Slip Copy, 2009 WL 1919943 (Table) (Wis.App.), 2009 WI App 128
Unpublished Disposition
Briefs and Other Related Documents

Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent, v. Shelby Peter FAIRCONATUE, Jr., Defendant-Appellant.

No. 2008AP1774-CR.
July 7, 2009.

Appeal from a judgment and orders of the circuit court for Milwaukee County: David A. Hansher and William Sosnay, Judges.[FN1] *Affirmed*.
FN1. The Honorable David A. Hansher presided over Fairconatue's trial and sentencing and decided Fairconatue's postconviction motion to modify his sentence. The Honorable William Sosnay decided Fairconatue's second motion for postconviction relief.

Before CURLEY, P.J., FINE and BRENNAN, JJ.

¶ 1 CURLEY, P.J.

*1 Shelby Peter Fairconatue, Jr., appeals the corrected judgment convicting him of one count of armed robbery-threat of force, as a party to the crime, and one count of felon in possession of a firearm, contrary to WIS. STAT. §§ 943.32(2), 939.05, and 941.29(2)(a) (2003-04).[FN2] He also appeals the orders denying his postconviction motions. On appeal, Fairconatue contends: (1) that the conviction must be reversed and the case dismissed because his constitutional right to a speedy trial was violated; (2) that his confession was not corroborated by a significant fact, thereby resulting in insufficient evidence to convict him of the armed robbery charge; (3) that his first statement given to the police was coerced and involuntary and should have been suppressed; and (4) that his second statement was a "sew up" confession which violated his due process rights. He also argues that the trial court erroneously exercised its discretion in refusing to modify his sentence after he was found ineligible for the Challenge Incarceration Program (CIP) and the Earned Release Program (ERP). We determine that: (1) there was no constitutional speedy trial violation; (2) his confession was corroborated by a significant fact-that is, that an armed robbery took place; (3) his first statement to police was neither involuntary nor coerced; (4) the claim of an illegal "sew up" confession was waived; and (5) the trial court properly determined that his ineligibility for CIP and ERP was not a new factor and no modification of his sentences was required. As a result, we affirm.

FN2. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

I. BACKGROUND.

¶ 2 Fairconatue was convicted by a jury of armed robbery-threat of force, as party to the crime, and felon in possession of a firearm. He was originally charged with only armed robbery-threat of force, as a party to the crime, while concealing his identity, but the State later filed an amended information adding the charge of felon in possession of a firearm and dropping the concealing identity penalty.[FN3]

FN3. The statute setting forth a penalty for concealing one's identity, *see* WIS. STAT. § 939.641 (2001-02), was repealed effective February 1, 2003, *see* 2001 Wis. Act 109, § 577.

¶ 3 According to the testimony elicited at trial, on January 9, 2004, three men armed with guns and wearing ski masks entered a neighborhood grocery store. The men directed the two cashiers and the manager to put the money from the three cash registers into pillowcases which the three men brought with them. The employees complied, and within a brief period of time the three men left the store with the money. Roger Gonzales, who was parked in the store parking lot, was alerted to the robbery and followed the three men after the three entered a car and drove away. Gonzales was able to get the license plate number of the car the men were in. He returned to the store and gave the police the license plate number. Shortly thereafter, the three robbers abandoned the car because they believed they were being followed. One of the robbers, who had borrowed the car from his girlfriend, then reported it stolen.

¶ 4 Because the car was reported stolen not long after the armed robbery had occurred, the police became suspicious. One of the detectives investigating the robbery went to talk to the man who reported the car stolen. This turned out to be Reynaldo Agrait, who was arrested for the armed robbery. The actual owner was located and gave the police consent to search the car. Among the items found by the police in the car were several ski masks and gloves.

*2 ¶ 5 Two days later, the police went to the same address where Agrait was arrested to arrest Fairconatue. Upon seeing the police Fairconatue ran from them, and before he was captured, he dropped a gun in the snow. After his arrest, Fairconatue was interviewed by the police on two separate occasions. He admitted his involvement in the armed robbery in both statements.

¶ 6 After Fairconatue was formally charged, numerous jury trial dates were set. On October 17, 2005, the trial court heard and denied Fairconatue's motion to suppress his statements. Fairconatue testified that the police framed him. Following the motion hearing, the jury trial began. The jury returned a verdict of guilty on each count. In January 2006, Fairconatue was sentenced to twelve years of initial confinement, to be followed by eight years of extended supervision on the armed robbery charge, and a concurrent sentence of five years of initial confinement, to be followed by five years of extended supervision, for the felon in possession of a gun charge. At sentencing, the trial court found Fairconatue to be eligible for CIP and ERP.

¶ 7 Fairconatue brought a motion in January 2007 seeking a modification of his sentences because of the Department of Corrections' decision that he was ineligible for either program. This motion was denied and he filed a notice of appeal. In November 2007, Fairconatue voluntarily dismissed his appeal in order to pursue a postconviction motion in the trial court. A postconviction motion was filed and briefs were ordered by the trial court. The trial court denied the motion on April 9, 2008. A new notice of appeal was filed in July 2008.

II. ANALYSIS.

A. Fairconatue's constitutional right to a speedy trial was not violated.

¶ 8 Fairconatue insists that his convictions should be reversed and the case dismissed because his constitutional right to a speedy trial has been violated. We review *de novo* whether a defendant has been denied the constitutional right to a speedy trial, although we defer to the trial court's findings of facts unless they are clearly erroneous. *State v. Urdahl*, 2005 WI App 191, ¶ 10, 286 Wis.2d 476, 704 N.W.2d 324. The right of an accused to a speedy trial is secured by the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution. *Urdahl*, 286 Wis.2d 476, ¶ 11, 704 N.W.2d 324.

¶ 9 To determine whether a defendant has been denied his or her constitutional right to a speedy trial, we apply the four-part balancing test established in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). We consider the length of delay, the reason for the delay, the defendant's assertion of the right, and the extent to which the delay prejudiced the defendant. Id. Wisconsin has adopted the same test. *Day v. State*, 61 Wis.2d 236, 244-46, 212 N.W.2d 489 (1973). "The right to a speedy trial is not subject to bright-line determinations and must be considered based on the totality of circumstances that exist in the specific case." *Urdahl*, 286 Wis.2d 476, ¶ 11, 704 N.W.2d 324.

¶ 10 We first address the length of the delay. In doing so, we inquire whether the length of the delay has crossed the line dividing ordinary from "presumptively prejudicial" delay. *Hatcher v. State*, 83 Wis.2d 559, 566-67, 266 N.W.2d 320 (1978). A presumptively prejudicial post-accusation delay is one that approaches one year. *See Doggett v. United States*, 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Fairconatue was arrested on January 11, 2004, and his trial began on October 17, 2005, more than twenty-one months later. Thus, the delay was presumptively prejudicial.

*3 ¶ 11 The next *Barker* factor to consider is the reason for the delay. There are three classes of reasons for delay, and different weights are to be assigned in each class. The first class is "[a] deliberate attempt to delay the trial in order to hamper the defense" which "should be weighted heavily against the government." *Barker*, 407 U.S. at 531. The second class is "[a] more neutral reason such as negligence or overcrowded courts" which "should be weighted less heavily" against the government. Id. The third class is "a valid reason, such as a missing witness," which "should serve to justify appropriate delay." Id.

¶ 12 Fairconatue and the State agree that most of the delay is attributable to the State, but they disagree on the weight to be given to those delays. The record reflects that eight different jury trial dates were scheduled, with two of those dates being changed before the actual date set for trial. The fourth jury trial date was vacated at the request of the trial court after Fairconatue violated the provisions of his bail and he was charged with a new crime, and the seventh jury trial date was changed several months before the date set for trial. It would appear that the remaining adjournments were either requested by the State or caused by the State. The first trial date was adjourned at the request of Fairconatue's attorney, but the reason for his request was that he had not received the entire discovery he requested. It is unknown as to why the State failed to honor the discovery request in a timely fashion. The second, third, fifth, and sixth trial dates were adjourned because the State had witness problems. Fairconatue argues that the delay attributable to the State equals 365 days, while the State submits that it is responsible for only 195 days, as two of the adjournment requests were out of the State's control. One was necessary due to a police officer witness having surgery and a detective who was attending training out of the state, and the other because a witness was out of the country. Regardless of whether it is 365 days or 195 days, none of the delays should be weighed heavily against the State because there is no evidence that the State "deliberate[ly] attempt[ed] to delay the trial in order to hamper the defense." Id.

¶ 13 We next address Fairconatue's assertion of his right to a speedy trial. While Fairconatue formally demanded a speedy trial on April 1, 2005, he effectively first raised an objection when he moved to dismiss the case for want of prosecution when the State requested an adjournment on March 7, 2005. In effect, Fairconatue waited fifteen months before asserting his right to a speedy trial.

*4 ¶ 14 The final *Barker* factor to be considered is the prejudice that the delay caused Fairconatue. Fairconatue argues that because he spent, by his calculation, 581 days awaiting trial, this must be found to be oppressive pretrial incarceration. Further, Fairconatue contends, citing *State v. Borhegyi*, 222 Wis.2d 506, 588 N.W.2d 89 (Ct.App.1998), and *Green v. State*, 75 Wis.2d 631, 250 N.W.2d 305 (1977), both of whose trials were delayed for shorter periods than Fairconatue's, that it is inherent that he suffered from anxiety and frustration. We disagree.

¶ 15 Although it is regrettable that Fairconatue's pretrial incarceration was as long as it was, it does not constitute a constitutional violation. It is well to remember that Fairconatue was released from jail prior to his trial, some seven months after his initial arrest, and it was his failure to follow the conditions placed on his release which led to his reincarceration. The record reflects that Fairconatue was released from jail on

August 23, 2004. Less than a month later, he had missed an office appointment and failed two drug tests. In addition, he was formally charged with additional criminal charges, which were later dismissed. When the trial court was alerted to the violations, it ordered a bench warrant for Fairconatue's arrest. When he next appeared in court it was the scheduled jury trial date. The court, knowing that new charges were pending, vacated the jury trial date. Consequently, for the remainder of the time Fairconatue awaited trial, he was being held on other charges besides those at issue here and the other charges were resolved weeks before the trial in this case.[FN4] We also observe that Fairconatue waited fifteen months to assert his right to a speedy trial and his trial was held a little over six months after he made his demand. While some weight should be given to his request, that weight is not substantial. Finally, Fairconatue has been unable to demonstrate any prejudice as a result of the delay. Thus, for the reasons stated, we conclude that there was no constitutional speedy trial violation.

FN4. A jury could not reach a unanimous decision and the State dismissed the charges.

B. Sufficient evidence was admitted at trial to convict Fairconatue of armed robbery.

¶ 16 Fairconatue's next argument is that while there is corroboration of the armed robbery, there was no corroboration of his confession.[FN5] Fairconatue comments in his brief that there is "no co-defendant testimony, no hairs, no fibers, no D.N.A., no testimony by any of the victims that they believed any of the robbers to be black men." In other words, Fairconatue views the confession corroboration rule as requiring a specific link between Fairconatue and the crime. This is not a correct reading of the law.

FN5. Fairconatue concedes that there is independent corroboration of the felon in possession of a firearm charge because a police officer saw him with a gun shortly before his arrest.

¶ 17 The corroboration rule is a common-law standard. *State v. Hauk*, 2002 WI App 226, ¶ 20, 257 Wis.2d 579, 652 N.W.2d 393. Determining if the facts fulfill a common-law standard presents a question of law. *Peplinski v. Fobe's Roofing, Inc.*, 193 Wis.2d 6, 18, 531 N.W.2d 597 (1995). We view the facts in evidence in a light most favorable to the jury's verdict. *See State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990).

*5 ¶ 18 The corroboration rule ensures that a conviction does not stand when there is an absence of any evidence independent of the defendant's confession that the crime in fact occurred. *See Holt v. State*, 17 Wis.2d 468, 480, 117 N.W.2d 626 (1962). The reason for the rule is set forth in *State v. Bannister*, 2007 WI 86, 302 Wis.2d 158, 734 N.W.2d 892.

The development of the corroboration rule commenced in 1660s England. RICHARD A. LEO ET AL., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L.Rev. 479, 502 (2006) (discussing the roots of the corroboration rule). *Perry's Case*, 14 Howell St. Tr. 1312 (1660), presented a case where three people were executed for a suspected murder. The convictions were based upon the discovery of a missing person's bloody hat and the confession of one of the defendants. The confessor implicated his brother and mother. Years after the defendants' executions, the missing man reappeared. He was alive. The corroboration rule addressed such cases by requiring evidence that the crime actually occurred, independent of a defendant's confession.

Bannister, 302 Wis.2d 158, ¶ 24, 734 N.W.2d 892.

¶ 19 Under the confession corroboration rule set forth in *Holt:*

All the elements of the crime do not have to be proved independent of an accused's confession; however, there must be some corroboration of the confession in order to support a conviction. Such corroboration is required in order to produce a confidence in the truth of the confession. The corroboration, however, can be

far less than is necessary to establish the crime independent of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.

Id., 17 Wis.2d at 480, 117 N.W.2d 626.

¶ 20 The significant fact need not be particular enough to independently link the defendant to the crime. *See State v. DeHart*, 242 Wis. 562, 566, 8 N.W.2d 360 (1943). That *DeHart* is still currently good law is confirmed by *Bannister,* where the court opined that:

A significant fact is one that gives confidence that the crime the defendant confessed to actually occur[red]. A significant fact need not either independently establish the specific elements of the crime or independently link the defendant to the crime. Rather, the State must present at least one significant fact that gives confidence that the crime the defendant has been convicted of actually did occur.

Id., 302 Wis.2d 158, ¶ 31, 734 N.W.2d 892.

*6 ¶ 21 There can be little doubt that the State proved a significant fact. One of the victims testified at trial that three armed and masked men came into the store and demanded money from the cash registers. The State was not required to present a significant fact that Fairconatue was tied to the robbery. As noted, the reason behind the rule is to assure that a crime actually happened. That was done here.

C. Fairconatue's statements to the police were neither coerced nor involuntary.

¶ 22 Fairconatue admitted to the police that he took part in the armed robbery of the grocery store. However, he contends that his statements should have been suppressed because the first statement was coerced and involuntary. Fairconatue points to the fact that he was only seventeen years old at the time of his arrest, and he was interrogated for three-and-one-half hours following his arrest in the evening hours, which he claims is longer than the average interrogation. He also maintains that the fact that the police did not tape record the interview is suspicious.[FN6]

FN6. Fairconatue made much of the fact that the police did not record the interrogations, and he mentions the case of *State v. Jerrell C.J.*, 2005 WI 105, 283 Wis.2d 145, 699 N.W.2d 110, which requires the electronic recording of juvenile interrogations, as leading the way towards proper police procedure. We note that *Jerrell* was decided after Fairconatue's trial and does not apply here. *See id.*, ¶¶ 3, 59 (explaining that its holding applies to "future cases"). Fairconatue's wish that the police record all interrogations has been realized. The requirement to record custodial interrogations was expanded to include adults by WIS. STAT. §§ 968.073 and 972.115. However, the statutes went into effect nearly three years after Fairconatue's interrogations. *See* 2005 Wis. Act 60, § 51(2) ("The treatment of sections 968.073 and 972.115 of the statutes first applies to custodial interrogations ... conducted on January 1, 2007.").

¶ 23 When the State seeks to admit a defendant's custodial statement, constitutional due process requires that it make two discrete showings: (1) the defendant was informed of his *Miranda* rights,[FN7] understood them, and knowingly and intelligently waived them; and (2) the defendant's statement was voluntary. *State v. Lee*, 175 Wis.2d 348, 359, 499 N.W.2d 250 (Ct.App.1993). A defendant's assertion that his statements were involuntary places on the State the threshold burden to prove by a preponderance of evidence that his statements were voluntary. Id. at 362-64, 499 N.W.2d 250. To meet this burden, the State must show that the defendant made the statements willingly and not as a result of duress, threats, or promises. Id. at 360, 499 N.W.2d 250.

FN7. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

¶ 24 If Fairconatue's statements were involuntary, the admission of the statements would violate his due process rights under the Fourteenth Amendment of the United States Constitution and article I, section

8 of the Wisconsin Constitution. *Rogers v. Richmond*, 365 U.S. 534, 540, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961); *see also* *State v. McManus*, 152 Wis.2d 113, 130, 447 N.W.2d 654 (1989). A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist. *State v. Clappes*, 136 Wis.2d 222, 236, 401 N.W.2d 759 (1987).

¶ 25 Once the State has made a *prima facie* case of voluntariness, the burden shifts to the defendant to present rebuttal evidence. *Lee*, 175 Wis.2d at 360-61, 499 N.W.2d 250. If a defendant fails to present evidence of coercion in rebuttal, further inquiry about balancing the actions of the police with the personality of the defendant is inappropriate. *State v. Deets*, 187 Wis.2d 630, 635-36, 523 N.W.2d 180 (Ct.App.1994). We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary. *Clappes*, 136 Wis.2d at 236, 401 N.W.2d 759. The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers. Id.

¶ 26 Two detectives testified during the *Miranda-Goodchild* hearing about the circumstances surrounding the two interrogations of Fairconatue.[FN8] The first detective told the court that Fairconatue was not handcuffed at the time of the interrogation and never complained about being sleepy. Further, Fairconatue never asked for food, drink, or a bathroom break. Before asking any questions of Fairconatue, the detective read him his *Miranda* rights, which Fairconatue said he understood. During the interrogation, the detective stated no promises or threats were made to Fairconatue, and Fairconatue freely admitted his involvement in the armed robbery and told the detective where he had obtained the gun. The detective also stated that Fairconatue signed the multi-paged confession.

FN8. *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 133 N.W.2d 753 (1965).

*7 ¶ 27 The State also called another detective who interviewed Fairconatue several days later. The detective stated that Fairconatue was not handcuffed during the questioning. He related that he re-advised Fairconatue of his constitutional rights and Fairconatue responded that he understood them and was willing to talk to the officer. The detective had prepared some questions in advance. The detective stated that he never made any threats or promises to Fairconatue and that the atmosphere was "[c]ordial." During this interview, Fairconatue was given two baloney sandwiches, a twenty-ounce soda, and cigarettes. Fairconatue was "forthcoming," according to the detective, and Fairconatue signed the one-page statement. Fairconatue never asked for a lawyer and the interview lasted a little more than an hour.

¶ 28 Fairconatue also testified. He contended that during the initial interview he did not recall being read any rights. He testified that the first detective showed him a card, but his reading skills were so poor that he could not read it. He claimed that during the interview he was very sleepy because he had been smoking marijuana. He also stated that he asked for a phone call, but he was not allowed to call anyone. Further, he testified that what was written down on the report was entirely made up by the detective and he never talked to them about the robbery. He also maintained that he never had a gun when he was arrested and that he was kicked in the head by the police. As to the second interview, Fairconatue acknowledged during cross-examination that he remembered that this detective read something to him. Fairconatue insisted that he could not read what had been written by the detective and he explained that his handwritten notation occurred only after the detective spelled out most of the words for him.

¶ 29 The trial court found that Fairconatue's version of the events was unbelievable. Instead, the trial court chose to accept the testimony of the two detectives that Fairconatue was advised of his rights before the interview, that Fairconatue indicated he understood those rights, and he willingly talked to the detectives. The trial court noted that Fairconatue had been arrested before, and, as a consequence, he had probably been interrogated before. Further, the trial court found that he was not handcuffed during the interrogation, and that during the second interview he was given food to eat and there were breaks in the questioning. The trial court concluded that the State had met its burden of proof and Fairconatue's detailed statements were given voluntarily. We agree.

¶ 30 Other than Fairconatue's claims, there is no showing that the statements he gave were involuntary or that the detectives failed to advise him of his *Miranda* rights. Fairconatue's testimony was vague and his version of the events had the police both planting a gun during his arrest and then making up his involvement with the armed robbery, a highly unlikely set of events. Examining the facts under the totality of the circumstances reveals that Fairconatue had a less than plausible version of the events and had previous experience with the police. On the other hand, the testimony of the two detectives both described fairly routine interrogations during which Fairconatue was advised of his rights, acknowledged them, and freely revealed his part in the armed robbery. Also supporting the trial court's finding was the fact that Fairconatue's statement concerning the two charges was six pages long and very detailed. It would be extremely difficult for a police officer, without any additional information, to make up the type of detail that was revealed in Fairconatue's confessions. Finally, the lengths of the interviews were not excessively long. One was three-and-one-half hours long, and the other a little over one hour. As a result, we are satisfied that the trial court's factual findings and conclusions, that Fairconatue was advised of his rights, understood them and voluntarily waived them, are supported by the record and are not clearly erroneous.

D. The second allegation that there was an illegal "sew up" confession has been waived.

*8 ¶ 31 Next, Fairconatue submits that his second statement was the result of an impermissible "sew-up" interrogation that violated his constitutional rights under the Fifth Amendment of the United States Constitution and under article I, section 8 of the Wisconsin Constitution.

¶ 32 Fairconatue points to the fact that he was arrested on January 11, 2004, at approximately 9:00 p.m., and then interviewed for the first time some time around midnight to 3:30 a.m. on January 12, 2004, and not re-interviewed by a detective until January 14, 2004, without ever, apparently, going before a magistrate. He concludes these facts support a finding that the second interview must have been an illegal "sew-up" confession.

¶ 33 Confessions obtained during unreasonable periods of detention amount to a constitutional denial of due process. *State v. Hunt*, 53 Wis.2d 734, 741, 193 N.W.2d 858 (1972). The parameters of detention and interrogation tactics in "sew-up" confessions were first addressed by our supreme court in *Phillips v. State*, 29 Wis.2d 521, 139 N.W.2d 41 (1966). The court stated:

While one may be detained by the police and interrogated to secure sufficient evidence to either charge him with a crime or to release him, the police cannot continue to detain an arrested person to "sew up" the case by obtaining or extracting a confession or culpable statements to support the arrest or the guilt.

Id. at 535, 139 N.W.2d 41.

*9 ¶ 34 The *Phillips* decision reflects upon two United States Supreme Court cases, *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), and *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), that were concerned about prevention of the illegal detention of a defendant when he or she is not promptly brought before a magistrate. The resulting *McNabb-Mallory* rule does not focus on the voluntariness of the defendant's inculpatory statements, but is applicable when an individual is detained for an unreasonable length of time without being charged; a confession obtained during that time period, regardless of voluntariness, is a "sew-up" confession that can be excluded from evidence. *See* *Krueger v. State*, 53 Wis.2d 345, 357, 192 N.W.2d 880 (1972).

¶ 35 "Due to Congress's concern that *McNabb* and *Mallory* focussed too much on delay and too little on a confession's voluntariness, the present rule of law is simply that a confession 'shall be admissible in evidence if it is voluntarily given.' " *United States v. Pugh*, 25 F.3d 669, 675 (8th Cir.1994) (quoting 18 U.S.C. § 3501(a)). "Delay between arrest and presentment is only one of five factors a trial judge must consider when determining whether a confession was voluntary, *see* 18 U.S.C. § 3501(b), but delay is not dispositive." *Pugh*, 25 F.3d at 675.

¶ 36 The *Phillips* court disfavored long detentions because they "impair the voluntariness of the confession from the standpoint of psychological aspect[s] of the usual police-station hazards." Id., 29 Wis.2d at 535, 139 N.W.2d 41. Further, the rationale for excluding "sew-up" confessions during illegal detention "is to prevent the weakening of the resistance of an accused by the psychological pressure of being held in custody and 'worked upon' by the police in order to obtain evidence." *Hunt*, 53 Wis.2d at 741, 193 N.W.2d 858.

¶ 37 Our review requires the " 'application of constitutional principles to the facts as found.' " *State v. Hartwig*, 123 Wis.2d 278, 283, 366 N.W.2d 866 (1985) (citations omitted). We independently determine such questions of "constitutional" fact. Id.

¶ 38 The problem with Fairconatue's argument, as the State points out, is Fairconatue's failure to ever raise this issue at the *Miranda-Goodchild* hearing or at trial has resulted in waiver. Fairconatue urges us not to apply the waiver rule, claiming that because he raised it in his postconviction motion and the trial court could have held an evidentiary hearing at the motion hearing, this court should address it. We disagree.

¶ 39 First, we note that the trial court judge who decided the postconviction motion-which was not filed until two years and three months after the jury trial-was not the same trial court judge who presided over the trial. In addition, because the issue was never raised at either the *Miranda-Goodchild* motion or the trial, no questions were ever asked of the police or the district attorney's office to explain why Fairconatue's formal appearance in court did not occur for three days. As noted by the State in its brief:

*10 Because Fairconatue's failure to timely raise the issue has left a factual vacuum with respect to whether there was a reasonable basis for the delay between the two interrogations, the State is unable to address the merits of Fairconatue's sew-up confession claim. For the same reason, this court should apply the waiver rule and decline to reach the merits of that claim.

We agree with the State. Consequently, we are applying the waiver rule and declining to address the merits of the issue.

¶ 40 Moreover, we note that the remedy for an illegal "sew-up" confession is to refuse to admit the confession at trial. Here, there were two confessions that basically duplicated one another. Thus, were we to have addressed the merits and agreed with Fairconatue's contention, the admission of the second confession at trial would have been harmless error.

E. The trial court did not erroneously exercise its discretion by refusing to modify Fairconatue's sentences.

¶ 41 Finally, Fairconatue argues that the trial court erroneously exercised its discretion when it refused to modify his sentence because there was a new factor. He bases his contention on the following statement made by the trial court at sentencing:

I'm going to find you are eligible for the Challenge Incarceration and the Earned Release Program which gives you a chance to get out of prison earlier. Shelby, did you hear what I just said? There's a program for those who have drug and alcohol problems that allows to you [sic] get out of prison earlier. I'm making you eligible; so, if you want to clean up your act[, which] you didn't do at Lincoln Hills or Ethan Allen while you were in the programs there, you have a chance to get out in less than twelve years. That's up to you.

After the sentencing, the parties became aware that the Department of Corrections had determined that Fairconatue was not eligible for either program because of the assaultive nature of the crimes.[FN9] Thus, he argues a new factor existed and he was entitled to a modification. We disagree.

FN9. All the parties apparently overlooked the presentence investigation report which stated that Fairconatue did not meet the statutory requirements for either CIP or ERP "due to the assaultive nature of the present offense."

¶ 42 Sentence modification involves a two-step process. *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609 (1989). First, a defendant must show the existence of a new factor thought to justify the motion to modify sentence. Id. Then, if the defendant has demonstrated the existence of a new factor, the trial court must decide whether the new factor warrants sentence modification. Id.

¶ 43 A new factor is

*11 "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Ralph, 156 Wis.2d 433, 436, 456 N.W.2d 657 (Ct.App.1990) (citation omitted).

¶ 44 In its decision denying the motion to modify the sentence, the trial court explained that at the time of the sentencing it recognized that its decision to make Fairconatue eligible for CIP and ERP was subject to the Department of Corrections' determination. The court wrote: "When the court made him eligible for these programs, it also knew that it would ultimately be up to the Department of Corrections as to whether or not the defendant would actually be permitted to participate in either program." As a result, the trial court determined that the fact that the Department of Corrections found him ineligible for either program was not a new factor: "This is not an event or development that frustrates the purpose of the sentence in this case, which was punishment, deterrence, and the absolute need for community protection. Defendant's inability to enter either the CIP or the ERP is not a new factor." In light of the trial court's clarification of its sentencing remarks, that the court always believed the final word on Fairconatue's eligibility belonged to the Department of Corrections, his ineligibility was not a new factor.

¶ 45 The trial court gave many reasons for the length of its sentence. Fairconatue had a long history of criminal offenses. Worse, he had a long history of noncompliance with programs designed to keep him out of trouble. The court noted that he was arrested for new charges while out on bail in this case. As a result, the trial court found that he posed a high risk to reoffend. Inasmuch as he was very young, the trial court felt he needed a lengthy sentence to protect the community. The trial court properly exercised its discretion in sentencing Fairconatue.

¶ 46 For the reasons stated, we affirm.

Judgment and orders affirmed.

Not recommended for publication in the official reports.

Wis.App.,2009.
State v. Fairconatue
Slip Copy, 2009 WL 1919943 (Table) (Wis.App.), 2009 WI App 128
Unpublished Disposition

Briefs and Other Related Documents (Back to top)

• 2008AP001774 (Docket) (Jan. 19, 2006)
END OF DOCUMENT