COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1366-CR **Cir. Ct. No. 2012CF74**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARMIN G. WAND, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Lafayette County: THOMAS J. VALE, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 KLOPPENBURG, P.J. Armin Wand, III, contends that: (1) the circuit court wrongly denied his pre-plea motion to suppress statements that he made during one interview session with law enforcement; and (2) the circuit court

wrongly denied, without an evidentiary hearing, his post-conviction motion to withdraw his pleas.

¶2 The State charged Wand with crimes relating to a fire at his residence that caused the death of his three sons, serious injuries to his wife, and the death of his wife's fetus. The fire occurred on September 7, 2012. Wand made statements to law enforcement in the days immediately after the fire. Wand filed a pre-plea motion to suppress the statements that he made. After an evidentiary hearing, the circuit court granted Wand's motion as to all of the September 8 statements and denied the motion as to all of the September 9 statements.

¶3 Wand subsequently entered pleas pursuant to a plea agreement. After sentencing and entry of the judgment of conviction, Wand moved to withdraw his pleas, and the circuit court denied the motion without an evidentiary hearing.

DISCUSSION

¶4 Wand argues on appeal that: (1) his September 9 statements to law enforcement "should have been suppressed" because they were involuntary;[1] and (2) in a postconviction motion, he presented newly discovered evidence in the form of new expert testimony that casts sufficient doubt on the voluntariness of his

[1] Wand repeatedly refers to his September 9 statements as "unreliable," but does not develop an argument that he means anything in using that term that could matter to the particular arguments that he raises on appeal other than that his statements were involuntary because they were coerced.

September 9 statements, such that he should be allowed to withdraw his pleas to correct a manifest injustice. We address each argument in turn.

I. Suppression of September 9 Statements as Involuntary

¶5 Although Wand fails to frame his argument on appeal this way, we understand Wand to contend that the circuit court erroneously denied his pre-plea motion to suppress his September 9 statements.

¶6 "In reviewing a [circuit] court's ruling on a motion to suppress evidence, the [circuit] court's findings of fact will be upheld unless they are clearly erroneous." ***State v. Eckert***, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996).

¶7 The standard of review and legal principles pertinent to a challenge to the voluntariness of a defendant's statements to law enforcement are well established.

> Under the due process clause of the Fourteenth Amendment, confessions that are not voluntary are not admissible. When we review a [circuit] court's determination on the voluntariness of a defendant's confession, we affirm the [circuit] court's findings of historical facts unless they are clearly erroneous. However, the application of the constitutional standard to historical facts is a question of law, which we review de novo. The State has the burden of proving voluntariness by a preponderance of the evidence.

State v. Agnello, 2004 WI App 2, ¶8, 269 Wis. 2d 260, 674 N.W.2d 594 (2003) (citations omitted). "A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State

exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. In determining whether a defendant's statements were voluntary, "[t]he pertinent inquiry is whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation." ***Id.***, ¶37.

¶8 We look at the totality of the circumstances and balance the personal characteristics of the defendant against the pressures imposed by law enforcement officers. ***Id.***, ¶38. The personal characteristics to be considered "include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." ***Id.***, ¶39. These characteristics must be balanced against the police pressures and tactics used to induce a response, such as the duration of the questioning, "the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination." ***Id.***

¶9 We first set forth the pertinent background facts and the circuit court's findings and conclusions made in its ruling on Wand's pre-plea suppression motion. We then address Wand's arguments in support of suppressing his September 9 statements.

A. Background Facts

¶10 The following undisputed background facts are taken from testimony at the pre-plea suppression hearing.

¶11 Special Agents James Sielehr and Brad Montgomery interviewed Wand at the University of Wisconsin Hospital in the evening on September 8. The interview ended when the agents read Wand his ***Miranda***[2] rights and he invoked his right to remain silent. Wand attempted to continue to talk with the agents, who responded by clarifying that if he wanted to talk with them further it would have to be at another time and location, and the agents gave him their business cards. While they waited for a deputy to take Wand to jail, Montgomery made two comments to Wand:

(1) That Montgomery thought it was "kind of strange that you come in that night of the fire buddy buddy with the guy [Armin Wand's brother Jeremy Wand, also charged with crimes related to the fire] that you know just murdered your family.... Well, just think about that."

(2) That Armin Wand's brother Jeremy told law enforcement that Armin Wand had kissed someone other than Armin Wand's wife.

¶12 Wand placed calls to both Sielehr's and Montgomery's cell phones from the jail on the morning of September 9, but neither agent answered Wand's calls. Sielehr asked Special Agent Lourdes Fernandez to visit Wand at the jail that same day. Fernandez and Special Agent Michael Reimer met Wand in a jail interview room on the afternoon of September 9. Wand told Fernandez and Reimer that Sielehr and Montgomery had advised him that if he wished to talk to them further, he could call them, and that is why he called the agents. Fernandez and Reimer read Wand his ***Miranda*** rights; after reading each right they asked Wand if he understood, and he confirmed that he did. Fernandez and Reimer asked Wand to tell them in his own words what he understood his rights to be.

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

Fernandez and Reimer then confirmed that Wand had reached out to talk to Sielehr and Montgomery to get clarification of comments Montgomery made to Wand, and confirmed that Wand wanted to talk to Fernandez and Reimer. Fernandez and Reimer interviewed Wand from approximately 2:30 p.m. to 9:00 p.m., providing Wand three breaks during that time.

B. Circuit Court's Findings and Conclusions

¶13 The circuit court first reviewed "the totality of the circumstances" regarding the September 8 interview. This included an extensive review of specific questions and statements by agents Sielehr and Montgomery and Wand's characteristics, such as his age (thirty-two), his low IQ, his having had prior contacts with law enforcement, his maintaining a household and managing his family's finances, his stuttering and poor eyesight, and his not appearing "stressed." The court concluded that Wand's September 8 statements were not voluntary based on "a repeated theme [of] a promise of leniency [as] a form of coercion."

¶14 More specifically, the circuit court concluded that a series of statements by the agents during the September 8 interview constituted promises to "help" Wand, to "make this all right," and to make favorable charging decisions for Wand if he cooperated, even though the agents did not have the authority to make charging decisions. The court contrasted those statements with what, in the court's opinion, would be appropriate for the agents to say, such as, "You're going to feel better. We're here for the truth. We want to get this matter resolved." The court concluded that the agents were instead promising Wand, in effect, "I have the authority to help you if you tell me what I want to hear," and concluded that those promises of leniency rendered Wand's statements involuntary.

¶15 The circuit court then turned to the September 9 interview and concluded that "the nature of the questions [was] entirely different." The court concluded that, unlike those posed in the September 8 interview, the questions posed by agents on September 9 did not include coercive promises of leniency.

¶16 The circuit court also concluded that "there was sufficient attenuation, division, separation," between the September 8 and 9 interviews so that any taint arising from the coercive effect of the first interview had dissipated by the time of the second. The court found that after the agents read Wand his ***Miranda*** rights on September 8, "[t]hey made a couple of comments ... not questions ... gave him their card[s]" and properly said, "You want to call us, then we'll talk to you." The court found that Wand's next contact with law enforcement was the September 9 interview, sixteen hours later, after he had spent the night in jail, where he was fed and allowed to rest, and that Wand initiated the September 9 interview. The court found that the agents began the September 9 interview by reading Wand his ***Miranda*** rights, after which Wand "indicated he understood them, and that he wished to proceed with those ... statements."

¶17 For all of the above reasons, the circuit court concluded that Wand's "statements on September 9th were freely and voluntarily given."

C. Wand's Reasons for Suppression of the September 9 Statements Based on Evidence at the Suppression Hearing

¶18 Wand argues that the circuit court should have suppressed his September 9 statements because: (1) all four agents failed to honor his September 8 invocation of his right to silence; (2) the taint from the first two agents' coercive tactics at the September 8 interview was not attenuated by the time of the September 9 statement; and (3) the second two agents' tactics on

September 9 were coercive, given Wand's personal characteristics. We address and reject each of Wand's purported reasons that his September 9 statements should have been suppressed.

1. Wand's September 8 invocation of right to silence

¶19 Wand argues that his September 9 statements were involuntary because Montgomery's two comments at the end of the September 8 interview, summarized above, did not "scrupulously honor" Wand's invocation of his right to silence, and those comments improperly influenced Wand's agreement to talk to the new agents on September 9.

¶20 We begin with the nature of Montgomery's two comments at the end of the September 8 interview, after Wand invoked his right to silence. The circuit court concluded that Montgomery's comments were not questions. Wand asserts that the agents made the comments "with the intent that [Wand] stew over them." This would seem to have been the case, but it is beside the point. Comments offered by an officer that might prompt thoughts by a suspect do not necessarily constitute the "'functional equivalent of express questioning' ... 'likely to elicit an incriminating response.'" *See* ***State v. Hambly***, 2008 WI 10, ¶¶46-47, 307 Wis. 2d 98, 745 N.W.2d 48 (quoted source omitted). Wand neither develops any argument that these comments were the functional equivalent of express questioning, nor does he develop any other theory as to why the comments violated his rights, and therefore we consider this topic no further.

¶21 As noted above, Wand tries to make an argument that Montgomery's comments on September 8 improperly influenced Wand's agreement to talk to the second set of agents on September 9, but we do not understand what that argument might be. Wand seems to suggest that there was a disconnect between the topic

about which Wand sought to talk to the agents following the first interview and the topic or topics that the agents covered in the second interview, but we see no disconnect. There appears to have been one large topic: the fire that caused the deaths of and serious injuries to Wand's family members.

¶22 In sum, we are not persuaded by any argument that Wand makes or may be attempting to make in connection with Montgomery's comments on September 8.

2. Taint arising from September 8 tactics

¶23 Wand references the fact that the circuit court concluded that the September 8 statements were involuntary due to promises of leniency, and then states, "There is absolutely no reason to suppose that those same inducements did not play into [Wand's] willingness to talk to the agents on September 9th." This suggests an argument that Wand challenges the circuit court's conclusion that the September 9 interview was sufficiently attenuated so that the taint arising from the September 8 interview had dissipated by the time of the second interview. However, Wand does not challenge the court's findings supporting its conclusion as to attenuation. Rather, the only rejoinder Wand makes in support of this argument is to cite his own testimony at the suppression hearing, but the testimony that he cites appears to have no bearing on the issue of possible promises of leniency.

¶24 Wand may also be attempting to make a broader argument based on the mistaken belief that, as a matter of law, if his statements on September 8 were involuntary, then his statements on September 9 were necessarily also involuntary. However, there is no such blanket rule. The case he cites for that supposed legal proposition does not contain the proposition, and instead states that the

admissibility of a subsequent statement obtained after an improperly obtained statement is to be determined by the traditional "fundamental voluntariness" analysis, which considers the totality of the circumstances. *See* ***State v. Schlise***, 86 Wis. 2d 26, 46, 271 N.W.2d 619 (1978).

3. Wand's characteristics and police tactics

¶25 Wand argues that his September 9 statements were coerced in light of the conduct of the agents on that date, given his personal characteristics. As we explain, we reject this argument because Wand forfeited it in the circuit court and for the further reason that it is undeveloped on appeal.

¶26 As we have explained, to determine whether a statement is coerced, we evaluate the characteristics of the defendant and the tactics used by law enforcement. ***Hoppe***, 261 Wis. 2d 294, ¶38. One problem here is that Wand completely failed at all times before the circuit court—in his suppression motion, at the suppression hearing, and again in his post-hearing brief—to identify a single specific tactic, statement, or question of the agents, by citation to the September 9 interview recordings or transcript, that Wand argued was coercive in light of Wand's personal characteristics. The psychologist who testified for Wand at the suppression hearing had not reviewed the interview recordings, and so offered no opinion as to the agents' tactics. In short, Wand forfeited his argument that his September 9 statements were involuntary, and we reject it on that basis. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited, and supporting the proposition that appellate courts generally do not address forfeited issues).

¶27 We reject Wand's coercion argument for the additional reason that it is undeveloped on appeal. He makes no developed argument about particular conduct of the agents at the September 9 interview that could have rendered his statements involuntary, in light of his personal characteristics. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶28 What Wand does appear to argue on appeal is that the circuit court should have suppressed his September 9 statements based on newly discovered evidence, which he contends sheds a negative light on the agents' tactics on September 9. This evidence was not presented to the circuit court at the time of the pre-plea suppression motion, but instead Wand proffered this evidence in the form of a psychologist's report filed with his postconviction motion to withdraw his pleas.[3]

¶29 In his reply brief on appeal, Wand makes a very broad statement to the effect that this court may overturn a circuit court's denial of a pre-plea suppression motion based on evidence presented for the first time after the judgment of conviction has been entered. We reject this argument because it is made for the first time in the reply brief and because it is made by improperly citing an unpublished per curiam opinion. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in

[3] Wand also submitted with his postconviction motion a report by a second psychologist who evaluated Wand's personal characteristics. We do not discuss this second psychologist's report because it does not differ in any significant respect from the report of the psychologist who testified at the suppression hearing.

a reply brief."); WIS. STAT. § 809.23(3)(b). We also reject this argument because we are aware of no authority that supports it, and Wand cites none.[4]

¶30 As the State notes, the new psychologist's report offered in support of Wand's postconviction plea withdrawal motion may be relevant to the question of whether plea withdrawal is necessary to correct a manifest injustice, but it is *not* relevant to the question of whether the circuit court properly decided Wand's pre-plea suppression motion after an evidentiary hearing and post-hearing briefing. We address Wand's postconviction plea withdrawal motion next.

II. *Postconviction Plea Withdrawal Motion Based on Newly Discovered Evidence Offered to Show That Wand's September 9 Statements Were Coerced*

¶31 In effect, Wand argues that he alleged newly discovered evidence in his postconviction motion sufficient to warrant withdrawal of his pleas. As we proceed to explain, we conclude that the new psychologist's report attached to his postconviction plea withdrawal motion is not newly discovered evidence. Accordingly, Wand fails to allege the "manifest injustice" necessary to warrant plea withdrawal.

¶32 "Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo." ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). "A defendant is entitled to

[4] Nor do we consider the part of Wand's postconviction plea withdrawal motion, reproduced in his appellate brief, that purports to show that Wand's statements were not reliable because they were either inconsistent with his brother's statements or consistent but "cross contaminated" by the agents' questioning, because Wand did not raise those arguments in his pre-plea suppression motion. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190 ("Issues that are not preserved at the circuit court ... generally will not be considered on appeal.").

withdraw a guilty plea after sentencing only upon a showing of 'manifest injustice' by clear and convincing evidence." ***Id.*** at 311 (quoted source omitted). "Newly discovered evidence may be sufficient to establish that a manifest injustice has occurred." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). "The determination of whether something proffered postconviction should be categorically excepted from being declared 'newly discovered evidence' ... presents a question of law, requiring an assessment only of the nature of the proffered item ...." ***State v. Fosnow***, 2001 WI App 2, ¶12, 240 Wis. 2d 699, 624 N.W.2d 883 (2000). "Newly discovered evidence ... does not include the 'new appreciation of the importance of evidence previously known but not used.'" ***Id.***, ¶9 (quoted source omitted).

¶33 As noted above, Wand attached a report by a psychologist who, unlike the psychologist who testified at the pre-plea suppression hearing, reviewed the video recordings and transcripts of all of the police interviews of Wand during the days immediately after the fire, including the September 9 interview, and purported to critique the police tactics used during each of the interviews. As to the interview on September 9, the psychologist identified certain questioning that he opined showed that the agents "actively shaped" the account provided by Wand, and other questioning that he opined generally reflected "standard Reid School techniques: confrontation, minimization, implied leniency, and theme development." The psychologist does not assert that his opinions were based on proven research findings or methodology that was not available to Wand and his counsel at the time the suppression motion was being litigated.

¶34 Wand asserts that his postconviction motion sufficiently alleged a manifest injustice resulting from his pleas arising from new expert testimony supporting the view that his September 9 statements were coerced. However, he is

really arguing that he presented newly discovered evidence that, if presented to the circuit court at the time of the suppression motion, would have led to a different suppression ruling and, therefore, shows a manifest injustice. Indeed, he said as much in support of his postconviction motion before the circuit court. The circuit court rejected that argument, ruling that the new psychologist's report was "a second opinion from another expert examining facts that existed at the time of the trial and coming up with a different conclusion." Therefore, the court concluded that Wand had not raised "new evidence that would entitle him to" an evidentiary hearing. We agree.

¶35 Following ***Fosnow***, we conclude that the new psychologist's report is "'nothing more than the newly discovered importance of existing evidence,' ... not newly discovered evidence for purposes of plea withdrawal." *See* ***id.***, ¶25 (quoted source omitted). In ***Fosnow***, we rejected a new psychiatric diagnosis, relevant to whether the defendant was criminally responsible for his crimes, as newly discovered evidence entitling the defendant to withdraw his pleas. ***Id.***, ¶16. We ruled that evidence of the defendant's diagnosis "existed and was known to him and his counsel at the time he entered his pleas," and that the postconviction expert opinion based on that evidence was "'the newly discovered importance of existing evidence,' rather than newly discovered evidence." ***Id.*** (quoted source omitted).

¶36 Similarly here, the postconviction psychologist's report provides new opinions on evidence comprising Wand's psychological evaluation conducted in support of the pre-plea suppression motion and the video recordings and transcript of his September 9 interview. This evidence was known to Wand and his counsel at the time he entered his pleas. Accordingly, we conclude that the

new psychologist's opinions do not constitute newly discovered evidence that would entitle Wand to withdraw his pleas to correct a manifest injustice.

CONCLUSION

¶37 For the reasons stated, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.