State of Wisconsin
Court of Appeals
District 1
Appeal No. 2012AP001126 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Lee Yang,

Defendant-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Kevin E. Martens, presiding

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is controlled by well-settled law. Therefore, the appellant does not recommend either oral argument or publication.

Statement of the Issues

I. Did the trial court err in denying the appellant's motion to suppress an incriminating in-custody statement he made to Detective Rudolfo Gomez where it was uncontroverted that Yang had earlier invoked his right to counsel, but he was not given the opportunity to confer with an attorney? After Yang had invoked his right to counsel, Gomez "visited" Yang and ostensibly offered comfort and assistance to Yang, purportedly because they were both veterans of the Vietnam War. Thereafter, the police claim that Yang "requested" to speak to Gomez by putting his hand out of the cell door while holding Gomez's business card. Gomez went again to Yang's cell and, only then, did Yang waive the right to counsel.

Answered by the trial court: No.

Summary of the Argument

Yang was interrogated three times. It was indisputably established that the second interrogation ended when Yang unambiguously invoked his right to counsel. Undeterred, Milwaukee police detective Rudolfo Gomez went to visit Yang in his cell. Gomez explained that both he and Yang were veterans of the Vietnam War and, therefore, Gomez was concerned about Yang's comfort. During this visit, Gomez showed Yang a "challenge point" coin that Gomez had been awarded during the war. Gomez also spoke briefly to Yang about the fact that Yang's son was a member of the Marine Corps. Yang immediately said that he wanted to talk to Gomez about the incident but, according to Gomez, he stopped him. As Gomez was leaving, he claims that he mentioned to the jailers-- apparently out of earshot of Yang-- that if Yang wanted a McDonald's hamburger, Gomez would pay for it.

Later, a jailer was making his rounds when he saw Yang's hand sticking out of the cell door. Yang had in his hand Gomez's business card. Yang did not say anything, but the jailer "assumed" that this meant that Yang wanted to speak to Gomez. The jailer summoned Gomez to the cell. When Gomez got there he once again read Yang the Miranda warning, and Yang waived his right to counsel. Yang then made an incriminating statement.

Yang moved to suppress the statement on the grounds that it was made after he had already invoked his right to counsel, and he had not been given the opportunity to consult

with an attorney prior to the visits by Gomez. The court conducted a hearing, and denied the motion, finding that Gomez reinitiated the interrogation.

The Court of Appeals must reverse the order of the trial court denying Yang's motion to suppress. Yang did not reinitiate the interrogation. Rather, Gomez's first visit to Yang was a ruse carefully designed to appeal to Yang's special vulnerability concerning the war. Thus, Yang was subject to the functional equivalent of interrogation.

Even if the court were to accept Gomez's questionable claim that his first visit was motivated only by a concern for Yang's well-being, the statement must still be suppressed because Yang's act of holding his hand out of the cell door does not establish, under the totality of the circumstances, that he wanted to speak to Gomez again.

Statement of the Case

I. Procedural History

The defendant-appellant, Lee Yang (hereinafter "Yang") was charged with first degree intentional homicide arising out of the shooting death of Shoua Lee on December 31, 2009 in

Milwaukee. (R:2) Following a preliminary hearing, the court found probable cause and bound Yang over for trial. (R:40-27) Yang entered a not guilty plea. *Id.*

Yang filed a pretrial motion to suppress an incriminating in-custody statement he made to police. (R:7) The motion was heard on December 10, 2010 and on January 20, 2011.[1] After hearing the testimony and the arguments of counsel, the court denied the motion. (R:48-52)

The matter proceeded to jury trial beginning on March 28, 2011. On April 1, 2011, the jury returned a verdict finding Yang guilty of first degree intentional homicide as charged. (R:59-70)

Later, the court sentenced Yang to life in prison, with eligibility for extended supervision after forty years. (R:60-49)

II. Factual Background

A. The shooting of Shoua Lee

On December 31, 2009 at approximately 6:00 a.m. Milwaukee police were dispatched to a call for shots fired. (R:53-40) When officers arrived, they found Shoua Lee lying on the front stoop of his home with a pool of blood underneath him. (R:53-43) Lee was apparently dead by the time the police arrived. (R:53-44) Lee's injuries appeared to have been caused by a large caliber firearm. (R:54-11)

[1] The evidence presented at the motion hearing will be set forth in the Factual Background section of this brief

The investigation revealed that a neighbor heard two “loud noises” at about 6:02 a.m., and when he looked out the window he saw a red Toyota Previa van drive past the front of his house. (R:54-6, 7, 8)

Police also learned that Kalia Her had been married to the appellant, Yang. (R:54-28) Her was currently in a relationship with the deceased, Lee, and she was currently living with him. (R:54-30) Her told the police that, to her knowledge, Vang drove a red van. (R:54-34)

Based on this information, the police went to Vang’s house, and parked in an alley two or three houses away. (R:54-11 to 14). Eventually, officers observed a person exit the house. When they approached the individual, they were able to identify him as Vang. (R:54-16) Police arrested Vang at gunpoint. (R:54-22)

Later, when police searched Vang’s home, they recovered three firearms from a second-floor bedroom. (R:54-33) There were no fingerprints on the weapons. (R:54-35) However, it was determined that the bullet that was recovered from Lee’s body had been fired from the 30-06 rifle that police recovered in Vang’s home. (R:57-70) Police also found a hunting vest that had rifle cartridges in the pocket. (R:54-48) There were numerous papers and commendations recognizing Vang’s service in the Vietnam War, including a document for the United States Army Civil Affairs Support Division. (R:54-4)

Vang also had a 1993 red Toyota Previa parked outside. Inside the van was a traffic citation that had been issued to Vang, and a pill bottle with his name on it. (R:54-47)

Vang was taken to police headquarters, and he was interrogated. He told the police that he had been married to Her, but that she had "taken off" shortly after she obtained her green card. (R:54-56) Vang denied any involvement in the shooting. *Ibid.*

Later, Vang was interrogated a second time, and he continued to deny any involvement. (R:54-81) The second interview ended when Vang invoked his right to counsel. (R:54-82)

At trial, Milwaukee Police Detective Rudolfo Gomez testified that Vang had requested to speak to him. (R:54-95) Thereafter, Gomez interrogated Vang. The audio recording of the interrogation was played for the jury, and a transcript of the interrogation was admitted into evidence. (R:57-90; R:22-Exhibits 103 and 106) In the statement, Yang said that he shot Lee twice with his (Yang's) 30-06 rifle because he believed that Lee had "brainwashed" Kalia Her. According to Yang, he fired the shots out of the window of his van.

Yang also testified at trial. He confirmed that the red van police seized was, in fact, his van. (R:59-16) He denied, though, that he shot anybody on December 31, 2009. *Ibid.* During Yang's testimony it was established that he had written letter seeking to have Her deported and, in the letters, he

mentioned that she has "boyfriends". (R:59-24)

B. Yang's motion to suppress his statement

As mentioned, following his arrest, Yang was interrogated on three separate occasions by the police. (R:47-6) The parties stipulated that the first occurred on December 31, 2009, and that there was no defense challenge to that statement.[2] *Ibid.* The second statement occurred on January 2, 2010. (R:47-7) Again, there was no challenge to that statement. *Ibid.* Significantly, though, the parties stipulated that the second interrogation ended because Yang invoked his right to counsel. (R:47-8) The third interview also occurred on January 2, 2010; however, it was the State's position that Yang had reinitiated the questioning. (R:47-8) The State then presented testimony concerning the circumstances under which the third statement was given.

Milwaukee police detective Rudolfo Gomez testified that he was involved in the Shoua Lee homicide investigation, and he was aware of the fact that Yang had invoked his right to counsel. Nonetheless, Gomez said that he approached Yang because they were both veterans of the Vietnam War. (R:47-15) Gomez produced a "challenge point" coin that he had been awarded during the war, and pointed to himself. (R:47-16) According to Gomez, Yang then wanted to talk about the situation with his wife[3], but Gomez stopped him. (R:47-17)

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[2] The statement did not contain any incriminating statements attributable to Yang

[3] Referring, of course, to the shooting of Lee. The State's theory was that Yang shot Lee out of jealousy. Apparently Yang believed that Lee was having an affair with Yang's wife.

Gomez said that he gave Yang a business card, and then Gomez left. (R:47-17)

According to Gomez, he left the building on some business and, when he returned a short while later, his assistant informed him that Yang had requested to speak to him (Gomez). (R:47-22, 23)

Lewis Brown was working as a jailor that day. Brown said that as he was making his rounds, he saw that Yang had his hand hanging out of the food tray hole in the cell door. (R:48-32) Yang was holding a business card. When Brown looked at the card, it was the card of Detective Gomez and, therefore, Brown "assumed" that this meant that Yang wanted to speak to Detective Gomez. (R:48-32) However, Yang did not say anything to Officer Brown. *Ibid.* Therefore, Brown contacted the detective bureau to let Gomez know. *Ibid.*

After Gomez got the message, he obtained the services of an interpreter, and he went to Yang's cell. (R:47-27) Gomez claims that, at that point, Yang indicated through the interpreter that he wanted to speak to Gomez about the shooting. (R:47-27)

Gomez gave Yang the MIranda warning, and then he began questioning Yang about the shooting. Almost immediately, Yang asked whether there would be a lawyer present. (R:47-37) Gomez told Yang that a lawyer would not be present, but that he (Gomez) had *assumed* that Yang wanted to speak to him anyway. *Ibid.* Gomez says that Yang

then agreed to be questioned without a lawyer. *Ibid.* Yang then gave a statement in which he confessed to shooting Lee.

The trial court denied Yang's motion to suppress the confession. The court found:

> Approximately 5 hours passed and at a little after 10 o'clock-- 10:05, 10:10 perhaps, Detective Gomez received information from Officer Brown that Mr. Yang wished to speak to him. Officer Brown indicated that it was not a verbal statement by Mr. Yang, but Mr. Yang held the card out of the slot of the cell towards Officer Brown, that Officer Brown took that to be a signal that based on his experience, that that was an indication that Mr. Yang wished to speak with Detective Gomez, and that indeed was confirmed later through the translator . . .

Argument

I. Detective Gomez-- not Yang-- re-initiated the interrogation and, therefore, no valid waiver of the right to counsel can be found.

It is beyond dispute in this case that Yang was in custody and he was subjected to interrogation when he unambiguously invoked his right to counsel. This creates a blanket prohibition against further interrogation until counsel is made available. That limitation continues to apply unless and until a suspect initiates further communication, exchanges or conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981). A suspect initiates further dialogue with police when he or she speaks words or

engages in conduct that can be "fairly said to represent a desire … to open up a more generalized discussion relating directly or indirectly to the investigation." *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 77 L. Ed. 2d 405, 103 S. Ct. 2830 (1983) It is significant, though, that a valid waiver of the right to counsel cannot be found where the police-- rather than the defendant-- re-initiate the interrogation. In *Bradshaw*, the Supreme Court explained:

> "[Although] we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation (citations omitted) the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, *a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.* We further hold that an accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Bradshaw, 462 U.S. at 1043.

The specific questions presented by this appeal, then, are as follows: (1) whether Detective Gomez's initial visit to Yang was the functional equivalent of interrogation (i.e. words and

conduct designed to elicit incriminating statement)[4]; and, if not, (2) whether Yang re-initiated interrogation by putting his hand out the cell door while holding Gomez's business card without saying anything.

As will be set forth below, Detective Gomez' first visit to Yang was a carefully designed ruse intended to appeal to Yang's special vulnerability to matters related to his service in the war and, therefore, it was plainly designed by police to elicit an incriminating response from Yang. Moreover, a waiver of the right to counsel is invalid where the police initiate the contact. Yang's conduct in holding out Gomez's business card-- without saying anything-- is not an unambiguous indication of a desire to re-initiate interrogation.

A. Standard of appellate review

The issue presented here is whether Gomez re-initiated interrogation when he visited Yang under the ruse of offering assistance to a "fellow warrior".

"Whether a suspect was subject to interrogation by the government is a question of constitutional fact. This court will not upset the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. The determination of whether the facts satisfy the legal standard is a question of constitutional law which this court decides independently of the circuit court or court of appeals but benefiting from their

[4] If the court finds that Gomez's first visit to Yang was the functional equivalent of questioning, then the later "waiver" of his right to counsel is invalid. This is because it was the police-- and not Yang-- the reinitiated the interrogation.

analyses." *State v. Hambly*, 2008 WI 10, P49 (Wis. 2008).

The facts here are not disputed. Therefore, the Court of Appeals decides the issue independently.

B. Detective Gomez' "visit" to Yang was a ruse carefully designed to elicit incriminating statements from Yang.

The record is clear that, in his first visit to Yang, Gomez did not expressly interrogate him. Thus, the question becomes whether Gomez' conduct was the functional equivalent of questioning. That is, whether Gomez's conduct was intended to eventually elicit incriminating statements from Yang.

On this point, the United States Supreme Court explained:

> [I]t cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly *susceptible to an appeal to his conscience* concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

Rhode Island v. Innis, 446 U.S. 291, 302-303 (U.S. 1980). By implication, then, if the conduct of the officers in *Innis* had been designed to appeal to Innis' conscience, the court would have found that it was, in fact, the functional equivalent of

questioning. The Wisconsin Supreme Court has made this point explicit:

> The Court qualified the objective foreseeability standard by stating that "any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion 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 from the suspect." *Innis*, 446 U.S. at 302 n. 8. *An officer's specific knowledge about the suspect may indicate that the officer should have known his or her conduct or words would have had the force of a question on the suspect.*
>
> Thus, the *Innis* test reflects both an objective foreseeability standard and the police officer's specific knowledge of the suspect. The *Innis* test can be stated 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, 278-279 (Wis. 1988).

Here, as a result of the search of Yang's home, the police had specific knowledge about him. They knew that he was a decorated veteran of the Vietnam War. Consequently, the detectives constructed a ruse obviously intended to appeal to Yang's vulnerability in this respect. We know that it was a ruse

because, prior to visiting him, Gomez knew that Yang had invoked his right to counsel (R:47-14), and when Yang apparently did not understand why Gomez was there, Gomez pulled out a challenge point award he received in Vietnam (R:47-15)[5] But, most convincing is Gomez' explanation of why he went to visit Yang:

> Well, I know that at the jail they serve baloney sandwiches which don't taste pretty good based on my experimenting with those sandwiches, and I felt that a man of his status that did service to this country deserved a little more, and I was willing to maybe get him a McDonald's sandwich or something more deserving of a warrior like himself.

(R:47-19)[6] For some reason, though, this offer was never expressed to Yang. Rather, Gomez says that he told this to the jailer. *Ibid.*

Sending Gomez to visit Yang was indisputably a ruse. It played upon a known vulnerability in Yang. It was designed to elicit an incriminating response from Yang, and it did in fact elicit a willingness to make incriminating statements. For this reason, any waiver of the right to counsel after that point is invalid. The police re-initiated interrogation.

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[5] It is interesting to note that, at that point, Yang began telling Gomez about the problems he was having with his wife, Kalia Her. (R:47-16) Gomez immediately recognized this as incriminating information and, according to Gomez, he stopped Yang. *Ibid.* The ruse had a more immediate effect on Yang than even Gomez probably expected.

[6] One cannot resist the temptation to comment on the contrived and cynical nature of Gomez' testimony. Gomez' "respect" for his fellow warrior went only so far as to entitle Yang to a McDonald's hamburger. It apparently did not motivate Gomez to make sure that Yang got the assistance of legal counsel that he had requested-- one of the rights, ostensibly, that Yang fought to defend in the Vietnam War..

C. Putting one's hand out of a cell door while holding a business card is not an unambiguous request to speak to the individual named on the card.

Even if one accepts Gomez's questionable claim that he initially visited Yang out of true concern for Yang's well-being (i.e. that the visit was not the functional equivalent of interrogation), Yang's still should have been suppressed. Recall that where the police re-initiate the interrogation, any waiver of counsel after that point is invalid.

Here, the State's claim is that Yang re-initiated interrogation by *putting his hand out of the cell door while holding Gomez's business card but while saying nothing.* Based on this, Gomez went to Yang's cell and asked him whether he wanted to talk to him.[7]

Concerning the test for whether a defendant re-initiates interrogation, the Court of Appeals very recently wrote:

> The Supreme Court, in *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983), set forth two different tests for determining whether a suspect has initiated a discussion or conversation with police officers. As stated by the four-justice *Bradshaw* plurality, a suspect initiates communication when he or she asks questions or makes statements "that under the totality of the circumstances 'evince[] a willingness and a desire for a generalized discussion about the investigation.'" (citation omitted) . As stated by the four-justice Bradshaw dissent, the suspect must instigate "'dialogue about the subject matter of the criminal investigation.'" (citation omitted) Under these tests, "even suspect-

[7] This confusion about whether a suspect actually requested a detective to come speak to him appears to be a persistent problem in the Milwaukee Police Department. In *State v. Conner*, the same exact thing happened.

> initiated conversation does not constitute a priori proof of waiver" of the right to counsel.n5 *See State v. Harris*, 199 Wis. 2d 227, 250-51, 544 N.W.2d 545 (1996); see also *Bradshaw*, 462 U.S. at 1044 (even if the suspect initiates contact after invocation, "the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation"). "A valid waiver of an asserted right 'cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation even if he has been advised of his rights.'" Harris, 199 Wis. 2d at 250-51 (citation omitted; brackets in Harris). "[I]f the authorities reinitiate contact, it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect." Id. at 251 (citation and internal quotation marks omitted).

State v. Conner, 2012 Wisc. App. LEXIS 648, 17-19 (Wis. Ct. App. Aug. 14, 2012), *recommended for publication in the official reports.*[8]

In *Conner*, the defendant was brought to the interrogation room because the Milwaukee police somehow thought that Conner had requested to speak to them. This, apparently, was a "mistake" on the part of the police. Nonetheless, after the police pestered Conner about waiving his right to counsel, Conner relented, and he gave an incriminating statement. The Court of Appeals held that the statement should have been suppressed by the trial court.

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[8] Until a final publication decision is made, this case is cited pursuant to Sec. 809.23(3), Stats. for its persuasive value. The facts in Conner are suspiciously similar to the facts in the present case, and both matters involve the Milwaukee Police Department.

The situation here is nearly identical. Yang's conduct in holding Detective Gomez' business card out the door of the cell, under the totality of the circumstances, certainly does not indicate that he wanted to re-initiate interrogation. It could just have meant that he wanted that McDonald's hamburger that Gomez had mentioned to the jailers. Thus, when Gomez showed up at the door of Yang's cell, it was no different than the situation in *Conner*, where the court wrote:

> [W]hile the officers who took Conner into the interrogation room on April 3, 2009, may have done so under the belief that Conner had at some point reinitiated questioning, or at the very least had expressed a desire to do so, the facts do not support this belief. The record shows that after he requested counsel, Conner did not ask to talk to officers, and did not tell Detective Salaam that he wanted to talk to police later without counsel.

Conner, 2012 Wisc. App. LEXIS 648 (Wis. Ct. App. Aug. 14, 2012)

For these reasons, even if Detective Gomez sincerely believed that Yang had requested to speak to him, this belief is not reasonable under the totality of the circumstances. Yang's statement should have been suppressed.

Conclusion

For these reasons it is respectfully requested that the court vacate the judgment of conviction, reverse the trial court's order denying Yang's motion to suppress his statement with instructions to grant the motion, and to remand the matter for a

new trial.

Dated at Milwaukee, Wisconsin, this _____ day of August, 2012.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3919 words.

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Dated this _____ day of August, 2012:

_____

Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2012AP001126 - CR

State of Wisconsin,

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v.

Lee Yang,

Defendant-Appellant.

Defendant-Appellant's Appendix

A. Record on Appeal

B. Excerpt of bench decision denying motion to suppress statement

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of August, 2012.

_____

Jeffrey W. Jensen