

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 18, 2009

David R. Schanker
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. 2008AP1990-CR

Cir. Ct. No. 2007CF68

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID C. LUKO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

¶1 NEUBAUER, J.¹ David C. Luko appeals from a judgment of conviction for intentionally shooting a caged or staked animal, operating a firearm

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

while intoxicated, and negligently mistreating an animal contrary to WIS. STAT. §§ 951.09, 941.20(1)(b), and 951.02. Luko admitted to the charged offenses after waiving his *Miranda*² rights during a custodial interrogation. Luko argues that the waiver was not valid because he was represented by counsel at the time of questioning and because he had invoked his *Miranda* rights during the preceding investigation, prior to his arrest. Because Luko's Sixth Amendment right to counsel had not attached at the time of questioning and because Wisconsin law does not recognize an anticipatory invocation of *Miranda* rights, we uphold the trial court's order denying Luko's motion to suppress his statement. We affirm the judgment.

BACKGROUND

¶2 In May 2005, Deputy Douglas Kocher of the Washington county sheriff's department received anonymous information indicating that Luko had been involved in the shooting of a dog in the town of Erin. On or about May 24, 2005, Kocher spoke with Luko at his taxidermy shop and Luko denied involvement in the shooting. The following day, Kocher received a fax from an attorney indicating that he was representing Luko and "any attempts to contact my client at this time may very well result in the filing of a civil rights action ... [and] a request for a restraining order." Kocher additionally received a letter, or "Invocation of Rights" from Luko stating:

I, David Luko ... declare that I do not want to be questioned by any federal or state law enforcement officer or agency or any federal or state prosecutor concerning any pending charges or any other matter without the presence or advice of an attorney. By this declaration it is my intent

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

to invoke my right to remain silent and my right to counsel guaranteed by the 5th, 6th, and 14th Amendments to the United States Constitution and article I, sections 7 and 8 of the Wisconsin Constitution. *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *State v. Hanson*, 136 Wis. 2d 195, 401 N.W.2d 771 (1987).

Kocher indicated that he understood from these communications that Luko wanted to deal with law enforcement through his attorney.

¶3 On October 19, 2005, Kocher approached Luko personally about submitting to a voice stress analysis. Luko told Kocher he would consult with his attorney. When Luko did not contact him, Kocher returned to Luko's shop a week later, at which point Luko declined to submit to a voice stress analysis. Kocher had no further contact with Luko, and his involvement in the investigation ended on March 24, 2006.

¶4 In April 2006, Detective Hope Demler was given the file regarding the dog shooting and the subsequent investigation. Demler knew from the file that Luko was represented by an attorney. Demler proceeded to investigate the case and learned from one of Luko's neighbors that Luko had admitted to shooting the dog. Demler then went to Luko's residence to arrest him. Although Luko continued to deny involvement, he was placed under arrest and transported to the Washington county sheriff's department where he was brought to an interview room and read his *Miranda* rights.

¶5 Luko indicated that he was willing to discuss the incident and then gave a written statement. According to Demler, Luko did not request an attorney, nor did he exercise his right to remain silent. Demler then had two additional contacts with Luko on August 28, 2006, for purposes of determining the location of the firearm, and on August 31, 2006, to "clear up some inconsistencies" in his

statements. During each of these contacts, Demler advised Luko of his *Miranda* rights, and Luko agreed to make a statement. Demler made no attempts to contact Luko's attorney.

¶6 Luko subsequently filed a motion to suppress his statements on grounds that the questioning in the absence of counsel by both Kocher and Demler violated his constitutional rights. The trial court denied Luko's motion based on its determination that Luko's Sixth Amendment rights had not attached at the time of questioning and that Wisconsin law does not recognize the anticipatory invocation of *Miranda* rights and therefore Luko's letter to law enforcement in May 2005 did not render his later waiver invalid.

¶7 Luko was later convicted by a jury. He now appeals.

DISCUSSION

¶8 Luko's appellate arguments are at times difficult to discern. We understand Luko to raise issues regarding both his Sixth Amendment right to counsel and his Fifth Amendment *Miranda* rights.³ With respect to his Sixth

³ The Sixth Amendment right to counsel is distinct from the Fifth Amendment *Miranda* right to counsel. The Sixth Amendment right to counsel is offense specific and attaches at the initiation of adversary criminal proceedings. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). The right to counsel under *Miranda*, based on the Fifth Amendment guarantee that "[n]o person ... shall be compelled in any criminal case to be a witness against himself," is not offense specific and relates only to custodial interrogation. *McNeil*, 501 U.S. at 176-77.

The Supreme Court's decision in *McNeil* clarifies the distinction between *Miranda*'s prophylactic and implicit right to counsel devised by the courts to protect a person's right not to incriminate himself or herself involuntarily during custodial interrogations and the Sixth Amendment explicit right to counsel "[i]n all criminal prosecutions" to assist the accused with his or her defense. *McNeil*, 501 U.S. at 175-78. See also *State v. Dagnall*, 2000 WI 82, ¶31, 236 Wis. 2d 339, 612 N.W.2d 680.

Amendment right to counsel, Luko argues that because he was in custody and represented by counsel in connection with the criminal investigation of the dog shooting, he could not make a valid waiver of his right to counsel prior to questioning in the absence of counsel. Also at issue is whether Luko’s May 2005 “Invocation of Rights” rendered his later waiver of those *Miranda* rights invalid.

¶9 Whether a criminal defendant has been denied the Fifth or Sixth Amendment right to counsel requires us to apply historic facts to a constitutional standard. *State v. Badker*, 2001 WI App 27, ¶8, 240 Wis. 2d 460, 623 N.W.2d 142. In doing so, we will uphold the trial court’s findings of fact unless clearly erroneous; however, we review de novo whether those facts satisfy the constitutional standard. *Id.*

Sixth Amendment Right to Counsel

¶10 The Sixth Amendment to the United States Constitution provides the right to counsel at all critical stages of a criminal prosecution. *McNeil*, 501 U.S. at 175. The right to counsel is “offense specific”; it cannot be invoked for future prosecutions because it does not attach until a prosecution is commenced. *Id.* A prosecution is commenced “at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *Id.* (citation omitted).

¶11 Luko argues that his Sixth Amendment right to counsel was violated when he was questioned in the absence of his attorney. Luko makes this argument despite longstanding law that a defendant who has been arrested but not charged has no right to counsel under the Sixth Amendment. *See Badker*, 240 Wis. 2d 460, ¶19; *State v. Lale*, 141 Wis. 2d 480, 485, 415 N.W.2d 847 (Ct. App. 1987); *State v. Taylor*, 60 Wis. 2d 506, 524, 210 N.W.2d 873 (1973) (When a defendant

has been arrested, but has not been charged either by complaint or information, he is not entitled to Sixth Amendment protection as a matter of constitutional right.). Luko contends that the Sixth Amendment right to counsel should extend to the investigatory phase of a criminal proceeding, especially when law enforcement has sufficient information to formally initiate a criminal prosecution prior to questioning, which, he argues, is the case here.

¶12 In support of his argument that the Sixth Amendment right to counsel should extend to the accusatory phase of a criminal proceeding, Luko cites to a New York court of appeals decision in *People v. Hobson*, 348 N.E.2d 894, 897 (N.Y. 1976), in which the court held that once a lawyer has entered a criminal proceeding representing a defendant under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer. However, as noted above, this is not the law in Wisconsin. *See also State v. Dagnall*, 2000 WI 82, ¶30, 236 Wis. 2d 339, 612 N.W.2d 680 (“The right to counsel under the Sixth Amendment arises after adversary judicial proceedings have been initiated—in Wisconsin, by the filing of a criminal complaint or the issuance of an arrest warrant.”).⁴ We therefore decline Luko’s invitation to ignore well-established

⁴ We reject Luko’s misplaced reliance on our decision in *State v. Dagnall*, 228 Wis. 2d 495, 596 N.W.2d 482 (Ct. App. 1999), *aff’d*, 2000 WI 82, 236 Wis. 2d 339, 612 N.W.2d 680. In *Dagnall*, the defendant’s “Sixth Amendment right to counsel attached when the complaint was filed ... prior to his interrogation by the detectives.” *Dagnall*, 228 Wis. 2d at 499. Here, Luko’s Sixth Amendment right to counsel had not attached at the time he asserted it. For this reason, Luko’s reliance on *Patterson v. Illinois*, 487 U.S. 285, 289 (1988), which involved a postindictment statement, is likewise misplaced.

Wisconsin law.⁵ See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (We are bound by prior decisions of this court and the supreme court.).

¶13 Because the State had not commenced adversary judicial proceedings at the time of the custodial interrogation, Luko's Sixth Amendment right to counsel had not yet attached. We therefore reject any contention that Luko's Sixth Amendment right to counsel was violated.

Fifth Amendment Miranda Rights

¶14 The State construes Luko's argument as seeking approval for an anticipatory invocation of *Miranda* rights prior to an accused being taken into custody. We agree with the State that the law does not support such a request. *Miranda* requires that a suspect be warned of the right to remain silent and the right to have an attorney present when that suspect is in custody and subject to custodial interrogation.⁶ The State contends that Luko's execution of an "Invocation of Rights" in May 2005 is not sufficient to invoke his *Miranda* rights and does not prevent a later waiver of those rights. We agree.

⁵ Much of Luko's argument before the trial court involved his concern that the State could manipulate a defendant's Sixth Amendment right to counsel through its timing of the initiation of formal criminal proceedings, i.e., circumventing a defendant's Sixth Amendment right to counsel by delaying formal proceedings until after questioning, even when it is in possession of sufficient information to do so prior to questioning. While acknowledging Luko's argument, the trial court recognized, as do we, that the law requires the initiation of formal criminal proceedings in order for the Sixth Amendment right to counsel to attach. See *McNeil*, 501 U.S. at 175.

⁶ The warnings required by *Miranda* are specific: an in-custody defendant must be warned that he or she has the right to remain silent, that anything he or she says may be used against him or her in court, that he or she has the right to an attorney, and that an attorney will be appointed if he or she cannot afford one. *Miranda*, 384 U.S. at 478-79.

¶15 It is well established that *Miranda* rights are specific to custodial interrogation. *State v. Hambly*, 2008 WI 10, ¶22, 307 Wis. 2d 98, 745 N.W.2d 48 (citation omitted), *cert. denied*, 129 S. Ct. 177 (No. 07-11514) (Oct. 6, 2008). In *McNeil*, the United States Supreme Court observed: “We have in fact never held that a person can invoke his [or her] *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation.’” *McNeil*, 501 U.S. at 182 n.3; *see also Hambly*, 307 Wis. 2d 98, ¶41 (A “person who is not in custody cannot anticipatorily invoke a Fifth Amendment *Miranda* right to counsel or right to remain silent.”). We therefore reject any argument that Luko’s attempt to invoke *Miranda* rights during the course of the investigation in May 2005 prevented him from engaging in valid waiver of those rights in April 2006.⁷

CONCLUSION

¶16 We conclude that Luko’s Sixth Amendment right to counsel had not attached at the time of the interrogation. Because Wisconsin law does not recognize a precustodial anticipatory invocation of Fifth Amendment *Miranda* rights, we conclude that Luko’s attempt to do so approximately one year prior to

⁷ Luko makes a single sentence argument that by ignoring his repeated precustodial statements that he did not wish to be questioned without counsel present, law enforcement exerted pressure on him in order to obtain a waiver of his right to silence and right to counsel. Luko did not raise this argument before the trial court, he does not develop this argument factually on appeal, nor does he otherwise challenge the sufficiency of his waiver of *Miranda* rights.

The record reflects facts sufficient to support a finding that when Luko was taken into custody he did not request to speak to his counsel at any time during the first interrogation or during the subsequent interrogations. Based on our conclusion that Luko’s precustodial statements did not serve to invoke his Fifth Amendment right to have counsel present and there being no other argument as to the sufficiency of waiver, we need not address this issue further. *See Kristi L.M. v. Dennis E.M.*, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375 (undeveloped arguments need not be addressed).

his custodial interrogation did not render invalid his later waiver of *Miranda* rights. We therefore uphold the trial court's denial of Luko's motion to suppress and affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

