LEGAL UPDATE

City of Madison

Summer 2005 Lieutenant Victor Wahl

Custodial Interrogations of Juveniles

***State v. Jerrell C. J.*, 2005 WI 105 (2005); Decided July 7, 2005 by the Wisconsin Supreme Court.**

The *Jerrell* case addressed several issues related to custodial interrogations of juveniles. Several suspects robbed a McDonald's in Milwaukee, and Jerrell (14 years of age), was arrested at his home at about 6am. He was taken to a precinct and placed in an interrogation room. Jerrell waited in the room for about 2 hours, until two detectives entered the room to question him. Jerrell was provided with his *Miranda* rights and agreed to speak with the detectives.

Jerrell initially denied any involvement in the robbery. The detectives challenged these denials, and one of the detectives spoke to him with a raised voice. The questioning continued until around noon, though Jerrell was provided with food and bathroom breaks, and with a 20-minute lunch break. The questioning resumed about 12:30, and within the hour Jerrell began to admit his involvement in the robbery. At about 2:40pm, Jerrell signed a written statement admitting his involvement in the McDonald's robbery. This was about eight hours after he had been taken into custody, and about five-and-a-half hours after the interrogation had began.

Several times during the interrogation, Jerrell had asked if he could make a phone call to his mother or father. Each time he was told that he could not.

Jerrell was eventually adjudged delinquent (in juvenile court) for his involvement in the armed robbery. He sought a new trial, claiming that his confession was involuntary. Jerrell's primary argument was that the detectives should have allowed him to contact his parents during the questioning, and that their failure to do so rendered the confession involuntary. The Court of Appeals rejected Jerrell's arguments, and he appealed to the Wisconsin Supreme Court.

The Court addressed three separate issues in the *Jerrell* case: whether Jerrell's confession was involuntary; whether juveniles subject to custodial interrogation should have the opportunity to contact a parent during the questioning; and whether police should be required to electronically record custodial interrogations of juveniles.

The court first addressed the voluntariness of Jerrell's confession. Recall that any statement obtained by police (in or out of custody) must be voluntary. This is a separate and distinct requirement (above and beyond the protections provided by *Miranda*). The voluntariness analysis will balance the personal characteristics of the defendant (intelligence, age, experience with police, etc.) against the pressures and tactics used by law enforcement officers (duration of questioning, threats, trickery, etc.). A statement will not be involuntary unless coercive or improper police conduct has taken place; however:

> [P]olice conduct need not be egregious or outrageous in order to be coercive. "Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures."

The *Jerrell* court concluded that his confession was involuntary, and therefore inadmissible. The court based this conclusion on Jerrell's young age (14), his lack of education and intelligence (8th grade, with a 3.6 GPA but only an 84 IQ), his limited prior experience with law enforcement (two prior arrests for misdemeanors), the fact that the detectives did not allow Jerrell to contact his parents when he requested to do so, the length of the interrogation (five-and-a-half hours), and the detectives' technique of repeatedly accusing Jerrell of lying, sometimes in a loud voice. The court stated:

> We conclude that (the confession) was '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.' Accordingly, we determine that the written confession was involuntary under the totality of the circumstances.

Having concluded that Jerrell's statement was involuntary (and therefore inadmissible), the Court continued to assess two additional issues. First, the Court considered Jerrell's assertion that any juvenile subject to a custodial interrogation must be given the opportunity to consult with a "parent or interested adult." The *Jerrell court* declined to adopt such a rule, but did indicate that refusing to allow a juvenile subject to custodial interrogation to consult with a parent or other adult might render any confession obtained involuntary:

> We are troubled by the tactic of ignoring a juvenile's repeated requests for parental contact…However, we decline to abandon the "totality of the circumstances" approach at this time in favor of Jerrell's per se rule regarding consultation with a parent or interested adult… Instead, we choose to reaffirm our warning…that the failure "to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel" will be considered "strong evidence that coercive tactics

were used to elicit the incriminating statements."

Finally, the Court considered whether police should be required to electronically record all juvenile interrogations. After a lengthy discussion of the merits of such a rule, the *Jerrell* court ruled:

> All custodial interrogations of juveniles in future cases shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention. Audiotaping is sufficient to satisfy our requirement; however, videotaping may provide an even more complete picture of what transpired during the interrogation.

This aspect of the *Jerrell* decision applies only to custodial interrogations of juveniles. Recall that a custodial interrogation is what triggers the requirement that a suspect be provided with *Miranda* warnings (and that the suspect waive his or her *Miranda* rights prior to any questioning). So, if questioning a juvenile under circumstances where *Miranda* is required, the *Jerrell* recording requirement applies. Statements obtained in violation of *Jerrell* will be suppressed.

Custody — for purposes of *Miranda* — can be defined as "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 103 S.Ct. 3517 (1983). So even questioning that takes place during a *Terry* stop can implicate *Miranda* under some circumstances (high-risk traffic stops, use of handcuffs, etc.). Interrogation — for purposes of *Miranda* — includes "express questioning or its functional equivalent." The functional equivalent of express questioning is defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 100 S.Ct. 1682 (1980). Under circumstances where both conditions — custody and interrogation — are present, *Miranda* is required and the *Jerrell* recording requirements also apply. However, when questioning a juvenile under circumstances where *Miranda* is not implicated, the requirements of *Jerrell* do not apply.

The *Jerrell* decision clearly requires — without exception — that custodial interrogations of juveniles at a "place of detention" be recorded. Clearly, any police facility, including MPD District Stations, will be considered a "place of detention." What is less clear is how other facilities, such as hospitals and schools will be viewed by courts.

Custodial interrogations of juveniles not conducted at a "place of detention" still must be recorded "where feasible." This requirement applies to **custodial interrogations** taking place in the field (highly intrusive *Terry* stops, for example). In-car video can be utilized to record many of these interrogations. It is likely that courts will interpret the "where feasible" exception narrowly, and will only allow unrecorded custodial interrogations of juveniles (not taking place in a "place of detention") to be admitted under very limited circumstances. So, officers should attempt to record all custodial interrogations of juveniles, regardless of location. However, there will be some instances where it will not be feasible to record custodial interrogations of juveniles in the field. These will typically involve custodial interrogation away from a squad (on foot, in another building, etc.) where no recording equipment is available; or questioning in a vehicle not equipped with in-car video. Officers conducting custodial interrogation of a juvenile (in the field) that is not recorded should clearly indicate in their report why recording the questioning was "not feasible." Again, questioning of juveniles in a non-custodial setting does not need to be recorded.

Questioning that is outside the scope of *Miranda*, such as routine booking questions or questioning occurring under the "public safety" exception to *Miranda*, likely fall outside the scope of the *Jerrell* recording requirement.

The *Jerrell* decision applies only to custodial interrogations of those who are 16 years of age or younger; 17 year olds are not considered "juveniles" for purposes of the *Jerrell* recording requirement.

Show-ups

***State v. Dubose*, 2005 WI 126 (2005); Decided July 14, 2005 by the Wisconsin Supreme Court.**

The *Dubose* case involved the admissibility of an out-of-court pretrial one-on-one identification (a show-up). Several subjects left a Green Bay bar, and proceeded to an apartment to smoke marijuana. While in the apartment, one individual (Dubose) pointed a handgun at the head of the apartment's resident, demanding money. Dubose and another individual left the apartment on foot. A neighbor saw Dubose and his accomplice flee the scene, and called police. The victim attempted to chase Dubose, and flagged down an officer responding to the neighbor's 911 call. Another officer observed two subjects matching the suspect descriptions (one of whom was reportedly wearing a flannel shirt) walking in the area. When he turned his squad car around, the two fled between some houses.

Officers quickly established a perimeter around the area, and a canine officer responded. The dog quickly tracked to a suspect (Dubose), who was taken into custody. Dubose, who was not wearing a flannel shirt, claimed that he had been fighting with his girlfriend and ran because he thought she might have called the police. Dubose did not have any weapons, money or contraband on his person at the time.

The officers then gave the victim an opportunity to identify Dubose. Dubose was seated (handcuffed) in the rear of a squad car and the victim viewed him. The victim told the officers that he was "98 percent" certain that Dubose had been the one that robbed him, and that he recognized him due to his small build and hairstyle.

Both Dubose and the victim were taken to the police station, and the officers conducted a second show-up. The victim viewed Dubose (alone) through a one-way mirror; this took place about 15 minutes after the initial show-up. A short time later, the officers showed the victim a single mug shot of Dubose, which he also identified.

Dubose sought to have all of the identifications of him suppressed, claiming that they were unnecessarily suggestive. The trial court denied this motion and Dubose was subsequently convicted. At trial, the victim testified and again identified Dubose in the courtroom.

Dubose appealed his conviction. The Court of Appeals rejected his appeal, and Dubose appealed the Wisconsin Supreme Court. The Supreme Court, in a 4-3 decision, agreed with Dubose and articulated a new rule regarding the admissibility of show-ups in Wisconsin:

> We conclude that the evidence obtained from an-out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A showup will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array…We emphasize that our approach…is not a per se exclusionary rule…Showups have been a useful instrument in investigating and prosecuting criminal cases, and there will continue to be circumstances in which such a procedure is necessary and appropriate.

Under this new rule, officers should only consider performing a show-up if they do not have probable cause to arrest the suspect. When officers develop probable cause to arrest a suspect without an eyewitness identification, the suspect should be arrested and a subsequent in-person or photo lineup should be performed. If officers do not have probable cause to arrest a suspect, a show-up may be performed. If officers conduct a show-up when it is not necessary, the suspect identification will be suppressed.

The *Dubose* court also indicated that other exigent circumstances—that make the use of an in-person or photo lineup unavailable—will allow the use of a show-up. It is not clear what type of situation will qualify under this exception.

The *Dubose* court also clarified that even if a show-up is necessary, it must be performed in a way to minimize its suggestiveness. The last Legal Update outlined some reminders on how to minimize suggestiveness:

- Obtain and document a complete description of the suspect from the witness, separately from other witnesses if possible. Don't simply document what the witness says; ask questions. Note that physical description is not limited to height, eye and hair color, and clothing description. It also includes posture, gait, hairline, skin texture, alertness, facial expression, eye movement, degree of agitation or calmness, and many other physical characteristics that people actually see, but often don't volunteer. Also, document thoroughly the witness's opportunity to see the suspect and the conditions in which this occurred.

- Always separate witnesses and do not allow witnesses to see whether another witness identified the suspect.

- Never tell a witness before an identification that the police have a suspect. In fact, you should convey to the witness that the person may or may not be the perpetrator; that they should not feel in any way compelled to make an identification; and that the investigation will continue whether or not they positively identify this suspect.

- It is also important that police not confirm a witness's positive identification. That is, after an identification is made, police should never tell the witness that s/he made the correct choice, or provide information to the witness that corroborates the identification (e.g. "He had the $20 you reported stolen in his pocket.")

- Document the identification and the witness's degree of certainty. Ask the witness if there is anything in particular about the person identified that informed their identification of that person as the perpetrator. Try to quote the witness's statements about these things.

- If there are additional potential witnesses, instruct the witness not to discuss their identification with those persons.

- If possible, do not show the suspect handcuffed or in a squad car. If handcuffed, take measures to conceal this fact from the witness.

The *Dubose* court concluded that the identification procedures performed by the police was impermissibly suggestive. The court based its decision on the following factors:

- Dubose was handcuffed and seated in a squad car at the time of the show-up.
- The officers told the victim that they may have caught "one of the guys" prior to the show-up.
- The officers performed two additional one-on-one identifications after the initial show-up.

The case was remanded to the trial court to determine if the victim's in-court identification of Dubose was sufficiently independent of the pretrial identifications to be admissible.

The *Dubose* decision reflects a significant change to the way MPD officers have traditionally handled show-ups, and officers must take care to adhere to the case's "necessity" requirement. The *Dubose* case also took a narrow view of what type of show-up is not impermissibly suggestive, and officers performing a show-up must be careful to ensure that the procedure is performed in a manner consistent with the above guidelines, and to adequately document the identification (including the use of in-car video).

Miranda—Physical Evidence

***State v. Knapp*, 2005 WI 127 (2005); Decided July 14, 2005 by the Wisconsin Supreme Court.**

In *Knapp*, the Wisconsin Supreme Court again considered whether physical evidence obtained as a result of a statement taken in violation of *Miranda* is admissible. In *Knapp*, officers were investigating a homicide and learned that Knapp had been the last person to see the victim the night of her death. Knapp was on parole, and the investigating officers obtained a parole hold for Knapp. The day after the murder, officers responded to Knapp's residence (a second floor apartment), and knocked on the door. The officers saw Knapp through a window, told him that they had a warrant to arrest him for a parole violation, and directed him to open the door. Knapp eventually did open the door, and the officers told him that he needed to accompany them to the station. Prior to leaving, the officers accompanied Knapp into his bedroom to allow him to put on some shoes. One of the officers asked Knapp what he had been wearing the prior evening. Knapp pointed to a pile of clothing on the floor, and the officers collected it as evidence. A subsequent DNA test revealed that the sweatshirt contained traces of the victim's blood. Knapp was eventually charged with homicide and challenged a variety of police actions prior to and during his arrest.

Recall that *Miranda* warnings are required when two conditions are present: **custody** and **interrogation**. Custody, for *Miranda* purposes, is defined as "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 103 S.Ct. 3517 (1983). Interrogation, for *Miranda* purposes, is express questioning, or any actions that are the functional equivalent of questioning, that "the police should know are reasonably likely to elicit an incriminating response from the suspect." It is well established that statements obtained in violation of *Miranda* cannot be used against the person questioned at a criminal trial (although they can, in some situations, be introduced to impeach the defendant if he or she testifies in a manner inconsistent with the un-Mirandized statement).

What had been less clear is the result when a statement obtained in violation of *Miranda* leads to the discovery of physical evidence. In *State v. Yang*, 233 Wis.2d 545 (Ct. App. 2000), officers questioned a suspect – in violation of *Miranda* – and used information obtained in the statement to locate physical evidence. The Court of Appeals ruled that the exclusionary rule did not apply to physical evidence obtained in this manner, and allowed Yang's conviction to stand.

It was clear that Knapp had been in custody (the officers informed him that they were arresting him and that they were about to convey him to the police station), and that the officer's question – asking Knapp what he had been wearing the prior evening – constituted interrogation. So, Knapp argued that the U.S. Supreme Court's decision (a few months after the *Yang* decision) in *Dickerson v. United States*, 530 U.S. 428 (2000) – in which the court clarified that the *Miranda* decision articulated a "constitutional rule" – required that the *Yang* decision be overruled (and that the pile of clothing and subsequent DNA test results be suppressed).

The Wisconsin Supreme Court, in the original *Knapp* case (decided in July of 2003) agreed with Knapp and concluded that the physical evidence obtained from his residence was inadmissible:

> We hold that the policy considerations related to deterrent effect and judicial integrity, which are the underpinnings of the exclusionary rule, support the suppression of physical evidence in situations where there was an intentional *Miranda* violation.

The original *Knapp* decision went on to state, "we do not have to, and do not, decide whether a negligent *Miranda* violation would result in the same holding." The first *Knapp* decision did not offer any explanation of why the officer's questioning of Knapp was viewed as an intentional *Miranda* violation, nor did it offer any guidance for what types of situations might be viewed as "negligent" violations of *Miranda*. The first *Knapp* case (*Knapp I*) was discussed in the Winter 2004 Legal Update.

In June of 2004, the United States Supreme Court decided *United States v. Patone*, a case addressing the same issue that had been decided in *Knapp I.* The *Patone* case involved similar facts to that of *Knapp* (physical evidence located as a result of statements taken in violation of *Miranda*). The U.S. Supreme Court, however, reached a different decision in *Patone* than the Wisconsin Supreme Court had reached in *Knapp I*. The *Patone* court concluded that the Self-Incrimination Clause to the United States Constitution focused on the introduction of testimonial statements at a criminal trial, and that the exclusionary rule (excluding physical evidence from admissibility at trial) did not apply.

Two days after the *Patone* decision was released, the U.S. Supreme Court vacated the *Knapp I* decision, and directed the Wisconsin Supreme Court to reconsider it in light of *Patone*.

The Wisconsin Supreme Court did reconsider *Knapp I*, and in *Knapp II* (released July 14, 2005) concluded that the Wisconsin Constitution rendered the physical evidence at issue in the *Knapp* case inadmissible. The court stated:

> [W]e conclude that physical evidence obtained as a direct result of an intentional violation of *Miranda* is inadmissible under Article I, Section 8 of the Wisconsin Constitution. We will not allow those we entrust to enforce the law to intentionally subvert a suspect's constitutional rights. As it is undisputed that the physical evidence here was obtained as a direct result of an intentional violation of *Miranda*, it is inadmissible.

Again, the Court offered no guidance as to what are "intentional" *Miranda* violations or what might be considered a "negligent" *Miranda* violation. In any event, if an officer intentionally violates *Miranda*, and recovers physical evidence as a result of the statement obtained in violation of *Miranda*, the physical evidence will not be admissible.

Long-Term Implications of the Dubose and Knapp II Decisions

While the *Dubose* and *Knapp II* decisions can be viewed as problematic for police, they could have a much more significant long-term impact on Wisconsin law. The United States Constitution provides the ultimate limit on police actions in the U.S., primarily through the 4th, 5th, 6th and 14th Amendments. However, Wisconsin also has a state constitution. Many provisions of the Wisconsin constitution are similar (but not necessarily identical to) these Amendments to the U.S. constitution governing police actions.

For years—and until this summer—the Wisconsin Supreme Court has expressly chosen to interpret the Wisconsin constitution in a manner consistent with the U.S. constitution. This has facilitated consistency, and the creation of clear rules for officers to follow. Many states have chosen to interpret their state constitutions as providing additional protections beyond the U.S. constitution. This can create significant confusion for officers, as State courts are not bound by U.S. Supreme Court decisions if they base a decision on a state constitution. So, a state court can effectively ignore a U.S. Supreme Court decision by basing its decision on its state constitution.

The *Dubose* and *Knapp II* decisions (both 4-3) expressly rejected years of precedent and chose to interpret the Wisconsin constitution as providing additional protections beyond the U.S. constitution. This could potentially impact many areas of police decision-making in the future; increasing confusion among officers and creating inconsistency between Wisconsin law and Federal law.

Some of the dissenting Justices wrote in opposition to the Court going down this path. From Justice Wilcox's dissent in *Dubose*:

> Seven years ago, the author of today's majority opinion recognized: 'This court has repeatedly stated that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical interpretation'…Today the majority alters course and abandons this long line of well-established precedent, contending that the Due Process Clause of the Wisconsin Constitution now affords greater protections than its federal counterpart. In doing so, the majority provides no legal justification for its decision other than its raw power to do so…The majority even recognizes that as a result, the exact same words in the federal and state constitutions now mean different things according to this court. Yet, the majority fails to articulate a reason for how identical language in the two documents can mean the same thing for a number of years and now suddenly mean something different. Simply stating that a majority of the court disagrees with a United States Supreme Court decision and has the power to construe our state constitution more broadly is not a principled basis for suddenly rejecting our long history of interpreting the due process clauses of the federal and state constitutions in concert.

It remains to be seen how the *Dubose* and *Knapp II* rulings will affect future Wisconsin state court decisions. However the potential for a flood of challenges to police actions (that the U.S. Supreme Court has concluded are permitted by the federal Constitution) under the Wisconsin constitution certainly exists.

OMVWI—Alternate Tests

***State v. Fahey*, No. 2004AP102 (2005); Decided June 30, 2005 by the Wisconsin Court of Appeals.**

Fahey was stopped by Cottage Grove PD for speeding, and subsequently arrested for OMVWI. He was conveyed to the station and put through standard OMVWI processing. This included the arresting officer reading Fahey the "Informing the Accused" form. Fahey did not request an alternative chemical test at that time.

Fahey's B.A.C. was measured at .20. After the OMVWI processing was complete, Fahey was released to a responsible party. About fifteen minutes later, Fahey returned to Cottage Grove PD, and—for the first time—indicated that he wanted an alternative chemical test (at police expense). The officer advised Fahey that he could go to a hospital and have a test performed at his own expense, but that no second test at police expense would be provided.

Fahey argued that the results of the primary breath test should be suppressed, since the officer, by not providing an alternative test at police expense when requested, violated Wisconsin's implied consent law.

Wisconsin's implied consent law requires that an OMVWI arrestee be informed of their rights to alternative tests (note that there are some very limited cases involving unconscious subjects where this is not required). If the arrestee makes a request for an alternative test at agency expense, police must make a "diligent effort…to comply with the demand."

The issue in *Fahey* was whether his indication—fifteen minutes after he had been released—that he wanted an alternative test at police expense constituted a "request" under Wisconsin's implied consent law. The Wisconsin Court of Appeals held that it did not:

> We hold that, where police have informed a suspect of his or her right to an alternative test at agency expense, the suspect has ample opportunity to make a request, the suspect makes no request, and the suspect is released from custody and leave the presence of custodial police, a subsequent request for an alternative test at agency expense is not a request within the meaning of Wis. Stat. §343.305 (5)(a). We do not hold that police must honor all requests made while a suspect remains in custody.

So, in most instances, once an OMVWI suspect is released from custody they will not be able to request an alternative chemical test at our expense. The court did not elaborate on the last sentence of the passage above ("we do not hold that police must honor all requests made while a suspect remains in custody"), but it suggests that there are circumstances where even a request for an alternative test at police expense made while the arrestee is still in custody need not be honored. These situations are probably quite limited, however.

As a reminder, if the arrestee requests the alternative test at our expense in a timely manner (while they are still in custody), the officer maintains custody of the arrested person. The alternative test is performed just as if it was our primary test (although the informing the accused does not need to be read) and the evidence is retained in police custody.

Alternative Test (at the suspect's expense) An OMVWI arrestee can also request an alternative test at their expense. If they do so, we are required only to provide them with a "reasonable opportunity" for the test. In *State v. Vincent*, 171 Wis.2d 124 (Ct. App 1992), the Wisconsin Court of Appeals addressed the issue of what obligations a law enforcement agency has in regards to alternative tests (at the arrested person's expense). The court stated that nothing in the implied consent/OMVWI statute "imposes a duty upon the (police) to transport the accused to the site of the test facility chosen by the accused." Instead, our responsibility to provide a reasonable opportunity for the suspect to have an alternative test at their expense is "limited to not frustrating the accused's request for his or her own test…(these) responsibilities include the prompt processing of the accused so that he or she has an opportunity to seek and obtain an alternative test within three hours." The *Vincent* court went on to point out that police are not required to release an OMVWI suspect within three hours. If the arrested person is unable to find a responsible party to be released to, or is being booked on other charges, we are not required to release them or convey them to the hospital to facilitate an alternative test (at their expense). As long as we do not hinder the suspect's access to their alternative test (by delaying processing or release, etc.) we are acting within the implied consent/OMVWI statute.

Miranda

In *State v. Rockette* (decided August 10, 2005 by the Wisconsin Court of Appeals), police made arrangements with a suspect's attorney to interview the suspect (who had not yet been formally charged, but was in custody). The attorney asked the officers not to read *Miranda* warnings to his client, and they did not do so. The suspect (Rockette) then answered questions and providing incriminating responses. After getting a new attorney, Rockette argued that the officers should have provided him with *Miranda* warnings.

The Court agreed with Rockette, and ruled that the officers should have read him his *Miranda* rights. Officers cannot subject someone to custodial interrogation unless they inform the person of their 5th Amendment rights (as outlined by *Miranda*). Then, the person must make a knowing and intelligent waiver of their rights prior to any questioning.

An attorney can neither invoke nor waive the 5th Amendment rights of a client. The court pointed out, "Rockette never personally indicated that he wished to waive his rights. Counsel could not do that for him by simply arranging a meeting with the police." Because Rockette entered a guilty plea pursuant to a plea agreement, the Court concluded that any *Miranda* violation was harmless, and his conviction was affirmed. However, the case demonstrated that when engaging in custodial interrogation—even with counsel present—*Miranda* warnings should be provided and a waiver from the suspect should be obtained.

In *State v. Hassel* (decided March 15, 2005 by the Wisconsin Court of Appeals) the court reviewed two separate incidents of questioning relating to an arson investigation. On one day, an officer spoke to Hassel at his home in a non-custodial situation. He was not provided *Miranda*, but several times stated "I can't talk to you." Hassel was subsequently arrested and interviewed the following day. When he was informed of his *Miranda* rights, Hassel stated, "I don't know if I should talk to you." He made no further indications of an unwillingness to speak, however, and answered questions freely during a three-hour interview. The *Hassel* court addressed two issues:

- Hassel's statement during the first interview ("I can't talk to you") was not a valid invocation of his *Miranda* rights. *Miranda* is only relevant in the context of custodial interrogation, and an individual cannot invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation. Because Hassel was not in custody at the time, his statement was not an invocation of his *Miranda* rights.

- Hassel's statement at the outset of the second interview ("I don't know if I should speak to you") was not sufficient to invoke his right to remain silent. A suspect must offer a clear invocation of his/her *Miranda* rights to stop police interrogation. An ambiguous statement will not be sufficient to serve as an invocation. Because Hassel's statement was ambiguous and was not a clear invocation of his right to remain silent, his statements were admissible.