COURT OF APPEALS
DECISION
DATED AND FILED

July 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1911-CR **Cir. Ct. No. 2007CF98**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER T. SEILER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

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

¶1 BROWN, C.J. Christopher Seiler appeals from his conviction for second-degree sexual assault of a child. While on probation from prior convictions that included child sexual assault, Seiler in April 2007 was discovered parked alone in a car after dark with a juvenile female, in violation of his

probation rules. Seiler was arrested and his agent visited him in jail, asking him to account for his recent activities and whereabouts, as his probation rules required him to do. Seiler told the agent that he was just discussing family issues with the girl. The agent disbelieved Seiler's account and conducted a follow-up investigation. Thereafter the agent advised the sheriff's department to investigate whether Seiler had sexual contact with the girl. The sheriff's investigation resulted in the charge and conviction from which Seiler now appeals.

¶2 Seiler argues that his Fifth Amendment privilege against self-incrimination was violated because "the accusation against him was causally derived from a compelled, custodial statement to his probation agent without ***Miranda***[1] warnings," i.e., by statements he made to the agent during their conversation about his whereabouts and activities. We reject Seiler's argument because the investigation that led to Seiler's charge was based on sources independent of his statements to the agent. The mere fact that Seiler happened to mention some of the people with whom the agent and sheriff's investigators later spoke does not immunize him for prosecution for the crime the independent investigation uncovered. *See* ***Kastigar v. United States***, 406 U.S. 441, 453 (1972) (holding that "use and derivative use" immunity is "coextensive with the scope of the privilege against self-incrimination"). Those he mentioned were already known to the agent and would have been contacted during the investigation regardless of Seiler's mentioning them during his discussion with his agent while he was in jail. We affirm.

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

Facts

¶3 In April 2007, Seiler was on probation for offenses including sexual assault of a child, and his probation rules included a prohibition on unsupervised contact with a person under age eighteen without his probation agent's prior permission.[2] Seiler was found by police on April 12, 2007, parked in a secluded location at night, with a minor female, N.F. Seiler was arrested for violating his probation rules.

¶4 Seiler's probation agent visited him in jail on April 18, 2007, and asked Seiler to give an accounting of his whereabouts and activities at the time of his arrest. Seiler's probation rules provided that he must inform his agent of his whereabouts and activities as directed, and explained that failure to comply with that rule (or any other) meant that his probation "may be revoked." Seiler gave a written statement to his agent, using a form which informed Seiler that "failure to [account in a truthful and accurate manner] is a violation," that could lead to revocation and that "none of this information can be used against [Seiler] in criminal proceedings."

¶5 In his statement Seiler stated that he knew N.F. because she was the niece of someone he worked with, S.S. Seiler claimed that he had picked up N.F.

[2] This prohibition was subject to certain exceptions for family members, which are not relevant here.

In reviewing this record, we rely upon Seiler's second amended motion for postconviction relief in the circuit court and the facts established in connection with that motion. We need not and do not discuss Seiler's assertion that the circuit court improperly relied upon facts inferred from documents Seiler attached to his original postconviction motion but did not attach to his amended motion. The facts Seiler himself admits and asserts are sufficient to decide the appeal, so it is irrelevant whether the circuit court relied upon facts in documents Seiler submitted in support of his motion or whether such reliance was proper.

that day "in effort to speak to her about issues with [S.S.], [S.S.'s] wife/girlfriend … and [the wife/girlfriend's] 2 daughters." Seiler said that he had spoken with N.F. previously about these issues and "wanted to speak to her" again about them because the "issues" were affecting him too.

¶6 In light of all the circumstances, the agent thought Seiler's accounting of his contact with N.F. was incredible and decided to call N.F.'s mother and Seiler's wife to ask what they knew about Seiler and N.F. Additionally, after S.S. left multiple messages at the probation agent's office, the agent contacted S.S. and spoke with him about Seiler's contact with N.F. S.S. had left messages for the agent because he worked with Seiler and wondered why Seiler was not at work.

¶7 The agent's conversation with S.S., along with Seiler's background, led her to contact the sheriff's department to suggest there were grounds for further investigation of possible sexual contact between Seiler and N.F. A sheriff's department detective spoke with S.S., Seiler, and N.F. S.S. told the detective that N.F. had said she engaged in sexual intercourse with Seiler. When the detective spoke with N.F., she confirmed that the sexual intercourse had occurred. The detective then spoke to Seiler and told him what N.F. said, and Seiler admitted the sexual intercourse as well.

¶8 Seiler was charged and subsequently pleaded no contest to a count of second-degree sexual assault of a child in violation of WIS. STAT. § 948.02(2). He was sentenced to twenty years of initial confinement and fifteen years of extended supervision, consecutive to the sentences he is serving after revocation of his probation for prior offenses.

¶9 In a postconviction motion, Seiler argued that his plea resulted from ineffective assistance of counsel because his trial attorney did not advise him that "all of the information that had been derived directly or indirectly from his probation statement to [his agent] on April 18, 2007, could not lawfully be used as evidence at trial or for any other purpose in this prosecution, and that a dismissal of the charge with prejudice would be required." The court denied Seiler's motion summarily as "insufficient to warrant an evidentiary hearing," citing ***Kastigar*** and stating that Seiler's prosecution was based not upon his compelled testimony but "an independent police investigation," which began with his being stopped by police in the car with N.F. "And the fact that … Seiler makes reference … in his statement to [N.F.] and [S.S.] doesn't mean he can just insulate and prevent an investigation …." Seiler appeals.

Analysis

¶10 The question here is whether Seiler's trial counsel was deficient in failing to challenge the evidence against Seiler on grounds that it was the product of compelled self-incrimination. A defendant who demonstrates that ineffective assistance of counsel led to his plea may seek plea withdrawal. ***State v. Milanes***, 2006 WI App 259, ¶13, 297 Wis. 2d 684, 727 N.W.2d 94. To prevail, Seiler must show both that his attorney's performance was deficient and that the deficiency was prejudicial to his case. ***Id.***, ¶14. If the defendant has failed to allege sufficient facts to raise a question of fact, or if the record conclusively demonstrates the defendant is not entitled to relief, then his motion may denied without any evidentiary hearing. ***State v. Howell***, 2007 WI 75, ¶¶75-76, 301 Wis. 2d 350, 734 NW.2d 48. On appeal in such a case, we review whether the circuit court erroneously exercised its discretion in denying the hearing. ***Id.***, ¶79.

¶11 The Fifth Amendment of the United States Constitution does not prohibit the government from compelling citizens to give truthful statements; it prohibits compelling citizens to incriminate themselves. ***Kastigar***, 406 U.S. at 444-45. So, even when statements have been compelled, there is no violation of the Fifth Amendment so long as the statements are not used to incriminate the person who gave them. ***Id.*** at 445-46. On this basis in ***Kastigar*** the United States Supreme Court explained that a statute compelling truthful testimony in exchange for "use and derivative use" immunity was consistent with the Fifth Amendment privilege against self-incrimination. ***Id.*** at 461. The Court explained that such immunity

> affords the same protection [as the Fifth Amendment] by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.

Id.; *see also* ***State v. Spaeth***, 2012 WI 95, ¶77, 343 Wis. 2d 220, 819 N.W.2d 769 ("[N]othing in this opinion prevents law enforcement from investigating offenses it learns of from a legitimate independent source, not derived from a compelled statement.").

¶12 Seiler attempts unsuccessfully to analogize his case to ***Spaeth*** and ***State v. Peebles***, 2010 WI App 156, 330 Wis. 2d 243, 792 N.W.2d 212. In ***Spaeth***, the defendant made expressly incriminating statements during a noncustodial, routine polygraph examination meeting at his probation agent's office. ***Spaeth***, 343 Wis. 2d 220, ¶¶4-11. He admitted crimes that were otherwise not known or suspected. *See* ***id.***, ¶16. There was no independent investigation or basis for prosecution. *See* ***id.***, ¶77. Similarly, in ***Peebles***, the defendant's

compelled admissions concerning additional uncharged crimes in the past were provided to the court and relied upon to increase his sentence. ***Peebles***, 330 Wis. 2d 243, ¶¶2-9, 21. In each case a probationer's compelled, incriminating confessions were the basis of his subsequent prosecution or penalty, violating the Fifth Amendment.

¶13 In stark contrast, Seiler's troubles started not because of any statements he was compelled to make but because he was discovered in a car with a minor, in violation of his probation rules, and in particularly suspicious circumstances—after dark, in a secluded place. The circumstances he put himself in gave rise to the suspicions against him.

¶14 There is nothing in the record to suggest that the agent shared anything in particular that Seiler said when she told the police she was suspicious about Seiler's activities with N.F. In his statement to the agent, Seiler did not admit any sexual conduct or other criminal conduct, beyond violating his probation by being alone with N.F. in the car. The police already knew who N.F. was because she was found in the car with Seiler. Since she was a minor, it was inevitable that when she was taken into custody by police, her parents would then have police contact too. And S.S. contacted the agent himself because he wondered why Seiler missed work. The fact that Seiler mentioned S.S. in his unconvincing account of his whereabouts and activities did not somehow put S.S. off limits for investigators. S.S. was N.F.'s uncle and Seiler's co-worker, so it was no great investigative leap for the agent or investigators to contact him about Seiler's contact with N.F.

¶15 In conclusion, we find no erroneous exercise of discretion in the circuit court's denial of an evidentiary hearing. The circuit court reasonably

concluded that Seiler's charge was "based on the stop," not on anything Seiler said after being put on a probation hold. Seiler's trial lawyer's failure to raise the Fifth Amendment issue was neither deficient nor prejudicial.

By the Court.—Judgment and order affirmed.

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