw***, 462 U.S. 1039 (1983), provides us with "[t]ests for determining whether a suspect initiated a discussion or conversation with law enforcement officers." ***Hambly***, 307 Wis. 2d 98, ¶73. ***Hambly*** provides:

> The four-justice ***Bradshaw*** plurality concluded that a suspect's "inquiries or statements ... relating to routine incidents of the custodial relationship" would not be sufficient to constitute "initiation," but that questions or statements that under the totality of circumstances "evinced a willingness and a desire for a generalized discussion about the investigation" would.
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> The four-justice ***Bradshaw*** dissent supplied its own competing test, arguing that when the "Court in ***Edwards*** spoke of 'initiat[ing] further communication' with the police and 'reopen[ing] the dialogue with the authorities,' it obviously had in mind communication or dialogue *about the subject matter of the criminal investigation*."

Hambly, 307 Wis. 2d 98, ¶¶73-74 (citations omitted; ellipses in ***Hambly***; emphasis and brackets in ***Bradshaw***). The ***Hambly*** court concluded it was "free to choose either the plurality or the dissent test" in ***Bradshaw*** to determine whether the suspect initiated further communication with law enforcement given that its "analysis and conclusion … would not differ under either… statement of the test." ***Hambly***, 307 Wis. 2d 98, ¶75. We take the same approach.

¶17 Detective Ball testified that after Allen requested an attorney, Detective Ball advised him that he could not further discuss the case with Allen. According to Detective Ball, he prepared to leave, at which point Allen stated: "Come back. I want to talk to you. I want to know what's going on." Detective Ball reiterated: "I can't talk with you because you requested a lawyer unless you decide[] that you no longer need a lawyer or want a lawyer." Allen subsequently decided that he wanted to speak with Detective Ball without a lawyer, and Detective Ball re-advised him of his ***Miranda*** rights. Detective Ball testified that Allen "was begging to talk to me."

¶18 We are not persuaded by Allen's argument that his statement "is one where he is simply inquiring why he is in custody, rather than wanting to discuss

the investigation." Allen writes: "There is nothing in the record to suggest that Mr. Allen was aware that Detective Ball wished to speak to him with regard to the homicide at issue in this case." The record belies Allen's assertion. During the suppression hearing, Allen's attorney questioned Detective Ball as to when he told Allen that he wanted to question him regarding a homicide:

> Q. At that point in time [as you were leaving to take Allen back to the holding cell after he asked for an attorney], had you told Mr. Allen that you wanted to question him regarding a homicide?
>
> A. When I first sat down, I told him what it was regarding.
>
> Q. So he knew at that point in time that you wanted to question him regarding a homicide; correct?
>
> A. Yes.[6]

¶19 Despite Allen's representations to the contrary, the context of his statement "to know what's going on" shows that after initially invoking his right to an attorney, Allen initiated further discussion about the homicide investigation. Allen's request referred to the homicide investigation—it evinced a willingness and desire for generalized discussion about the investigation. *Cf.* ***Hambly***, 307 Wis. 2d 98, ¶82 (concluding that the context of the suspect's statement that he did not understand why he was under arrest "evinced a willingness and a desire for a generalized discussion about the investigation"). His inquiry was not "so routine that [it] cannot be fairly said to represent a desire on the part of an accused to open

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[6] In addition, Detective Peterson testified during the suppression hearing that he had a telephone conversation with Allen as part of the investigation related to the homicide during which he advised Allen that he was a suspect. The telephone conversation took place prior to when Allen was brought into custody, which further belies Allen's contention that "[t]here is nothing in the record to suggest that Mr. Allen was aware that Detective Ball wished to speak to him with regard to the homicide at issue in this case."

up a more generalized discussion relating directly or indirectly to the investigation." *See* ***Bradshaw***, 462 U.S. at 1045 ("There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.").

Waiver of rights.

¶20 Having concluded that there was no violation of the ***Edwards*** rule, the next issue we address is whether Allen freely and knowingly waived his ***Miranda*** rights to counsel and silence. *See* ***Bradshaw***, 462 U.S. at 1046.

> A ***Miranda*** waiver is voluntary if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception." For a ***Miranda*** waiver to be knowing and intelligent, it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Resolving the waiver question requires a case-by-case examination of all the facts and circumstances, including the suspect's background, experience, and conduct.

Hambly, 307 Wis. 2d 98, ¶91 (citations omitted).

¶21 Allen's argument with respect to the voluntariness of his waiver boils down to the following:

> One can only argue that the second interview of Mr. Allen was allegedly initiated by the defendant. As a result, the officers not only initiated the third and fourth contacts with Mr. Allen, but removed him from the jail and placed him in an interview room for purposes of interrogating him with regard to the homicide. Thus, Mr. Allen's decision to give inculpatory statements to Detective Peterson was likely brought about by the continued police pressure to give a statement.

¶22 After the initial interview, Allen waived his rights two additional times—at the outset of the interview with Detective Applegate and at the outset of the interview with Detectives Peterson and Ball when Allen admitted to shooting Jones. We presume, given that Allen asserted his right to counsel during his initial interview, that if he did not wish to speak with detectives during the interviews that followed, he could have again asserted his ***Miranda*** rights. Moreover, Allen's ability to resist police pressure is evidenced by the detectives' testimony, and the trial court's finding, that Allen knew how to terminate the interviews when he no longer wanted to talk to the detectives. We further note that there is no suggestion in the record that Allen was deprived of meals or creature comforts. To the contrary, the testimony revealed that Allen was allowed to smoke cigarettes, was not restrained, and did not appear to be tired or in any physical discomfort.

¶23 The trial court found that Allen received and waived his ***Miranda*** warnings and freely made a statement. The trial court further noted that there "[wa]s no indication of any coercion or deception on the part of the police that somehow would defeat the voluntariness of the re[-]initiation." We see no reason to disturb these findings.

Right to remain silent.

¶24 We next address Allen's argument that his termination of subsequent interviews was the equivalent of exercising his right to silence, which was not honored by the detectives. He posits that his termination of the second interview with Detective Ball on August 29, 2007, "is undoubtedly the equivalent of exercising the right to silence." Allen points out that he also terminated the subsequent interviews with Detectives Peterson and Applegate and that the police

initiated these interviews in addition to the final interview during which he made inculpatory statements.

¶25 The propriety of resuming questioning once the right to counsel or silence has been invoked is governed by ***Michigan v. Mosley***, 423 U.S. 96 (1975). *See* ***State v. Hartwig***, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985). The ***Hartwig*** court acknowledged that in ***Mosley***, the United States Supreme Court focused on the following factors in concluding that the interrogation of a defendant was properly resumed and the defendant's right to silence was not violated:

> (1) The original interrogation was promptly terminated. (2) The interrogation was resumed only after the passage of a significant period of time. (In ***Mosley*** it was two hours). (3) The suspect was given complete ***Miranda*** warnings at the outset of the second interrogation. (4) A different officer resumed the questioning. (5) The second interrogation was limited to a crime that was not the subject of the earlier interrogation.

Hartwig, 123 Wis. 2d at 284. The ***Hartwig*** court recognized, however, that the absence or presence of the ***Mosley*** factors was "not exclusively controlling" and did not establish a test that could be "woodenly applied." ***Hartwig***, 123 Wis. 2d at 284-85 (citation and internal quotations omitted). "The essential issue is whether, under the circumstances, the defendant's right to silence was scrupulously honored." ***Id.*** at 285.

¶26 Thus, police are not permanently barred from interrogating a suspect who has invoked the right to silence. After Allen invoked his right to silence at the end of each interview leading up to the ultimate interview with Detectives Peterson and Ball, police scrupulously honored those invocations. The

interrogations resumed only after the passage of a significant period of time.[7] *See* ***id.*** at 285-86 ("What constitutes a 'significant' period must be interpreted in light of the circumstances of the case and in light of the goals to dispel the compulsion inherent in custodial surroundings and to assure the defendant that his right to silence will be scrupulously honored."). Aside from the aborted interview with Detective Peterson, Allen was advised of his ***Miranda*** rights at the outset of each interview. Furthermore, with the exception of the ultimate interview, three different detectives (Detectives Ball, Peterson, and Applegate) interviewed Allen. *See* ***State v. Turner***, 136 Wis. 2d 333, 359, 401 N.W.2d 827 (1987) (establishing that re-interrogation by the same officer for the same crime does not by itself run afoul of ***Mosley***). After considering the ***Hartwig*** factors, we conclude that the subsequent interviews did not violate Allen's right to silence.[8]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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[7] In this regard, Allen offers only that "[t]hese interviews were conducted within a relatively short period of time." The record reflects that the two initial interviews (one with Detective Ball on August 29, 2007, and one with Detective Peterson on August 30, 2007) occurred a day apart. The short third interview with Detective Applegate may have occurred on the same day as the interview with Detective Peterson. *See supra* ¶8 n.5. The final interview, when Allen provided the inculpatory statements, was conducted the following day, August 31, 2007. Although the precise timing of Detective Applegate's interview is unclear from the record, when considered in context, it is not problematic under ***Michigan v. Mosley***, 423 U.S. 96, 104 (1975). *Cf.* ***Zelenka v. State***, 83 Wis. 2d 601, 611-12, 266 N.W.2d 279 (1978) (concluding ***Mosley*** was satisfied where there was a half-hour interval between interrogations and the defendant was questioned about the same offense by the same officer); ***State v. Shaffer***, 96 Wis. 2d 531, 539, 292 N.W.2d 370 (Ct. App. 1980) (concluding nine-minute interval between invocation of right to silence and resumption of questioning did not violate ***Mosley*** when considered in context).

[8] Based on this resolution, we do not address the State's argument that any error was harmless.