

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

CLERK OF COURT
JULY 19 2006

AUG 16 2006

CLERK OF CIRCUIT COURT

STATE'S SUPPLEMENTAL RESPONSE
TO MOTION TO SUPPRESS STATEMENTS
TO NEWS REPORTERS ON SIXTH AMENDMENT GROUNDS

INTRODUCTION

Defendant asked for supplemental briefing to incorporate the evidence established at the July 19, 2006, hearing. Essentially, defendant wished the court to take into consideration the existence of Exhibit 9, his letter to jail authorities indicating he wished no further interviews with members of the media. Additionally, the defendant wanted the court to include, in his motion to suppress, the telephone interviews conducted by Emily Matesic which are referred to in Exhibits 4, 5, and 6 which reflect a telephone conversation Emily Matesic had with Mr. Avery on December 8, 2005.¹ Lastly, the defendant maintains his challenge to the admissibility of the statements obtained by Channel 5 news reporter Jennifer Kolbusz which occurred on November 18 and December 14, 2005. The state opposes the motion to suppress and asks the court to find all statements admissible.

¹ The state also notes Ms. Matesic reports having a telephone interview with Mr. Avery in March after Dassey's first confession was made public.

MATESIC INTERVIEWS

The November 12, 2005, video interview at the Calumet County Jail conducted by Emily Matesic is admissible for at least two reasons. First, as the state initially argued, there is no evidence supporting the existence or establishment of an agency relationship between the Calumet County Sheriff's Department and Emily Matesic of WBAY TV, Action News 2, Green Bay. It was entirely her initiative that led to the meeting. Law enforcement did nothing other than permit her to go into the secure jail area and interview the defendant. Based on the controlling precedent in *State v. Lee*, 122 Wis. 2d 266, 362 N.W.2d 149 (1985) and the evidence adduced no agency relationship existed and none was established. Second, the video interview of November 12 is admissible because the defendant's sixth amendment right to counsel did not exist at the time of the interview. It did not exist because it had not "attached." Although the defendant had been charged with possession of a firearm by a felon and did indeed have counsel for that offense, he had not been charged with the offense of first-degree murder. Consequently, defendant Avery's right to counsel on the charge of murder did not exist. One's sixth amendment right to counsel does not exist until one is charged with the offense. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *State v. Harris*, 199 Wis. 2d 227, 544 N.W.2d 545 (Ct. App. 1996). Moreover, the sixth amendment right to counsel is "charge" or "offense" specific. *McNeil*, 501 U.S. at 175. The fact that defendant had been charged with possession of a firearm by a felon is irrelevant to the analysis. It is an entirely separate and distinct charge from that of murder and mutilation of a corpse. *Texas v. Cobb*, 532 U.S. 162 (2001). The sixth amendment right had not attached. Therefore, the statements are admissible.

Similarly, the telephonic interviews conducted by Emily Matesic on December 8, 2005, and March 2006 are admissible. First and foremost, again there was no agency relationship

established by the defense that supports the proposition that news reporter Matesic became an agent of the state. Second and equally important is the fact that in these telephone interviews, like every other telephone interview, defendant Avery was the initiator of the specific conversation that led to the statements now at issue. In determining who “initiated” the discussions that led to the statements at issue, the court must look at the particular communication at hand and not who initiated the exchanges that took place or led up to the interview. *State v. Pischke*, 198 Wis. 2d 257, 265, 542 N.W.2d 202 (Ct. App. 1995).

Finally, it must be noted that defendant Avery does have a first amendment right of free speech which includes the right of access to the media. *See generally Lomax v. Fiedler*, 204 Wis. 2d 196, 205, 554 N.W.2d 841 (1996).

THE KOLBUSZ INTERVIEWS

Similarly, the two interviews conducted by WFRV TV Channel 5 news reporter Jennifer Kolbusz are admissible. Kolbusz was not an agent of law enforcement. She did not interview defendant Avery at the request of law enforcement. She did not receive any instructions from law enforcement. She asked no individual questions suggested by law enforcement. Law enforcement did not participate in either one of her interviews. Law enforcement simply provided an opportunity for Avery to take advantage of his first amendment rights. The fact that at one time Avery may have indicated, presumably with the assistance of counsel, that he wished no further media interviews is, quite frankly, irrelevant to the court’s determination. Mr. Avery does not have a sixth amendment right of counsel in interviews conducted by the media or other private individuals. Consequently, defendant Avery’s stated intention contained in Exhibit 9 is of no consequence to the court’s determination. Defendant’s

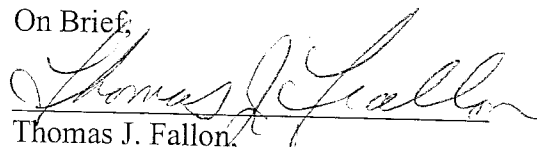
participation in the interview was entirely voluntary and his choice. There is no sixth amendment right to be "free from interrogations" conducted by members of the media or other private individuals. State action is required. In this particular case, there was no state action. No agency relationship existed and none was established. Therefore, there is no sixth amendment violation, and the statements are admissible.

Dated this 7th day of August, 2006.

Respectfully submitted,

Kenneth R. Kratz
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State Bar #1013996

On Brief,



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