

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD NICHOLAS VANWAGONER,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 250926

Jackson Circuit Court

LC No. 01-004448-FC

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

PER CURIAM.

In this case arising out of a home invasion during which the victim was beaten to death with a baseball bat, defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to life without the possibility of parole. We affirm.

Defendant's sole issue challenges the admission of his confession to the police. Before trial, defendant moved to suppress the confession on the ground that it had been given without the presence of counsel after counsel retained on defendant's behalf informed both the chief assistant prosecutor and the police that the police were to refrain from speaking to his client. Defendant argued that under *People v Bender*, 452 Mich 594, 596; 551 NW2d 71 (1996), the police were required to inform defendant that a retained attorney was available to consult with him, and that their failure to do so rendered his confession following a subsequent polygraph examination per se involuntary. Following a *Walker*¹ hearing, the trial court issued a written opinion and order granting defendant's motion to suppress the confession. In doing so, the trial court concluded that although not an agent of the police, the chief assistant prosecutor nevertheless had a duty to inform the police that counsel had been retained to represent defendant, or to at least inform counsel when the polygraph examination was scheduled to take place.

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

The prosecutor subsequently applied for interlocutory leave to appeal to this Court, which granted leave and stayed the trial court proceedings. See *People v Vanwagoner*, unpublished order of the Court of Appeals, entered May 1, 2002 (Docket No. 240932). On review of the trial court's opinion and order, this Court reversed and remanded for further proceedings after concluding that the trial court erred in suppressing the confession because certain pertinent facts distinguished this case from *Bender*. *People v Vanwagoner*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2002 (Docket No. 240932), slip op at 2. Specifically, this Court concluded:

In the instant case, defendant did not give his confession during the course of a custodial interrogation. No evidence showed that the police were aware that an attorney had been retained to represent defendant, or that the attorney made any attempt to contact defendant in order to consult with him. [*Id.*]

This Court also disagreed that the chief assistant prosecutor had a duty to convey the fact that defendant was represented by an attorney, and further concluded that because defendant was coherent at the time he confessed, and was aware of and freely waived his rights, his confession was not involuntary. *Id.* Defendant's subsequent application for leave to appeal to our Supreme Court was denied on May 22, 2003. See *People v Vanwagoner*, 468 Mich 908; 661 NW2d 583 (2003).

Defendant now argues that this Court erred in earlier reversing the trial court's decision to suppress his confession. Specifically, defendant argues that this Court erred in concluding that the confession was not given during a custodial interrogation and that the police were not aware that counsel had been retained for defendant. However, "[u]nder the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). The doctrine applies to cases where the prior appeal involved the same set of facts, the same parties, and the same question of law. *Manistee v Manistee Fire Fighters Ass'n, Local 645, IAFF*, 174 Mich App 118, 125; 435 NW2d 778 (1989). The doctrine also applies to issues addressed in interlocutory appeals. See *People v Freedland*, 178 Mich App 761, 770; 444 NW2d 250 (1989). "If a litigant claims error in the first pronouncement, the right of redress rests in a higher tribunal," or in a motion for rehearing before the same panel. *Kozyra, supra* at 433-434. Consequently, in the absence of such procedural redress, the law of the case doctrine will generally apply to preclude review "without regard to the correctness of the prior determination." *Muilenberg v The Upjohn Co*, 169 Mich App 636, 641; 426 NW2d 767 (1988).

Although there are exceptions to the doctrine, there is no claim or indication that this Court's prior decision was obtained by fraud, see *In re Forfeiture of \$19,250*, 209 Mich App 20, 24, 30; 530 NW2d 759 (1995), and there has been no intervening change of law or material change in facts, see *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 654; 625 NW2d 40 (2000); *Freeman v DEC International, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). Consequently, defendant's present appeal is precluded by the law of the case doctrine from further review by this Court. See *Kozyra, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Bill Schuette

I concur in result only.

/s/ Janet T. Neff