

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

DEC 12 2006

Case No. 05 CF 381

DECISION AND ORDER

**ON DEFENDANT'S MOTION TO SUPPRESS STATEMENT
TO MARINETTE COUNTY SHERIFF'S DEPARTMENT**

The defendant has filed a motion to suppress statements he made to Detective Anthony O'Neil of the Marinette County Sheriff's Department after approximately 2:55 p.m. on November 5, 2005. The defendant contends that the statements he made after that time to Detective O'Neil were made in violation of his 5th and 14th amendment right to counsel under the Federal Constitution and his corresponding right to counsel under Article 1, Section 8 of the Wisconsin Constitution. Specifically, the defendant asserts that during the course of his interview by Detective O'Neil, he indicated a desire not to speak further with the detective outside the presence of his attorney and any statements made after that point must be suppressed.

The court heard testimony from Detective Anthony O'Neil and Attorney Steven M. Glynn relating to the defendant's motion on August 9, 2006. The relevant facts are as follows:

On November 5, 2005 Detective Anthony O'Neil of the Marinette County Sheriff's Department was requested by the Calumet County Sheriff's Department to interview Steven Avery and other members of his family concerning the disappearance of Teresa Halbach. Members of the Avery family were in Crivitz at the time on property owned by the family. Following discussion with other family members, O'Neil interviewed Steven Avery in his unmarked squad car. Most, but not all, of the interview was recorded without Steven Avery's knowledge. The interview lasted between 2-3/4 hours and 3 hours, but was periodically interrupted by telephone calls from the press and Steven Avery's attorney, Steven Glynn.

During the course of the interview, O'Neil informed Avery a number of times he was not under arrest and was free to leave. O'Neil did not take Avery into custody, even after the interview. No threats or promises are alleged to have been made to Steven Avery by Detective O'Neil. Avery sat in the front passenger seat of O'Neil's vehicle while being interviewed and was described as being cooperative throughout the interview. O'Neil learned that Steven Avery was not a high school graduate, but O'Neil came to the conclusion that Avery had "a lot higher than an 8th grade education."

Attorney Steven Glynn, who represented Steven Avery in a civil lawsuit against Manitowoc County arising out of Avery's wrongful conviction for a 1985 offense, was in his office in Milwaukee with his partner, Walter Kelley, on November 5, 2005. After Kelley notified Glynn he'd been contacted by a reporter concerning a missing woman and statements regarding her disappearance from Steven Avery, Glynn decided he should contact Avery. Glynn spoke with Avery on three different occasions on November 5

during the course of two separate telephone calls. He also spoke with Detective O'Neil between the second and third times he spoke with Steven Avery. Detective O'Neil was not asked questions during the hearing involving much of the content of his conversation with Attorney Glynn. Glynn testified that he spoke to O'Neil as follows:

"I know I don't have the authority to make you stop questioning him, but I am telling you that I don't want him questioned anymore, and I'm going to talk to him again and make sure he tells you he doesn't want to be questioned anymore."

Glynn further testified that O'Neil told him in response to his request to stop questioning Avery, "Something to the effect that Steve is going to have to make up his own mind on that."

After the telephone conversation between Attorney Glynn and Detective O'Neil, the following exchange took place between Detective O'Neil and Steven Avery:

Steve: Well I guess they don't want me to talk no more.

Sheriff: They don't?

Steve: No, but here's his number, in case, when you want to talk to me you can contact them and they can, they want to be there too.

Sheriff: Okay. So, let me ask you this, Steve. Although they're telling you that they don't want you to talk no more, is that your wishes? I'm gonna ask you.

Steve: Well, I gotta listen to the lawyer.

Sheriff: Well, you're your own person.

Steve: Well, yeah.

Sheriff: And we're not talking about you committing any crime here, what we're talking about is a missing person, right?

Steve: Well, yeah.

Sheriff: So in the interest of a missing person last being seen by you, that we're aware of, and trying to figure out where this person may be, am I understanding you correctly in the idea that you could help in this investigation to find this missing person, that you're refusing to cooperate because your attorney's telling you not to talk to us?

Steve: Well, no, no.

Sheriff: Okay, so, I mean you're . . .

Steve: I wanna help.

Sheriff: . . . you're a 40 some year old man. You're an intelligent guy. You've got nothing to fear, you know, do you want to finish this conversation?

Steve: Well, as long as it's easy, whatever I know.

Sheriff: Look.

Steve: Yeah.

Sheriff: You know, that's up to you.

Steve: We can.

Sheriff: It's up to you.

Steve: Yeah.

Sheriff: Now your attorney's maybe giving you this advice. And I'm just saying . . .

Steve: Yeah.

Sheriff: . . . hey look it, here it is person to person. You understand what we're talking about, a missing person, and it's purely up to you. They can't invoke it on your behalf, but you can on your behalf say he look it, now this is my own decision and this is what I'm going to do. Okay?

Steve: Well, yeah. I'd like to help.

Sheriff: I haven't threatened you.

Steve: No.

Sheriff: I haven't promised you anything. I told you that you're free to leave. You don't have to talk to me. Now I'm going to ask you Steve, do you continue, do you still want to talk to me about this so we can . . .

Steve: Yeah, you can talk a little longer, you know.

Sheriff: Okay.

Steve: I wanna help.

Sheriff: I understand that.

Steve: You know, that's what I wanna do.

Sheriff: And that's where I'd wanna be to. You know, we're talking about a serious issue here and I'm sure there's people that . . .

Steve: Well yeah, and I don't like people being missin' and the family's gotta go through it like I did.

Sheriff: Hmmm.

Steve: It's rough on them.

Sheriff: Sure.

Sheriff: How do we explain this vehicle being on your family's property, after you seen it go out the driveway hang a left?

Steve: I don't know. I got no ideas.

Sheriff: Any ideas?

Steve: No.

Sheriff: Okay.

The defense asserts that the quoted exchange represents an unequivocal invocation by Steven Avery of his right to counsel under the United States and Wisconsin constitutions and that any further statements he made to Detective O'Neil after that point must be suppressed.

At the outset, it is helpful to understand arguments that the defense is not making. The defendant is not arguing that Steven Avery was in custody during any of the time he was being interviewed by Detective O'Neil. He is not arguing that any statements he gave must be suppressed on the grounds they were given involuntarily, independent of any constitutional right to counsel. Finally, the defendant is not alleging any denial of his right to counsel under the sixth amendment to the constitution in recognition of the fact that the sixth amendment protections do not attach until a criminal prosecution has commenced. The sole question is whether the defendant has a right to counsel under either the 5th amendment to the United States Constitution or Article I, Section 8 of the Wisconsin Constitution that was violated during the course of Detective O'Neil's interrogation on November 5, 2005.

The essential flaw in the defendant's argument is that in the absence of a custodial interrogation, a defendant does not have a right to counsel under either the 5th amendment to the United States Constitution or Article I, Section 8 of the Wisconsin

Constitution. The defendant argues in his brief that “poorly reasoned Wisconsin opinions hold that, as a matter of federal constitutional law, the police can ignore a request for counsel when an interviewee is not in custody.” One may take the philosophical view that the Wisconsin opinions interpreting the 5th amendment in this manner are “poorly reasoned.” However, if there are any “well-reasoned” decisions from any jurisdiction which hold otherwise, the defendant does not cite the court to them. The court is unaware of any reported decision in any jurisdiction which holds that the 5th amendment extends to a defendant a constitutional right to counsel in a non-custodial setting. Detective O’Neil could not have violated a constitutional right which Steven Avery did not have. The *Miranda* decision upheld a defendant’s right to counsel when questioned in a custodial setting.

There is no testimony in the record to dispute Attorney Glynn’s recollection that he told Detective O’Neil he did not want Mr. Avery to be interviewed further after they spoke on the phone. As noted by the State, however, the right to invoke the right to counsel and right to remain silent when they do exist are personal to the defendant. Attorney Glynn recognized this in his discussion with Detective O’Neil. Steven Avery’s statements to Detective O’Neil concerning his desire to terminate the interview process were not entirely unequivocal. Because he was not in custody, the court does not have to decide whether the statements would have been enough to terminate the interview had he been in custody. However, Mr. Avery seemed to go out of his way to avoid saying specifically that he wished to terminate the interview. His statements, “Well, I guess they don’t want me to talk no more” and, “Well, I gotta listen to the lawyer” suggest he was

inclined to terminate the interview not because he wished to do so himself, but because his attorney was telling him to. Because Steven Avery was not in custody, the court need not decide whether these statements of Steven Avery would have warranted suppression of any further statements had he been in custody at the time.

The defendant asserts that even if Avery did not have a 5th amendment right to counsel, he had an independent right to counsel under Article I, Section 8 of the Wisconsin Constitution, which was violated. It is true that in some cases the Wisconsin Supreme Court has extended constitutional rights under the Wisconsin Constitution beyond those granted by their federal counterparts. The Wisconsin Supreme Court has stated that it “will not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the constitution of Wisconsin and the laws of this state require that greater protection of citizens’ liberties ought to be afforded.” State v. Knapp, 285 Wis. 2d 86, 115 (S. Ct. 2005) However, the court has also ruled that, “where the language of the provision in the state constitution is ‘virtually identical’ to that of the federal provision or where no difference in intent is discernable, Wisconsin courts have normally construed the state constitution consistent with the United States Supreme Court’s construction of the federal constitution.” *Id.* at 114. The defendant does not cite the court to any Wisconsin Supreme Court decision suggesting that a defendant’s right to counsel in a non-custodial setting is any greater under Article I, Section 8 of the Wisconsin Constitution than it is under the 5th amendment to the Federal Constitution. Neither does the defendant cite the court to any reported decision from any other state in the union which has extended a similar right

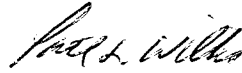
under its own state constitution. The court does not believe there is any evidence to suggest that the Wisconsin Supreme Court would extend the rights granted under Article I, Section 8 of the Wisconsin Constitution in the manner suggested by the defendant.

ORDER

For the foregoing reasons, the defendant's motion to suppress statements made to the Marinette County Sheriff's Department is denied.

Dated this 12th day of December, 2006.

BY THE COURT,



Patrick L. Willis,
Circuit Court Judge