State of Wisconsin: Circuit Court: Milwaukee County:

State of Wisconsin,

Plaintiff,

v. Case No. 2014CF4982

Robert McCorkle,

Defendant.

Defendant's Brief in Opposition to State's "Forfeiture by Wrongdoing" of the Defendant's Sixth Amendment Right to Confront the Statements of Richard Conn Concerning the May 17, 2014 Shooting Incident

Argument

I. In order for forfeiture by wrongdoing to apply, the State must establish that in shooting Conn on July 5, 2014, McCorkle's intent to was make Conn unavailable as a witness in the present case.

In, *State v. Jensen,* 2007 WI 26, ¶ 57, 299 Wis. 2d 267, 302-03, 727 N.W.2d 518, 536, the Wisconsin Supreme Court wrote:

> In short, we adopt a broad forfeiture by wrongdoing doctrine, and conclude that if the State can prove by a preponderance of the evidence that the accused caused the absence of the witness, the forfeiture by wrongdoing doctrine will apply to the confrontation rights of the defendant.

However, the following year, the United States Supreme Court significantly narrowed the "broad" application of the forfeiture by wrongdoing doctrine. The court wrote:

> In 1997, this Court approved a Federal Rule of Evidence, entitled "Forfeiture by wrongdoing," which applies only when the defendant "engaged or acquiesced in wrongdoing

> that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. Rule Evid. 804(b)(6). We have described this as a rule "which codifies the forfeiture doctrine." *Davis v. Washington,* 547 U.S. 813, 833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Every commentator we are aware of has concluded the requirement of intent "means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." 5 C. Mueller & L. Kirkpatrick, Federal Evidence § 8:134, p. 235 (3d ed.2007); 5 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 804.03 [7] [b], p. 804–32 (J. McLaughlin ed., 2d ed.2008); 2 K. Broun, McCormick on Evidence 176 (6th ed.2006).[2] The *368 commentators come out this way because the dissent's claim that knowledge is sufficient to show intent is emphatically *not* the modern view. See 1 W. LaFave, Substantive Criminal Law § 5.2, p. 340 (2d ed.2003).

Giles v. California, 554 U.S. 353, 367-68, 128 S. Ct. 2678, 2687-88, 171 L. Ed. 2d 488 (2008).

Under, *Giles,* it is the defendant's intent-- more precisely, the defendant's *motive*-- that is key in deciding whether the defendant forfeits his right of confrontation. In order for forfeiture by wrongdoing to apply, the state must show that, in procuring the absence of the declarant, the defendant was acting with the specific motive to make the declarant unavailable as a witness *against the defendant*. For example, under *Giles*, if the defendant's motive for killing the victim/declarant was hatred, jealousy, lucre, anger, or any of the other common motives for murder, the defendant does not forfeit his Sixth Amendment confrontation rights. However, if it is shown that the defendant's motive for murder was to make the victim/declarant unavailable as a witness in the defendant's own trial, then the defendant forfeits his right to confront the declarant.

Here, though, the State attempts to take it one step further. The State argues that *whenever* it is shown that the defendant's motive for murder involved any sort of witness tampering, whether it involved the defendant's trial or not, that defendant forfeits his right of confrontation. This is not the law, nor does it make any sense. Firstly, all of the cases cited by the state for this proposition predated *Giles*. *See* state's brief p. 16. That is, these were cases that fell under the "broad" application of the rule, before *Giles* made clear that the court must find that the defendant's motive was to make the victim unavailable as a witness in the defendant's own case. Secondly, such a rule makes no sense. A defendant whose motive for murder was hatred of the victim ought not to have greater confrontation rights than a defendant whose motive for murder was to make the

victim/declarant unavailable as a witness in someone else's trial..

Here, as the state acknowledges, the relevance of Conn's statement to police concerning the May 17th, 2014 shooting is that it establishes a *motive* for McCorkle to shoot Conn on July 5th, 2014. In other words, under the state's theory, McCorkle's motive was to make Conn unavailable as a witness *in Harrison's case.* If the state's theory is true, then McCorkle did not act with the intent to make Conn unavailable as a witness in the present case charging McCorkle with homicide. Thus, just as if McCorkle's motive for murder was hatred or jealousy, he does not forfeit his Sixth Amendment right to confrontation of Conn's statements.

II. The court must conduct an evidentiary hearing at which the state must prove by a preponderance of the evidence that: (1) McCorkle is responsible for Conn being unavailable as a witness; and, (2) that McCorkle acted with the motive to make Conn unavailable as a witness in the present case.

Application of the forfeiture by wrongdoing doctrine is not something that occurs based upon the arguments of the attorneys. Rather, the State must, "[P]rove by a preponderance of the evidence that the accused caused the absence of the witness, [before] the forfeiture by wrongdoing doctrine will apply to the confrontation rights of the defendant." *Jensen,* 2007 WI 26, ¶ 57, 299 Wis. 2d at 302-03, 727 N.W.2d at 536. In other words, the court must conduct an evidentiary hearing.

Nevertheless, the state in this case makes the peculiar argument that because the court earlier terminated McCorkle's communication rights, no further evidentiary hearing is necessary. *See*, state's brief p. 14. This assertion is ostensibly supported by *State v. Rodriguez*, 2007 WI App 252, ¶ 6, 306 Wis. 2d 129, 133-34, 743 N.W.2d 460, 462. In *Rodriguez,* which occurred prior to *Jensen* adopting the forfeiture by wrongdoing doctrine, the court terminated the defendant's communication rights after holding an evidentiary hearing. As the court noted, "The State supported its request for the order with audiotapes of multiple telephone calls made by Rodriguez from the

House of Correction in which Rodriguez urged his brother, Luis, to tell LaMoore not to testify." *Id*. On appeal, the court of appeals held that this finding, combined with the fact that the witnesses did not appear for trial, was sufficient to prove by a preponderance of the evidence that Rodriguez had caused the witnesses not to appear. This, however, falls far short of supporting the state's claim that whenever an order terminating communication rights is entered, forfeiture by wrongdoing will apply without a further hearing.

In the present case, the situation is vastly different. Firstly, the court conducted no evidentiary hearing on the state's request for termination of McCorkle's communication rights.[1] Thus, there is no evidence in the record to support the order.

Secondly, the recorded calls in *Rodriguez* contained specific statements by Rodriguez intended to prevent the witnesses from appearing at his trial. Here, the recorded calls contain no specific statements made by McCorkle intended to prevent Conn from appearing at McCorkle's trial. For that matter, there are no specific statements attributable to McCorkle that demonstrate McCorkle's desire to prevent Conn from appearing at Harrison's trial.

Finally, the mere fact of the telephone calls between McCorkle and Harrison falls far short of establishing-- even to a mere preponderance of the evidence-- that McCorkle killed Conn (that is, that McCorkle is responsible for Conn's unavailability as a witness). In order for the forfeiture by wrongdoing doctrine to apply here, the state must present evidence sufficient to prove by a preponderance of the evidence that McCorkle killed Conn.

This can only be done at an evidentiary hearing.

[1] According to CCAP docket entries, the order was submitted and signed on November 10, 2014 without conducting any hearing. Later, defense counsel asked the court to rescind the order, but on November 24, 2014, again, without taking any testimony or receiving any evidence, the court denied the request to rescind the order.

III. The recorded statement of Conn ought not be admitted under the residual exception to the hearsay rule.

A. The hearsay rule applies even if the court finds that McCorkle forfeited his right to confontation.

The state argues that forfeiture by wrong-doing ought to also forfeit any hearsay objection. To its credit, though, the state admits that there is currently no Wisconsin law specifically providing that where the defendant has procured a witness's absence at trial, the court may suspend the hearsay rule as to the statements of the missing witness. The state declares that where there has been forfeiture of confrontation rights by wrong-doing, "logic" demands that any hearsay objection is also waived.

However, logic does not demand that wrong-doing by the defendant permits the court to suspend the hearsay rule. Rather, logic demands quite the opposite conclusion. The primary means of testing the reliability of testimony is cross-examination. When confrontation is not possible (the witness is unavailable) the integrity of the fact-finding process demands that the reliability of the statements be self-evident (i.e. circumstantial guarantees of trustworthiness). This concept is very clear in the pre-*Crawford* jurisprudence permitting the court to admit hearsay statements in a criminal case where the hearsay is admissible under a "firmly-rooted" exception to the hearsay rule. The hearsay rule is integral to the integrity of the fact-finding process.

If the state's proposition were true, that the defendant's wrong-doing in procuring a witness's absence from trial forfeits his right of confrontation *and* suspends the hearsay rule, then the defendant could be convicted on the basis of patently *unreliable* evidence. This would clearly violate due process. "Due process prevents a prosecutor from relying on testimony the district attorney knows to be false, or later learns to be false. [internal citation omitted]. Due process requires a new trial if the prosecutor in fact used false testimony which, in any reasonable likelihood, could have affected the judgment of the jury." *State v. Nerison*, 136 Wis. 2d 37, 54, 401 N.W.2d 1, 8 (1987). The admission of unconfronted statements which bear no circumstantial guarantees of

trustworthiness permits-- if not invites-- the defendant to be convicted on the basis of false statements. In other words, the hearsay rule is fundamental to the integrity of the fact-finding process; and the enforcement of the rule implicates the defendant's due process right to be convicted only upon reliable evidence.

Thus, the hearsay rule applies in this case even if the court determines that McCorkle has forfeited his confrontation rights as to Conn's statements.

B. Conn's statement to police bears no circumstantial guarantees of trustworthiness.

The state argues that Conn's statement to police has circumstantial guarantees of trustworthiness because it was recorded, and because the statements were made to police officers (i.e. they are like statements against Conn's interest). Additionally, according to the state, the fact that Conn identifies the shooter as Hakeem Harris-- a friend of Conn's brother, and the cousin of his child's mother-- is a circumstantial guarantee of trustworthiness because naming Harris as the shooter might subject Conn to criticism and embarrassment from his family.

For the reasons set forth below, Conn's statement to police has almost no guarantees of trustworthiness.

> Residual hearsay exceptions require the proponent to establish circumstantial guarantees of trustworthiness comparable to those existing for enumerated exceptions. *Sorenson,* 143 Wis.2d at 243, 421 N.W.2d at 84. Stevens contends that this exception is not a "catch-all" or "near miss" category that permits the admissibility of otherwise unacceptable hearsay. We agree with Stevens. It is for the novel or unanticipated category of hearsay that does not fall under one of the named categories, but which is as reliable as one of those categories. It is intended that the residual hearsay exception rule will be used very rarely, and only in exceptional circumstances. Cotchett & Elkind, Federal Courtroom Evidence 168.2 (1986). In our view, the very words of the rule indicate that the key to using the exception is governed by the circumstances *surrounding the making of the hearsay statement.*

State v. Stevens, 171 Wis. 2d 106, 120, 490 N.W.2d 753, 760 (Ct. App. 1992).

Firstly, the fact that Conn's statements to police were audio recorded offers no guarantee that the statements themselves are reliable. It means only that the

statements Conn made to the police that day may be accurately recounted in court. That is, the declarant's statements are not subject to the witness accurately recounting the declarant's statements in court. The recording assures us that we know *what* Conn said to the police. It offers no assurance, though, that what Conn said to the police was true.

Secondly, the statements Conn made about the May 17th shooting were certainly not against Conn's penal interest. Rather, Conn portrays himself as the victim in that incident. The court should also appreciate the fact that Conn was being questioned as a suspect in several homicides and other crimes, and he therefore had a strong motive to provide information to police that would provide law enforcement substantial assistance in solving other crimes. In the event Conn were himself convicted, he could claim as a mitigating factor at sentencing that he assisted the police in solving other crimes.

Finally, the fact that Hakeem Harris was a friend of Conn's brother, and a cousin of Conn's girlfriend, offers no guarantee of trustworthiness. It is important to emphasize that Conn believed the May 17th shooting to be retaliation for the fact that Conn had punched his girlfriend in the face, and caused her an orbital fracture. Thus, Conn's "identification" of Harris as the shooter may be nothing more than speculation on Conn's part as to who, among the girlfriend's family, was most likely to retaliate.

Conclusion

For these reasons, it is respectfully requested that the court order as follows:

A. That an evidentiary hearing be conducted;
B. That, following the evidentiary hearing, the court find that the state has failed to prove by a preponderance of the evidence that McCorkle was responsible for Conn's death; and, even if he was, McCorkle was not motivated by the desire to make Conn unavailable as a witness in this case;
C. As such, McCorkle has not forfeited by wrong-doing his confrontation rights as to Conn's statement to police; and,

D. Conn's statement is inadmissible hearsay.

Dated at Milwaukee, Wisconsin, this _____ day of March, 2015:

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