

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2006AP1865-CR

Cir. Ct. No. 2005CF584

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE R. PEREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jose Perez appeals a judgment of conviction for possession with intent to deliver cocaine and an order denying his motions to suppress statements and evidence. Perez contends his statements were given in violation of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

He asserts both that the evidence against him was seized after his unlawfully obtained statements, making the evidence fruit of the poisonous tree and his consent to search was invalid. We reject Perez's arguments and affirm.

Background

¶2 During a controlled drug purchase by Green Bay narcotics investigators, Perez arrived to take part in the transaction. When Perez was later stopped, he had \$180 of \$200 in pre-recorded currency that had been given to the investigators' confidential informant buyer. Perez was arrested, but apparently not given his *Miranda* warnings during the stop.

¶3 Investigator David Poteat met with Perez at the Green Bay Police Department. Poteat introduced himself and informed Perez he was under arrest for delivery of cocaine and Poteat was there to speak to Perez about the crime. Poteat also stated the police suspected there were more narcotics in Perez's home. Poteat had not yet read Perez's *Miranda* warnings. At this point, however, Perez interjected and stated there was more cocaine at his residence and he would tell Poteat where. This is the first statement at issue on appeal.

¶4 Poteat stopped his conversation with Perez. He believed Perez would likely give consent to search his home and waive his *Miranda* rights to give a statement. Because Perez spoke Spanish, and even though the preceding conversation had been in English, Poteat thought he should find an interpreter to give the *Miranda* warnings. He was able to contact Spanish-speaking FBI agent Robert Molina.

¶5 Molina provided Perez a copy of the *Miranda* rights written in Spanish and asked Perez to read them aloud. Perez did so and appeared to

understand what he had read. Perez asked no questions of Molina regarding his rights. Perez did ask for an attorney but then, according to Molina, “almost immediately said after that no, I’ll talk to you guys without an attorney.” Molina then presented Perez with a consent to search form, also written in Spanish, which Perez read aloud and then signed with no apparent objection.

¶6 After obtaining consent to search Perez’s home, Molina left the room and advised Poteat that he was uncertain if, under FBI policy, he could continue questioning Perez given his “request” for an attorney. Poteat had Molina advise Perez that because he had asked for an attorney, they were going to let him “sit there for a while and think about it” and to knock on the door if he wanted to talk further with police.

¶7 Perez never asked to speak with officers, but Poteat checked on him “a couple times just to make sure if he needed to go to the bathroom ... or anything of that nature. I also told him that we were beginning the search of his residence.” When Poteat advised Perez they had started the search, Perez responded by saying that he would tell Poteat where the drugs were. Poteat said okay and Perez advised that there were drugs in his closet. This is the second statement at issue.

¶8 Perez was charged with delivery of cocaine as party to a crime, possession with intent to deliver cocaine, and possession of THC as party to a crime. After the Information was filed, Perez pled not guilty and brought his suppression motions. He argued his first statement was given before he had been advised of his *Miranda* rights, his second statement was given after he invoked his right to counsel, and his consent to search his home was invalid. When the court denied these motions, Perez pled no contest to possession with intent to deliver

cocaine. The remaining counts were dismissed and read in, and Perez was sentenced to two years' initial confinement and three years' extended supervision.

Discussion

*I. Whether Perez's First Statement Was Obtained Contrary to **Miranda***

¶9 Whether evidence should be suppressed because of a purported constitutional violation presents a question of constitutional fact. *State v. Samuel*, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423; *State v. Anderson*, 165 Wis. 2d 441, 447, 477 N.W.2d 277 (1991). When reviewing a question of constitutional fact, we uphold the circuit court's findings of fact unless clearly erroneous, but we independently determine whether the facts fulfill the constitutional standard. *State v. Hambly*, 2006 WI App 256, ¶8, 726 N.W.2d 697 (petition for review granted March 14, 2007).

¶10 *Miranda* “established that the State may not use a suspect's statements stemming from custodial interrogation unless the State 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. In determining whether a *Miranda* violation has occurred, the first step is determining whether there was custodial interrogation “because *Miranda* warnings need only be administered to individuals who are subjected to custodial interrogation.” *Fischer*, 259 Wis. 2d 799, ¶22. The State has the burden to show, by a preponderance of the evidence, whether custodial interrogation occurred. *Id.* There is no question Perez was in custody. Thus, the only question is whether he was interrogated. *See id.*, ¶23.

¶11 Interrogation is not limited to express questioning. *Hambly*, 726 N.W.2d 697, ¶11. It includes the functional equivalent; that is, “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Our supreme court has paraphrased the *Innis* rule as follows:

if an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer’s remarks or observing the officer’s conduct, conclude that the officer’s conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect, then the conduct or words would constitute interrogation.

State v. Cunningham, 144 Wis. 2d 272, 278-79, 423 N.W.2d 862 (1988).

¶12 Perez contends Poteat’s statements, that Perez was under arrest for cocaine possession and officers suspected more cocaine in his home, run afoul of this rule. He argues the words were not normally attendant to routine arrest, were likely to elicit an incriminating response, and were provocative. *See State v. Bond*, 2000 WI App 118, ¶¶16-20, 237 Wis. 2d 633, 614 N.W.2d 552. Perez also claims the fact that he did not fully comprehend English should be considered.

¶13 Perez’s argument regarding his English comprehension is not persuasive. The trial court found he “generally seems to speak English and seems to understand pretty well and was able to communicate....” Indeed, at the start of the suppression hearing, Perez had informed the court “I understand basically when one person is speaking. I’m doing okay with the English language but I do want [the interpreter] here for specific things that I don’t understand.” The court later observed how “quite sparsely during this hearing” the interpreter was used.

The court's finding that Perez sufficiently understands English is not clearly erroneous, and we therefore cannot consider an argument predicated on a contrary factual premise.

¶14 As to the force of Poteat's opening statements to Perez, we conclude they were not the functional equivalent of interrogation. Wisconsin courts have derived from the *Innis* rule five general standards. First, "interrogation" includes words or actions by the police that officers should know are reasonable likely to elicit an incriminating response, but "interrogation" does not include anything normally attendant to arrest and custody. *Bond*, 237 Wis. 2d 633, ¶16. Second, this rule only applies to words or actions that officers "*should have known* [are] reasonably likely to elicit an incriminating response[.]" because we will not hold officers accountable for unforeseeable results. *Id.*, ¶17 (citations omitted). Particularized knowledge of a suspect's personal traits can be a factor of this foreseeability test. *Id.*

¶15 Third, police intent is important, but we focus primarily on a defendant's perceptions by asking whether an impartial observer would perceive officers' words and actions as designed to elicit a response. *Id.*, ¶18. Fourth, we examine the tone of the remarks. Offhand, casual comments will not be treated as skeptically as words that could be considered particularly evocative or provocative. *Id.*, ¶19. Finally, we review whether officers directly addressed the defendant or were merely speaking to each other in the defendant's presence. *Id.*, ¶20.

¶16 Here, Poteat's statements merely advised Perez why he was under arrest and what the purpose of the interview was. Perez asserts this was not something normally "attendant to arrest and custody" but does not analyze his

assertion. Indeed, *Hambly* suggests that an officer's reciting the reasons for an arrest is not normally the functional equivalent of interrogation. *Hambly*, 726 N.W.2d 697, ¶¶17-19. Moreover, Poteat testified that such introduction was always his practice when initiating an interview. In any event, we do not see why an officer informing a subject of the basis for his arrest is not attendant to arrest and custody, at least when such introduction is neutrally delivered.

¶17 Perez's only claim of personal traits that might make him more susceptible to police tactics was this claimed difficulty with English, which we have rejected. The "interrogation environment" was not coercively hostile. *See Cunningham*, 144 Wis. 2d at 280. Poteat's statement was brief, he displayed no weapons or other show of force, and there is no suggestion that Poteat was anything other than civil and professional when addressing Perez. Given the setting, an objective observer would not likely perceive Poteat's introductory statement as inherently designed to elicit a response. *See id.* Rather, it would likely be viewed as merely informative. Perez's statement that there was more cocaine in his house was volunteered, not obtained contrary to *Miranda*. There is therefore no basis for the court to have suppressed the statement.

II. Whether the Second Statement Was Obtained After Perez Requested Counsel

¶18 Perez argues his second statement, that the cocaine was in his closet, was improperly obtained because he had invoked his right to counsel. The legal sufficiency of a defendant's invocation of the right to counsel also presents us with a question of constitutional fact. *State v. Jennings*, 2002 WI 44, ¶20, 252 Wis. 2d 228, 647 N.W.2d 142.

¶19 "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted

his right to counsel.” *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). The request for counsel, however, must be unambiguous. “[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the accused *might* be invoking the right to counsel” then precedent does not require the cessation of questioning. *Davis v. United States*, 512 U.S. 452, 459 (1994).

¶20 Here, the trial court found that Perez immediately withdrew his request for an attorney. This is supported by the record and not clearly erroneous. In any event, Perez at best made an ambiguous request for counsel when, after asking for an attorney and without any intervening comment from Molina or Poteat, he immediately changed his mind and said he would speak to officers without a lawyer. Officers are not required to clarify ambiguous requests for counsel. *Jennings*, 252 Wis. 2d 228, ¶36.

¶21 Further, Perez’s statement was voluntary and spontaneous. Molina and Poteat were not interrogating Perez. Rather, Perez offered the location of his cocaine in response to Poteat’s update that the search of Perez’s home had begun. Perez does not explain how such an update would, under *Innis*’s objective foreseeability test, constitute interrogation or even how it would invite a response. Rather, he makes an unsupported argument that his *Miranda* waiver was not knowing or intelligent. We do not consider underdeveloped, unsupported arguments. *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). To the extent this argument is based on Perez’s assertion he did not comprehend English, again, we have rejected that underlying premise. There is no basis for suppressing this second statement.

III. Whether the Search Was Unlawful

¶22 Perez contends the evidence obtained from the search of his home must be suppressed as fruit of the poisonous tree because the evidence was obtained based on information learned in the course of interrogation. He also contends consent was involuntarily given.

¶23 To the extent Perez argues the search was conducted in violation of *Miranda*, we note first that we have concluded there was no such violation as to either statement Perez gave. Second, search and seizure questions are governed by Fourth, not Fifth, Amendment considerations. See *State v. Turner*, 136 Wis. 2d 333, 353, 401 N.W.2d 827 (1987). Simply stating the search violated the Fourth Amendment, absent more, is an inadequate argument. See *M.C.I.*, 146 Wis. 2d at 244-45. Also, the “fruit of the poisonous tree” argument is raised for the first time on appeal.

¶24 The actual issue is whether Perez’s consent to the search of his home was voluntary. Perez contends “Poteat had already told Perez that they were beginning the search of his residence ... Perez’s consent could not have been freely and voluntarily given. He was merely submitting to a claim of lawful authority.” However, Perez is describing the point when he made his second statement that the cocaine was in his closet. By then, however, Perez had already signed the consent to search form.

¶25 The question is thus whether Perez’s signing the consent form was voluntary. *Turner*, 136 Wis. 2d at 353. We examine the totality of the circumstances to determine whether the accused “has exercised a free and unconstrained choice or whether, alternatively, his will has been overborne and his

capacity for self-determination critically impaired.” *Id.* at 354 (internal citations omitted).

¶26 Nothing in the record suggests Perez’s consent was involuntary. The consent form Perez signed was a Spanish language version. Despite Perez’s claims of illiteracy, he had read the form out loud to Molina. Perez had been given his *Miranda* rights prior to being asked to sign the consent form. He does not contend, nor does the record show, Poteat or Molina used any improper or coercive tactics to get him to sign the form. There was no overt show of force and there were no threats. There would be no basis to conclude the consent was involuntarily given, so the court properly denied the suppression motion.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

