ORIGINAL

STATE OF WISCONSIN CIRCUIT COURT BRANCH 3 MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 06-CF-88

Judge; Jerome Fox

BRENDAN R. DASSEY,

Defendant.

STATE'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

Brendan R. Dassey (hereinafter "defendant") seeks an order suppressing the statements he made to law enforcement agents on February 27, 2006[1] and March 1, 2006, as well as the fruits of those statements. Defendant claims the statements were obtained "involuntarily" and in violation of the defendant's rights under the Fifth, Sixth and Fourteenth Amendments. The defendant does not claim a *Miranda* violation, nor does he claim that *Miranda* was required. The State asserts that Miranda rights were not required on either date because the defendant was not in custody on either date. However, presence or absence of custody and the provision of Miranda rights are relevant to the voluntariness determination.

[1] Although the state is not planning on offering any statements obtained on February 27, it recommends the court find the statements voluntary. In addition, even if the court were to find these statements involuntary, such a finding would have little bearing on the determination of the voluntariness of the March 1, 2006 statements. See *e. g. State v. Whitman,* 160 Wis. 2d 260, 466 N.W.2d 193 (Ct. App. 1991) where the court held that improper police practices that render statements involuntary may be sufficiently attenuated from subsequent, proper questioning to enable a defendant to make voluntary statements. *Id*, 270-72.

I. GENERAL PRINCIPLES

Generally speaking, when a defendant seeks to suppress statements, the state must show that the defendant (1) received and understood Miranda warnings; (2) knowingly and intelligently waived his rights; (3) the warnings were sufficient in substance; (4) the statements were voluntary; and (5) prove all of this by a preponderance of the evidence. *State v. Jiles*, 2003 WI 66, ¶ 26, 262 Wis. 2d 547, 663 N.W.2d 798.

"Custody" is determined by whether there is either a formal arrest or restraint on freedom of movement of a degree associated with formal arrests. *Thompson v. Keohane*, 516 U.S. 99 (1995), *New York v. Quarles*, 467 U.S. 649 (1984) and *State v. Leprich*, 160 Wis. 2d 472, 465 N.W.2d 844 (Ct. App. 1991). This is a "totality of the circumstances" test. The test is whether a reasonable person in the suspect's position would have considered himself or herself to be in custody, given the degree of restraint under the circumstances. *State v. Gruen*, 218 Wis. 2d 581, 593, 582 N.W.2d 728, 732 (Ct. App. 1998). This determination depends on the objective circumstances, not on the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v. California*, 511 U.S. 318, 323 (1994). Therefore, the unarticulated intentions of the officers are irrelevant. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

In *Gruen*, the court set forth the relevant factors in determining custody. They are: (1) the freedom to leave; (2) the purpose, place and length of interrogation; and (3) the degree of restraint. Citations omitted. *Gruen*, 218 Wis. 2d at 594. The factors in determining the degree of restraint include, but are not limited to, (1) whether the person was handcuffed; (2) were guns drawn; (3) was the person subject to a frisk; (4) the particular manner in which the person was restrained; (5) was the person moved; (6) questioned in police vehicle or at a police station; and

(7) number of police officers involved in the detention and questioning. *Gruen*, 218 Wis. 2d at 594-95.

In the case at bar, the State expects the evidence to show that the defendant was not in custody when questioned by police on February 27, 2006. The defendant was not under arrest, he was not restrained, there were no guns used, he was not frisked, and there were no restraints whatsoever. The questioning was relatively short in duration and he had every reason to believe he was free to leave and he did in fact leave. Thus, Miranda was not required at this interview because he was not in custody. The determination as to the admissibility of those statements will be based solely on the question of whether the statements were voluntary. Nonetheless, the fact that there was no custody and the manner in which he was treated are clearly relevant to the court's determination of whether the statements were voluntary.

As to the statements obtained on March 1, 2006 (those in the police car and those at the Manitowoc County Sheriff's Department), the State likewise expects the evidence to show them to be non-custodial. The evidence will show that the defendant was not placed under arrest by Special Agent Fassbender or Detective Wiegert. The evidence will show that the officers called the defendant's mother, Barb Janda, at approximately 9:50 a.m. and asked her permission to speak with her son, the defendant. She granted the officers' permission to speak with her son. Further, the evidence will show that Special Agent Fassbender told the defendant's mother that they would like to transport her son to the sheriff's department to do a "taped" interview. She agreed to that procedure.

Additionally, the evidence will show that when the officers arrived at the Mishicot High School, they met with the dean of students and informed him of their wish to meet and speak with the defendant. They advised the dean of students they had the mother's permission to take

the defendant to the sheriff's department in order to speak with him. The Dean acquiesced to the request. The evidence will further show that at approximately 10:05 a.m., the officers met with the defendant and asked the defendant to go with them to the sheriff's department for the interview. The defendant agreed. The evidence will show further that approximately 10:10 a.m., they did advise the defendant of his Miranda rights and obtained his waiver. They told the defendant again that they wanted to take him to the sheriff's department and he agreed with that decision. Thus, during this initial encounter with the law enforcement officers, the defendant agreed, just as his mother had, to go with the officers. He was not arrested, he was not handcuffed, he was not ordered to go with the officers, no guns were used (in fact the investigators removed their weapons before any interview occurred), he was not frisked, there were no restraints whatsoever placed upon him, and he walked under his own power to the police car. There were only two officers present, and only two officers were involved in the entire encounter to set up interview.

Further, the evidence will show that there was relaxed, informal conversation en route to the station, that there was a stop at the defendant's house to obtain a pair of blue jeans, that there were no threats, no raised voices, and no arguments en route to the station. The defendant was never frisked until the decision was made that he was going to be arrested near the conclusion of the interview. This all becomes significant, not only for the determination of custody but also for the determination of voluntariness, because although Miranda warnings were not required, the circuit court may consider the presence or absence of warnings in a voluntariness analysis. *See State v. Clappes*, 136 Wis. 2d 222, 237, 401 N.W.2d 759 (1987) and *State v. Hoppe*, 2003 WI 43, ¶ 56, 261 Wis. 2d 294, 661 N.W.2d 407.

II. DETERMINING VOLUNTARINESS

Whether a particular defendant's statements were made voluntarily depends upon the totality of the circumstances surrounding their making. *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881 and *State v. Hoppe*, 261 Wis. 2d 294. This "totality" test requires balancing the defendant's personal characteristics against police pressures used to induce the statements. *Id.* The relevant personal characteristics of a defendant include his age, education and intelligence, physical and emotional condition, and any prior experience with the police. *In the Interest of Jerrell C. J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110 and *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). These factors are to be balanced against police pressures used to induce the statements. *State v. Knapp*, 2003 WI 121, 265 Wis. 2d 278, 666 N.W.2d 881 and *State v. Hoppe*, 2003 WI 43, 261 Wis. 2d 294, 661 N.W.2d 407.

In *Hoppe*, the Wisconsin Supreme court reaffirmed that there must be some form of coercive or improper police conduct before statements can be found involuntary. *Hoppe* 261 Wis. 2d 294, at ¶ 46. The court framed the inquiry as follows: whether the statements were coerced or the product of improper pressures exercised by the person or persons conducting the interrogation. *Hoppe* at ¶ 37. The court also noted that coercive police conduct could include subtle forms of psychological persuasion, and that in those cases, the mental condition of the defendant becomes a more significant factor in the voluntariness calculus. *Hoppe*, ¶ 40. Further, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist. *Id.* at 46.

III. CASE LAW RELEVANT TO ANTICIPATED EVIDENCE AND ISSUES

A. Personal Characteristics

In *State v. Schindler*, 146 Wis. 2d 49, 427 N.W.2d 110 (Ct. App. 1988), the court held that a low IQ (a few points above mild retardation), an emotional condition consisting of crying, fear of mental breakdown, lack of memory and generally wishing for one's demise, and an allegedly confusing version of "Miranda" rights was insufficient evidence to support a finding of involuntariness especially when there was no evidence of improper coercion on the part of police. *Schindler*, 146 Wis. 2d at 49.

Age alone, absent police coercion, does not allow for a finding of involuntariness. *See, e.g., In Interest of Shawn B.N.*, 173 Wis. 2d 343, 365, 497 N.W.2d 141 (Ct. App. 1992), where the court held that absent coercion, the fact that a defendant was 13-years of age and possibly emotionally disturbed did not render his statement involuntary. Furthermore, in *Vance v. Bordenkircher*, 692 F.2d 978, 980-81 (4th Cir. 1982), *cert denied,* 464 U.S. 833 (1983), the court found that a 15-year old boy with an IQ of 62 with the mental age of nine had voluntarily confessed to the murder of a homeowner and his housekeeper. The court concluded in that case physical age and mental capacity alone do not require a finding as a matter of law that a confession was involuntary.

In *Vance*, much like the case at bar, the child was advised of his rights, his access to outside adults was not restricted and no evidence of coercion existed. In *Vance*, the confession did occur in a relatively short period of time. In the case at bar, the defendant is 16 years old. He is an adult in the sense that the legislature permits him to be charged directly in adult court for crimes of this nature. The defendant will be 17 in six months, and thus would be considered an adult for criminal court charging purposes.

Additionally, the case of *Hardaway v. Young*, 302 F.3d 757 (7th Cir. 2002) is likewise instructive by way of contrast. In that case, Hardaway confessed to killing an 11-year old boy in apparent retaliation for shooting three gang members, one of whom died. Several interrogations occurred over a 16 hour period. The juvenile had 19 prior police contacts and was given several breaks during the questioning. He never once asked for his parents or a lawyer. While the court denied the request for habeas relief, it did emphasize, however, that age is a critical factor and that the younger the child, the more carefully the police questioning tactics will be scrutinized to determine if excessive coercion, intimidation or simple immaturity tainted the confession.

In the instant case, the defendant is 16 1/2 and although he had no prior police contacts other than those in this case, his intelligence was not so low as to equate with that of a 12, 13 or 14 year old or one so mentally impaired as to negate a waiver of rights. Moreover, he never asked for, nor was he denied access to his mother, who was at the sheriff's department for at least part of the questioning. In fact, she was allowed to see her son at the conclusion of the questioning. This occurred at the suggestion of the law enforcement officers and not at the urging of the defendant or his mother.

Finally, there is the case *In the Interest of Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110, which was reproduced in part in defendant's brief. The facts which will be established at the hearing in the case at bar are substantially different. First and foremost, Jerrell C.J. was 14 years of age. The defendant in this case is 16 1/2. More significantly, Jerrell C.J. was actually arrested, handcuffed and brought to the police station. At 6:20 a.m., Jerrell arrived at the station and was placed alone in an interview room until 9:00 a.m. He was handcuffed while in the room. Then the questioning began. In this case, none of those things occurred.

Another significant difference between *Jerrell C.J.* and this case is the fact that *Jerrell*, made two or three requests to talk with his parents. Those requests were denied. In this case, no such requests were made by the defendant or his mother, Barb Janda, who was present for part of the interrogation at the sheriff's department. In fact, the police sought her permission to interview her son and to conduct the interview at the sheriff's department. This did not occur in *Jerrell C.J.*

B. Police Stratagems.

In light of *Colorado v. Connelly*, 479 U.S. 157 (1986), the propriety of police conduct has become the most important factor in determining voluntariness and hence, the admissibility, of a defendant's statements. Generally speaking, police activity such as the length and condition of interrogation, the psychological and physical pressures used by the questioner(s), including threats or promises, delay in arraignment, whether Miranda warnings were given, regardless of whether they were required, are common factors to be considered. *State v. Clappes*, 136 Wis. 2d 222, 401 N.W.2d 759 (1987) and *Withrow v. Williams*, 507 U.S. 680 (1993).

In the current case, it is questionable whether the defendant alleges any coercion or police impropriety in the first place. Essentially, the defendant argues that because there were two police officers involved, there was an improper balance of power because there were two adults and one 16-year old. The defense cites no case law for this proposition. However, courts have addressed the concept of the "good cop/bad cop" scenario and found this stratagem was not an improper interrogation practice in the absence of threats of violence or other clear forms of coercion. *State v. Owen*, 202 Wis. 2d 620, 551 N.W.2d 50 (Ct. App. 1996). So if the "good cop/bad cop" strategy is not improper, the fact that there were two officers interviewing the defendant is certainly not improper, absent threats of violence or other clear forms of coercion.

Next, the defendant argues the officers implied more than they knew and thus used that strategy to overbear his will. Again, defendant cites no case law; and more specifically, no actual examples of this in which he can causally connect those statements with the concept of overbearing his will. Assuming *ad arguendo* there was a misrepresentation; a police officers misrepresentation as to the amount and type of incriminating evidence linking a defendant to a crime does not necessarily overcome a defendant's free will or render his waivers of his right to counsel and to remain silent involuntarily. *See, e.g., State v. Woods*, 117 Wis. 2d 701, 723, 345 N.W.2d 457 (1984). Further, by March 1, 2006, some forensic testing had been completed such that Special Agent Fassbender and Detective Wiegert did know a significant amount what had occurred on October 31, 2005, at the Avery compound. They also had evidence from which they could draw reasonable inferences that the defendant was not being truthful in his earlier statements. Therefore, implying that they knew more did not in any way cause the defendant's statements to be involuntary.

Finally, defendant impliedly suggests that some type of promise was made which induced him to confess. The defendant does not clearly articulate that promise nor has he established its existence. The existence and nature of police promises allegedly used to induce a defendant's statements are questions of historical fact. *State v. Owens*, 148 Wis. 2d 922, 436 N.W.2d 869 (1989). Courts have dealt with the "promise" issue in several cases. In *State v. Deets*, 187 Wis. 2d 630, 523 N.W.2d 180 (Ct. App. 1994), the court held that there was no impropriety when police told a particular defendant that if he did not cooperate, the district attorney would look at the case differently. Additionally, courts have generally held that a statement by an officer that cooperation would be beneficial "falls far short" of improper coercion. *State v. Lampe*, 119 Wis. 2d 206, 216, 349 N.W.2d 677 (1984), (citing *State v. Cydzik,* 60 Wis. 2d 683, 692, 211 N.W. 2d

421 (1973) which held that "a statement by a law enforcement officer that a defendant's cooperation would be to his benefit, 'falls far short of creating the compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' "). The defendant on several occasions during the interview unequivocally demonstrated his ability to "resist" suggestions by officers as to facts at issue in the case, clearly exhibiting free will; those specific instances will be more fully developed at the evidentiary hearing. Similarly, in *State v. Woods*, 117 Wis. 2d 701, 345 N.W.2d 457 (1984) the court held that comments to the effect that it would be "better" or "easier" for you if you talked were not like promises of leniency or of an improved position in the legal system if he confessed, which are the type of promises that may invalidate a subsequent confession. *Id* 731-32.

CONCLUSION

The court must apply a totality of the circumstances test in resolving the issue of whether the defendant was in custody and more importantly, whether the statements rendered on March 1, 2006, were voluntary. The court must engage in a balancing test if, and only if, the court finds that there were coercive or improper police procedures employed to overbear the will of the defendant. If the court finds no improper police conduct, then there is no need to take into consideration the particular personal characteristics of the defendant. If, however, the court finds that there was some improper police conduct in the form of subtle psychological coercion then the court must look at all of the surrounding circumstances. The court should examine all that did happen, as well as what did not happen; *e.g.*, the absence of threats, violence, or relentless tag team interrogation techniques. Upon consideration of the totality of the circumstances, the court must conclude that defendant's statements are the product of free and unconstrained will,

reflecting deliberateness of choice, and are not the result of conspicuously unequal confrontation in which pressures brought to bear exceeded the defendant's ability to resist.

Dated this _28th_ day of April, 2006.

Respectfully submitted,

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