COURT OF APPEALS DECISION DATED AND FILED

May 3, 2011

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. 2010AP505-CR

Cir. Ct. No. 2008CF5903

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDY L. MARTIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

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

¶1 CURLEY, P.J. Randy L. Martin appeals the judgment convicting him of being a felon in possession of a firearm and for carrying a concealed

weapon. *See* WIS. STAT. §§ 941.29(2), 941.23 (2007-08).[1] He also appeals the orders denying his motion to suppress evidence and his motion for reconsideration. Martin argues that the trial court erred in denying his motion to suppress statements he made to police because: an officer asked him questions likely to elicit incriminating responses while he was in police custody without giving him his ***Miranda***[2] warnings; the conversation between Martin and police was an "interrogation" for ***Miranda*** purposes even if Martin initiated it; and the resulting error was not harmless. Martin additionally argues that the trial court erred in denying his motion to suppress the handgun found in his car shortly after his arrest because it resulted from an unconstitutional, warrantless search. We affirm.

I. BACKGROUND.

¶2 On November 14, 2008, Milwaukee Police Sergeant James Fidler observed an altercation involving Martin and another driver. Fidler had pulled up to an intersection where traffic had stopped at a red light when he observed Martin get out of his car and yell in the direction of a car ahead of him. As Martin walked toward the car ahead of him, the driver of that vehicle stepped outside. Martin pulled what looked like a weapon out of his coat pocket, pointed it at the other driver, and said, "I have something for you." At that point, the other driver motioned to Fidler and Martin put the object inside his pocket and walked back to his car.

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[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

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

¶3 Sergeant Fidler promptly arrested Martin for disorderly conduct and searched him. Fidler recovered an expandable baton from Martin's front coat pocket and a knife from Martin's waistband.

¶4 Two other Milwaukee police officers, Hollis Smith and Andrew Moutry, stopped to assist Sergeant Fidler. Fidler told Smith to search Martin's car. Smith consequently asked the passenger seated in Martin's car—LeRoy Henry—to step out and proceeded to search the car while Fidler stayed with Martin. Smith pulled out a plastic storage drawer located under the front passenger seat and found a loaded .22-caliber handgun inside.

¶5 Officer Smith showed the weapon to Martin and Henry. He then asked Martin and Henry whether either of them owned the gun. Both denied any knowledge of it. Officer Smith then turned to handcuff Henry. As Martin saw this happening, he asked Smith why he was arresting Henry. Smith explained that he was arresting Henry for carrying a concealed weapon. Martin asked the officers if they would let Henry go if Martin said the gun was his. Officer Smith replied: "I don't want you to say it's yours if its not. I just want the truth, is the gun yours." Martin responded, "yeah, it's mine if you let my uncle go."[3] Officer Smith then asked Martin to describe the weapon. Smith said he did so to prevent Martin from falsely confessing:

> I just wanted the truth. I didn't want him to say the gun was his just to get his uncle out of trouble, and by him describing the gun to me that satisfied me that he had personal knowledge or intimate knowledge of this weapon and knew about it.

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[3] Although Henry was not Martin's biological uncle, Martin referred to him as his "uncle" because he had known him since he was a child.

¶6 Martin said that the gun was a "black 22-caliber hand gun." His description was correct: the gun was in fact a .22-caliber, and, according to Smith, this would not have been obvious to someone who was not closely familiar with the gun.

¶7 Prior to this conversation, none of the officers on the scene gave Martin any warnings pursuant to ***Miranda***.

¶8 Martin was subsequently charged with being a felon in possession of a firearm and for carrying a concealed weapon. Martin moved to suppress his admission that the gun was his, his description of the gun, and the gun itself at trial. The trial court denied Martin's motion, and Martin's statements and the gun were entered into evidence at trial. A jury found Martin guilty on both counts.

¶9 After trial, and prior to sentencing, Martin moved for reconsideration of his search and seizure motion based on ***Arizona v. Gant***, 129 S. Ct. 1710, 1719 (2009), which created a new rule for searches incident to arrest after Martin's trial. The trial court denied the motion, and Martin now appeals.

II. ANALYSIS.

¶10 On appeal, Martin argues that the trial court erred in denying his motion to suppress statements he made to police because: an officer asked him questions likely to elicit incriminating responses while he was in police custody without giving him his ***Miranda*** warnings; the conversation between Martin and police was an "interrogation" for ***Miranda*** purposes even if Martin initiated it; and the resulting error was not harmless. Martin additionally argues that the trial court erred in denying his motion to suppress the handgun found in his car shortly after

his arrest because it resulted from an unconstitutional, warrantless search. We disagree and discuss each argument in turn.

A. The trial court did not err in denying Martin's motion to suppress his statements.

¶11 We turn first to Martin's argument that the trial court erred in denying his motion to suppress statements he made to police while in custody. The Fifth Amendment to the United States Constitution provides that no "'person ... shall be compelled in any criminal case to be a witness against himself.'" *See*, *e.g.*, ***State v. Cunningham***, 144 Wis. 2d 272, 276, 423 N.W.2d 862 (1988). "In ***Miranda*** [***v. Arizona***, 384 U.S. 436 (1966)], the Supreme Court established that the State may not use a suspect's statements stemming from custodial interrogation unless" it "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." ***State v. Fischer***, 2003 WI App 5, ¶21, 259 Wis. 2d 799, 656 N.W.2d 503. "Included among those safeguards are the now-familiar ***Miranda*** warnings." ***Id.*** Thus, the issue is whether a custodial interrogation actually occurred, because "***Miranda*** warnings need only be administered to individuals who are subjected to custodial interrogation." ***Id.***, ¶22. The State must establish whether a custodial interrogation took place by a preponderance of the evidence. ***Id.***

¶12 Whether the trial court correctly concluded that a custodial interrogation did not take place in this case is a mixed question of fact and law. *See* ***Cunningham***, 144 Wis. 2d at 281-82. We review the circuit court's findings of fact under the clearly erroneous standard. ***State v. Armstrong***, 223 Wis. 2d 331, 352, 588 N.W.2d 606 (1999). The ultimate question of whether the facts constitute an interrogation, however, is a question of law we review *de novo*.

Cunningham, 144 Wis. 2d at 282; ***State v. Coerper***, 199 Wis. 2d 216, 222, 544 N.W.2d 423 (1996).

¶13 Because the parties do not dispute that Martin was in custody when he claimed that the gun was his, and because they do not dispute that Martin did not receive ***Miranda*** warnings, the sole issue before us is whether Smith "interrogated" Martin. *See* ***Fischer***, 259 Wis. 2d 799, ¶¶22-23 ("Custodial interrogation" for ***Miranda*** purposes "generally means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way." When a defendant is in custody at the time of alleged incriminating statements, the remaining issue is whether he or she was "interrogated" by the State.).

¶14 The United States Supreme Court further defined "interrogation" in ***Rhode Island v. Innis***, 446 U.S. 291 (1980). *See*, *e.g.*, ***Cunningham***, 144 Wis. 2d at 276. ***Innis*** held that interrogation includes "express questioning of a suspect in custody," as well as "conduct or words which are the 'functional equivalent' of express questioning." ***Cunningham***, 144 Wis. 2d at 277. However, "[n]ot all police conduct that may cause a defendant to speak constitutes interrogation." ***Id.***

¶15 "[T]he focus of the ***Innis*** test is 'primarily upon the perceptions of the suspect.'" ***Cunningham***, 144 Wis. 2d at 279 (citation omitted). Our role on appeal is to ascertain "whether the officer's conduct or words could reasonably have had the force of a question on the suspect." *See* ***id.***

¶16 While the ***Innis*** test "is not directed at the subjective intent of the police officer[,]" it is important to note that "'where a police practice is *designed* to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to

have that effect.'" ***Cunningham***, 144 Wis. 2d at 280 (emphasis added; citation omitted). "If an officer knows of a suspect's unusual susceptibility to a particular form of persuasion, and the officer's conduct or words play on that susceptibility," then "the officer's conduct or words might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response." ***Id.*** at 279. On the other hand, "[t]he police cannot be held accountable for the unforeseeable results of their words or actions." ***Id.*** at 279-80.

¶17 Furthermore, in interpreting and applying the ***Innis*** test, we "must keep in mind the evils addressed by ***Miranda***." ***Cunningham***, 144 Wis. 2d at 280. Our conclusions regarding whether police conduct constitutes an interrogation "should be responsive to the concerns expressed in the ***Miranda*** decision." *See* ***id.*** The purpose of providing ***Miranda*** warnings is to prevent "'government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.'" ***Id.*** (citation omitted).

¶18 Finally, we note that "[i]n determining whether police conduct or comment constitutes the functional equivalent of interrogation, 'each case must be considered upon its own facts.'" ***State v. Bond***, 2000 WI App 118, ¶15, 237 Wis. 2d 633, 614 N.W.2d 552 (citation and brackets omitted).

¶19 With these standards in mind, we conclude that Martin was not interrogated for ***Miranda*** purposes and that the admission of his statements at trial was therefore proper as a matter of law. As a preliminary matter, we note that the particular comments at issue here do not include Smith's initial confronting of Martin and Henry with the gun and do not include the first time when Smith asked them who owned the gun. Rather, at issue are Smith's comments after Martin

asked the officers if they would let Henry go if Martin said the gun was his, as well as Smith's comments after Martin said, "yeah, it's mine if you let my uncle go." Viewed in the context of the particular circumstances in this case, it is clear that Smith's comments to Martin at both points during this encounter were not "'designed'" with the aim of eliciting incriminating testimony, *see* ***Cunningham***, 144 Wis. 2d at 280 (citation omitted), but were directed instead at preventing a false confession. For example, the first set of comments at issue here, which begins with Smith's admonishing Martin, "I don't want you to say it's yours if its not," directly responds to Martin asking the officers if they would let Henry go if Martin said the gun was his. Similarly, Smith's request that Martin describe the gun directly responds to Martin giving for the second time what appears to be false information: "yeah, it's mine *if you let my uncle go*." In the context of the particular circumstances of this case, we do not think that the individual statements Smith made can be divorced from the entire conversation, which was aimed not at interrogation, but instead, at preventing a false confession. This is not an example of an officer taking advantage of a defendant in custody. *See* ***id.*** Nor was there any evidence of coercion. *See* ***id.*** In sum, the "evils addressed by ***Miranda***" were not present in this case. *See* ***id.***

¶20 Moreover, ***Bond***, which Martin analogizes to the facts of his case, is distinguishable from the facts at issue here. Unlike Officer Smith in the case before us, the officer whose comments were at issue in ***Bond*** "drew force" from his "'specific knowledge'" of the defendant and the defendant's vernacular and was accordingly able to "utilize a 'particular form' of speech" to elicit the defendant's incriminating response without directly questioning him. *See* ***id.***, 237 Wis. 2d 633, ¶¶17, 19; *see also* ***id.***, ¶5 (describing the context of the conversation between defendant and police found to have violated the defendant's Fifth

Amendment rights under ***Miranda***). The officer's comments in ***Bond*** were consequently held to have been designed to compel an incriminating response. ***Id.***, ¶18. Thus, in ***Bond***, the "evils addressed by ***Miranda***," *see* ***Cunningham***, 144 Wis. 2d at 280, were a central factor in the court's analysis, whereas in Martin's case the absence of impropriety on the officer's part compels a different result.

¶21 In our view, this case more closely resembles ***Fischer***. In ***Fischer***, police confronted the defendant with evidence from a burglary scene that matched his footwear and told him that "it shouldn't become [sic] a surprise to him" if he were charged. ***Id.***, 259 Wis. 2d 799, ¶4 (one set of quotation marks omitted). The defendant then began asking questions about the details of the burglaries, and in doing so, made various incriminating statements. ***Id.***, ¶¶5-9. For example:

> [Defendant] Fischer asked [Officer] Vento where the Brookfield police had found his shoe prints. Vento told Fischer that at Goodyear, there was an impression of a shoe where the plexiglass had been kicked in. Fischer then called Vento a liar, stating that the plexiglass was never kicked in but, in fact, had been pushed in with his hand and that the footwear impression would have come from his shoe when he stepped inside the building. Vento then told Fischer he was not sure whether the plexiglass had been kicked in or stepped on but only knew there was a footwear impression similar to his shoes that would be sent to the crime lab for a comparison.
>
> Fischer then asked Vento what had been reported missing from the burglaries. Vento informed Fischer that some property had been taken from a car parked in the parking lot and from inside Goodyear, including a television and some stereo equipment. Vento then explained to Fischer that if Fischer was responsible for the crimes, "what typically helps in these types of cases ... is to make victims feel less like victims. And one of the ways to do that is to get some of the property back." Fischer denied responsibility for the property taken from the car and then asserted that, hypothetically, if he were responsible, he would not be able to return any of the property because it would have been sold for drugs. Fischer further stated that a second person had been there.

> Fischer then asked what had been reported missing from the burglary at F & F Tire World. Vento informed Fischer that some tools had been reported stolen. Fischer responded, saying he doubted that the person reporting the crime was being truthful because no tools were taken, that "he had all of his own tools with the receipts and could show a proper purchase, and he had no reason to take tools."

Id., ¶¶5-7 (ellipses in ***Fischer***).

¶22 In ***Fischer***, this Court concluded that the officer's answers to Fischer's questions, even when they resulted in incriminating responses, were not "the functional equivalent of interrogation" for ***Miranda*** purposes. ***Fischer***, 259 Wis. 2d 799, ¶41. As in Martin's case before us, the ***Fischer*** court found persuasive the fact that there was "nothing in the record to indicate that the detectives had any specific knowledge of Fischer or of any unusual susceptibility to questioning he might have had." *See* ***id.***, ¶29. Like the case before us, the exchange consisted of the defendant asking questions, and the detectives responding to those questions, at which point the defendant would implicate himself. *See* ***id.***, ¶33. Also, as in the case before us, the ***Fischer*** court was mindful of "the purpose of ***Miranda*** and ***Innis***," which is to "prevent law enforcement officers from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." ***Id.***, ¶35. As in Martin's case, the conduct and words at issue did not implicate this purpose. *See* ***id.***

¶23 For these reasons, we cannot say that the trial court's finding that the officers asked no questions likely to elicit incriminating responses was clearly erroneous, *see* ***Armstrong***, 223 Wis. 2d at 352, nor can we say that the trial court erred in concluding as a matter of law that no custodial interrogation occurred, *see* ***Cunningham***, 144 Wis. 2d at 282. Because we conclude that the trial court did

not err, we need not consider whether any alleged error was harmless. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (cases should be decided on narrowest possible ground).

B. The trial court did not err in denying Martin's motion to suppress the contents of the search of his vehicle.

¶24 Martin next argues that the trial court erred in denying his motion to suppress the contents of the search of his vehicle, and also erred in denying his motion for reconsideration.

¶25 Prior to trial, the trial court concluded that the officers had conducted a valid search incident to arrest pursuant to ***New York v. Belton***, 453 U.S. 454 (1981), and ***Thornton v. United States***, 541 U.S. 615 (2004). The trial court also determined that the search was a valid inventory search.

¶26 After trial, Martin moved the court to reconsider this ruling in light of ***Gant***, which held that a search incident to arrest is only valid when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. ***Id.***, 129 S. Ct. at 1719. The trial court denied the motion for reconsideration, reasoning that even if the search would have been unconstitutional under ***Gant***, the good faith exception would apply because police conducted the search based on a good faith understanding that the search incident to arrest was legal under pre-***Gant*** law.

¶27 Following the trial court's ruling, the Wisconsin Supreme Court decided ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, and ***State v. Littlejohn***, 2010 WI 85, 327 Wis. 2d 107, 786 N.W.2d 123. Martin concedes that, under the current state of the law as set forth in these cases, we may

not overturn the circuit court's denial of his motion to suppress based on ***Gant***. The ***Dearborn*** and ***Littlejohn*** opinions hold that searches such as the one in this case were constitutional under the law before ***Gant***, and ***Gant*** was thus a clear break from prior cases. *See* ***Dearborn***, 327 Wis. 2d 252, ¶27. ***Littlejohn*** further holds that the good faith exception applies to searches like the one in this case even if they would have been unconstitutional under ***Gant*** if the officers were operating under a pre-***Gant*** view of the law. *See* ***Littlejohn***, 327 Wis. 2d 107, ¶5.

¶28 Martin concedes that he cannot prevail on this issue under current law; however, he is pursuing this issue in order to preserve his right to pursue it in the future. While we find Martin's arguments compelling, we will not address whether the supreme court's decisions in ***Dearborn*** and ***Littlejohn*** were incorrect. *See* ***State ex rel. Swan v. Elections Board***, 133 Wis. 2d 87, 93-94, 394 N.W.2d 732 (1986) (the court of appeals is primarily an error correcting court); *see also* ***State v. Olsen***, 99 Wis. 2d 572, 583, 299 N.W.2d 632 (Ct. App. 1980) (the court of appeals is bound by the prior decisions of the supreme court). In our view, the only court that may address the validity of these cases is our supreme court. Because the court of appeals is primarily an error-correcting court, *see* ***Swan***, 133 Wis. 2d at 93-94, we are duty-bound to apply the law as it presently exists. We therefore affirm the ruling of the trial court on this issue.

By the Court.—Judgment and orders affirmed.

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