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STATE OF WASHINGTON

NO. 42964-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent

v.

ALFRED JOSEPH SANCHEZ, Appellant

Appeal from the Superior Court of Thurston County
The Honorable Christine Pomeroy
Thurston County Superior Court Cause No. 09-1-00591-9

SUPPLEMENTAL BRIEF OF APPELLANT

By:

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A. ASSIGNMENTS OF ERROR:

1. The trial court erred by entering finding of fact nos. 2, 3, 5, 6, 7, 8.
2. The trial court erred by entering conclusions of law nos. 1, 2, 3, 4.
3. The trial court erred by failing to enter defendant's proposed findings of fact nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15.
4. The trial court erred by failing to enter defendant's conclusions of law nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.
5. Mr. Sanchez's statements to police are inadmissible because they were not knowing, intelligent, and voluntary.
6. Because Mr. Sanchez's statement to police was not knowing, intelligent, or voluntary, all evidence derived there from and/or taken during that same encounter is inadmissible and must be suppressed.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. The trial court's Findings of Fact and Conclusions of Law fail to establish that Mr. Sanchez's statements to the police were knowingly, intentionally and voluntarily when his commanding officer had advised him to appear before police and cooperate.

C. STATEMENT OF THE CASE:

SGT. FOLINO'S INSTRUCTIONS TO MR. SANCHEZ

Joseph Albert Sanchez, hereinafter defendant, was on technically duty when he was ordered by his commanding officer to speak to police on March 28, 2009. RP¹ 84-85. At that time, his commanding officer First Sergeant Folino also had changed into his duty uniform. RP 85. Folino instructed Mr. Sanchez, and the other soldiers whom police had requested, to "sit in the conference room and wait to be questioned by police – or the detective at the time." Folino officer instructed the men to cooperate with the police:

¹ RP refers to the Report of Proceedings from the evidentiary hearing at first trial, when the CrR 3.5 hearing was held.

“We will give a statement.” RP 85. Mr. Sanchez believed that he had been ordered to give a statement to police. RP 85.

Folino made it clear that he did not know what had happened but that the Ranger were in trouble with the Army. RP 81.

Mr. Sanchez and the other men waited in something called the “war room” because it contained items from World War II. RP 86. The “war room” was a limited access room and Mr. Sanchez had been allowed in that room on only one prior occasion. RP 86. None of the Rangers could leave the “war room” waiting area until all of soldiers had been interviewed. RP 80.

Det. Costello didn’t recall whether he or Detective Fayette asked the Army to have the boys bring the clothes they had been wearing that evening or earlier that morning to the interview. RP 40. He stated, “I don’t recall that. I’m not saying it didn’t happen. I don’t recall that.” RP 40. Det. Fayette recalled asking for clothes but also recalled that several of the Rangers stated that they had washed their clothes. RP 62. Police wanted their clothing for evidence. RP 62. She did not know which Rangers said they had washed their clothes. RP 62.

*MR. SANCHEZ’S STATEMENT TO POLICE – UNTAPED AND TAPED
STATEMENT TO POLICE*

Prior to the taped interview, the police conducted an interview. RP 36. Det. Costello advised Mr. Sanchez of his Miranda rights. RP 14, 17. Det. Costello recalled that Mr. Sanchez stated that he understood those rights and that he would talk to police. RP 18. Det. Costello’s purpose in the interview was to conduct a pre-interview, “to figure out what they’re going to say before we record it.” RP 19. During the pre-taped interview, Det. Costello said that Mr. Sanchez made a statement. RP 53.

Det. Fayette knew that when the police left, the Rangers would be confined to quarters. RP 62.

After the un-taped statement, the detectives proceeded to take the tape-recorded statement. RP 19-20. During the taped interview with Olympia police, Mr. Sanchez was asked to describe the clothing he had worn the previous night. RP 25. He complied and responded that he had been wearing a black waterproof jacket, a black ASU hat, jeans, and black shoes. RP 25. He denied that he owned or carried a knife. RP 25.

Mr. Sanchez admitted drinking about 10 beers at Charlie's Tavern. RP 27. He saw a scuffle on the dance floor after which bouncers kicked out his friend Melville. RP 27. Mr. Sanchez went with Melville because they are friends. RP 28.

Mr. Sanchez denied that he had any problems with anyone outside the bar. RP 28. Because Mr. Sanchez had kicked the door and broken the lock while exiting the bar with Melville, he paid for that damage when he went inside to settle up his bar bill and get his debit card. RP 29.

After he left the bar a second time, he saw a fight. RP 30. He called out to his friends and got no response. RP 30. Then he called a cab and left. RP 30.

The police concluded the taped interview with what must be characterized as a series of confusing questions later construed to be, not outright admissions, but perhaps tacit admissions:

DETECTIVE: So I just want to make you aware that the guy that got stabbed is friends with the people in the car, and he looked at the video, and he's saying that the person he saw in the video kick the door in, which you're saying you did, is the person that stabbed him. I want to be clear. I want you to understand that. I want you to understand that so that when you're denying involvement that you understand what we're saying. So do you understand that?

MR. SANCHEZ: I understand what he's saying, yeah.

DETECTIVE: And I also told you that it might be more explainable – it might be explainable if what if all these guys are huge, there's an assault, and somebody uses a knife to end an assault that they started or got out of hand, and you're denying that as well.

MR. SANCHEZ: Yes.

DETECTIVE: Would you agree thought that you said that you believed that's probably what happened?

MR. SANCHEZ: I don't know.

RP 32.

On March 31, 2009, Olympia Police asked Mr. Sanchez to appear at the police station for a second interview. RP 35-36. At that time, Mr. Sanchez had obtained the advice of an attorney and asserted his right not to speak to police. RP 36-37.

THE COURT'S RULING ON THE CR.R 3.5 HEARING

The trial court did not like "the testimony and recall" of Det. Costello regarding the pretrial interview. RP 95. The court noted that Costello could not recall specific questions and answers. RP 95.

Regarding the taped statement, the trial court asked the State to affirm on the record that the State did not intend to go into the pre-taped interview because of the detective's poor memory. RP 95. The State did so affirm. RP 95.

Because the State had conceded that it would not use the pre-taped interview, the trial court did not make any findings of fact regarding the advisement of rights or the admissibility of the pre-taped statements. RP 95, 98-99.

Regarding the taped statement, the trial court found that Mr. Sanchez was advised of his rights. RP 99.

The court ruled that the taped statement was admissible. RP 98-99.

However, as noted below, the prosecutor argued that Mr. Sanchez had made inconsistent statements to police. TRP² 2766, et al.

For example, the prosecutor argued that the descriptions of Mr. Sanchez's clothing matched the descriptions of the assailant Brad Merten, the victim, described his assailant as wearing a cap with a fork on it³. TRP 2787, 2788. Merten further described his assailant as wearing a black North Face jacket and described the cap as black in color. TRP 2788. Of course, Mr. Sanchez had described his clothing in the taped statement in March, 2009 as a Northface black waterproof jacket, a black ASU hat, jeans, and black shoes. RP 25, TRP 2820.

The prosecutor also used his taped statements to argue that Mr. Sanchez was likely accurate or reliable in his taped statement when he talked about events that were not related to the fight, the stabbing, or kicking in the bar door. TRP 2830. The prosecutor argued that Mr. Sanchez's taped statement regarding the critical events was contrary to the other evidence, both the testimony and the video evidence as well. TRO 2830-2831. The prosecutor went through a list of "inconsistencies" that showed "a pattern here of not being completely honest with people. . ." TRP 2831.

At oral argument, counsel for respondent State of Washington argued that Mr. Sanchez's statements to police were exculpatory and that the admission of the statements at trial, was harmless error. Mr. Sanchez demonstrates that the record establishes otherwise.

The trial court did not enter Findings of Fact and Conclusions of Law as required by CrR 3.5 until April 17, 2014, after oral argument in this case and pursuant to order of this Court. The Court adopted the Findings of Fact proposed by the State and rejected those proposed by Mr. Sanchez. (See Appendix A & B)

² TRP = TRIAL REPORT OF PROCEEDINGS.

³ The Arizona Sun Devils cap has a "pitchfork" on the front.

This Court permitted filing of this supplemental brief.

D. LAW AND ARGUMENT:

- I. WHERE MR. SANCHEZ'S STATEMENT TO LAW ENFORCEMENT WAS MADE UPON THE ORDER OF HIS COMMANDING OFFICER, MR. SANCHEZ'S STATEMENT AND THE TRIAL COURT ERRED WHEN IT HELD IT TO BE VOLUNTARY AND THEREFORE ADMISSIBLE AT TRIAL.

“Custody” over military personnel occurs when there has been some assumption of control over their movements. *United State v. Higgins*, 39 C.M.R. 440, 442 (1967). The control may take many forms, such as ordering a person to appear at a specified time and place for the purpose of making a statement:

In military life, unlike civilian life, a suspect may be required to report and submit to questioning quite without regard to warrants or other legal process. It ignores the reality of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action.

State v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

In this case, Mr. Sanchez was in exactly this type of “custody” when he responded to his commanding officer’s order to dress in his uniform, appear for orders, and then remain in the “war room” to cooperate with civilian police and to give a statement to them if that is what the civilian police wanted.

This type of custody is far more draconian than merely being arrested, handcuffed, and asked to chose whether to talk to police. In the type of custody in which Mr. Sanchez found himself, he was in his 24/7 career where his commanding officer has the right to issue orders and he has the duty to follow them. In this environment, he was ordered in the early morning hours, some hours after consuming 10 beers, to dress in his full uniform, meet with civilian police, and fully cooperate with them. RP 84, 85. This cooperation extended to making a statement and, if asked, to handing over his clothing. RP 85, CP41

In military life, the commanding officer has the right to expect that his orders will be followed. Sgt. Folino expected that Mr. Sanchez and the other Rangers would follow his orders. Just as Sgt. Folino expected he would, Mr. Sanchez followed his commanding officer's orders. CP 40-42

This, under the unique factual context of this situation, there was no question that Mr. Sanchez knew that he had to obey Sgt. Folino. Whether the police read him the Miranda rights or not, he had to make a statement. In this situation, Miranda was superfluous. Mr. Sanchez, ordered to cooperate with police, did exactly what they wanted him to do. He listened to their reading of Miranda rights. He said that he understood them. RP 88, 89. He gave the statement. He did what he had been trained to do. He was a good soldier. Sgt. Folino would have expected nothing else. Undoubtedly Mr. Sanchez's failure to follow the orders of his commanding officer would have been detrimental to his career. Mr. Sanchez was not free to make any "knowing, intelligent, and voluntary" waiver.

Prior to the initial contact with police, Sgt. Folino did not inform Mr. Sanchez that he could have an attorney. CP 40-41. However, after army officers later informed him that he could have a JAG attorney, he decided that he wanted one. RP 91. He immediately informed police that he intended to exercise his right to counsel when he next encountered them. RP 37. Mr. Sanchez's exercise of his right to counsel when made aware of his right to counsel speaks volumes about the voluntariness of any statement he made to Olympia police at any time.

The appellate court reviews a trial court's findings of fact following a CrR 3.5 hearing for substantial evidence and review de novo whether the trial court's factual findings support its conclusions of law. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Substantial evidence is that which is sufficient to persuade "an unprejudiced, thinking mind of the truth of the fact to which the evidence is direct." *State v. Summers*, 107

Wn.App. 373, 388, 28 P.3d 780, 43 P.3d 526 (2001) (quoting *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972)).

Under this standard of review, this court will find that findings of fact nos. . 2, 3, 4, 5, 6, 7, 8 are not supported by substantial evidence.

FOF 2, 3, and 4 are not supported by substantial evidence because they omit critical facts. They are, at best, partial truths.

FOF 2 omits evidence regarding the police conversation with Sgt. Folino prior to the police arrival at JBLM. This FOF omits Sgt. Folino's assurance to police that he would make the men available for interview and that he would order them to cooperate in every way. FOF 2 also fails to include that Sgt. Folino ordered the men to dress out in their uniforms, which meant that the men were on duty. He ordered them to cooperate in every way that police requested. He gave the men no discretion in their decision to cooperate with police. He ordered the men to wait in the "war room" throughout the time that all of the interviews occurred. The men were interviewed individually but made to wait until all of the interviews had concluded. The men were not free to leave with the room or the Army. The men were not advised that they could have attorneys. To the contrary the men were ordered to fully cooperate with police and Sgt. Folino expected 100% compliance.

FOF 3 likewise is incomplete and irrelevant. Mr. Sanchez already was in the custody of the Army. He was not free to leave. The Olympia Police surely knew this and did not have to take any other efforts to restrain him. The obvious and simple fact is that Mr. Sanchez could not leave the interview room and had been ordered to cooperate.

FOF 4 affirms FOF 3, with the exception that police knew this.

FOF 5 is not supported by any evidence. The trial court failed to make any findings of fact whatsoever regarding the pre-taped interview. RP 95, 98-99. This is so because the trial court did not like "the testimony and recall" of Det. Costello regarding the pretrial interview.

RP 95. The court noted that Costello could not recall specific questions and answers. RP 95. Moreover, the trial court asked the State to affirm on the record that the State did not intend to go into the pre-taped interview because of the detective's poor memory. RP 95. The State did so affirm. RP 95.

Because the State had conceded that it would not use the pre-taped interview, the trial court did not make any findings of fact regarding the advisement of rights or the admissibility of the pre-taped statements. RP 95, 98-99.

Because the court declined to make any findings whatsoever regarding any aspect of the pre-taped interview, FOF 5 is not supported by any evidence at all.

FOF 6 is fatally flawed for the same reason as FOF 5.

FOF 7 is not supported by substantial evidence because it omits the information that Mr. Sanchez was not voluntarily in the interview room with Olympia police. He was ordered by his commanding officer to enter the interview room with them and make a statement and cooperate with them in every way they requested.

Consenting to Miranda rights is simply another form of cooperation with his military commander. That Mr. Sanchez was familiar with Miranda, understood their content, and consented to make a statement is irrelevant. His commanding officer ordered him to make a statement and he complied.

The trial court erred when it entered conclusions of law 1, 2, 3, 4 because the findings of fact were not supported by substantial evidence and therefore did not support the conclusion of law (COL).

COL 1 is simply not supported by substantial evidence because Mr. Sanchez was in custody. At the time of the interrogation had been significantly deprived of his freedom of action. By order of his commanding officer, he was required to be in the interview with Olympia police and he was required to make a statement to them. He could not leave until he

done so. The commanding officer's orders to a subordinate who had been trained to obey his commander made Miranda superfluous and wholly irrelevant.

COL's 2 and 3 are not supported by substantial evidence for the same reasons as COL 1.

COL 4 is not supported by substantial evidence and goes to the heart of this case. It presents a question of first impression for the Washington courts. Where commanding officer Sgt. Folino had trained his men to unquestioningly follow his orders and had issued orders in this case for them to cooperate with Olympia in every way, including making a statement, those orders, which Mr. Sanchez obeyed to the letter, removed his ability to make a knowing, intelligent, and voluntary waiver of Miranda rights. The evidence in this case compels the conclusion that Mr. Sanchez's statement to police was simply that of a good soldier obeying his commander, rather than a civilian's free and unfettered exercise of her Miranda rights.

II. MR. SANCHEZ'S STATEMENT WAS NOT EXCULPATORY.

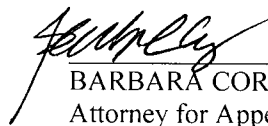
At oral argument, the State contended that Mr. Sanchez's statement was exculpatory. It was not.

The State repeatedly argued that the taped statement was inconsistent with the evidence. e.g., TRP 2830, 2832, 2835-2836; ; that Mr. Sanchez was "not completely honest with people" –TRP 2831. Had the taped statement not been admitted, these arguments could not have been made.

E. CONCLUSION:

For the foregoing reasons, Mr. Sanchez urges this Court to accept this supplemental brief as additional authority for reversal of his conviction.

RESPECTFULLY SUBMITTED this 14th day of May, 2014.


BARBARA COREY, WSBA#11778
Attorney for Appellant

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger, a copy of this document to: John Tunheim, Thurston County Prosecutor's Office, 2000 Lakeridge Drive S.W., Olympia, WA 98502 and to Alfred Joseph Sanchez, DOC#355172, Washington Corrections Center P.O. Box 900, Shelton, WA 98584.

5.15.14
Date


Kim Redford, Legal Assistant

STATE OF WASHINGTON
MAY 16 PM 1:29
COUNTY OF THURSTON

APPENDIX A

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3 3. Folino swore that he commanded Mr. Sanchez and the other individuals with whom
4 police wanted to speak about a bar fight in Olympia. Folino instructed the Staff NCO to
5 have the man dressed in their uniforms, present, and ready to speak to police when they
6 arrived.
- 7
8 4. Folino spoke directly to his men, including Mr. Sanchez. He ordered each men to
9 appear before the police and relate the events of the evening, which included the events
10 including and surrounding the bar fight. Folino expected the men to comply fully with
11 his orders. The soldiers, including Mr. Sanchez, had no choice but to follow these
12 orders and fully cooperate in the investigation.
- 13
14 5. Folino had never known a single man in his command to fail to follow his orders. His
15 men are trained to follow his orders exactly as given without question or hesitation
16 because such training may save lives. This training is so ingrained that it is second
17 nature to them.
- 18
19 6. Folino ordered his men to do whatever the police wanted them to do, including giving a
20 statement.
- 21
22 7. Folino never advised the men of their rights under the United States Constitution,
23 including the Fifth Amendment "Miranda" rights. Folino did not do this because he
24 never considered that the men would ever even have the option of not cooperating with
law enforcement.
8. Folino believed that the military is obligated to followed command structures and to
facilitate and cooperate with law enforcement.
9. Prior to the interview, the defendant was ordered by a superior to go into the interview
and to "cooperate." The defendant complied and went into the interview room. The
interview occurred in a private room in the ranger barracks.
10. Mr. Sanchez thereafter went into an interview with Dets. Costello and Fayette of the
Olympia Police Department. Costello "probably" identified himself as a police officer.
Mr. Sanchez was not in custody. Costello orally advised Mr. Sanchez of his
constitutional rights. He made a statement that was not taped recorded because the
police were trying "to figure out what they [subjects of the interviews] were going to
say before we record it."
11. When that interview was completed, the detectives asked the defendant if he would be
willing to provide a taped statement. The defendant agreed.
12. At the beginning of the taped statement, the defendant was again advised of his
constitutional rights. However, that advisement of rights was incomplete because police
failed to advise Mr. Sanchez that he could assert his right to stop answering questions at
any time during the interview. Mr. Sanchez acknowledged that he understood the rights
he was given, waived those incomplete rights, and made a taped statement.

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13. Following the interview, the defendant left the room. He was not arrested at that time.
 14. After March 28, 2009, Mr. Sanchez learned that he could have an attorney when he spoke to the police.
 15. When he went to Olympia Police Department at the request of Costello on March 31, 2009, Mr. Sanchez informed police that he had talked to an attorney and decided not to talk to police.

II. CONCLUSIONS OF LAW

1. Mr. Sanchez's contact with Olympia Police Detectives Costello and Fayette was involuntary on March 28, 2009 and occurred at the order of his commanding officer.
2. Folino ordered his men to appear before the detectives and to do whatever the police wanted them to do, including giving a statement.
3. Folino had trained his men to follow without question every command he issued and Mr. Sanchez had never disobeyed a single command.
4. Because of the command structure in the military, the location of the interviews, and the commander's insistence that his men cooperate fully with the police, Mr. Sanchez obeyed his commander.
5. Mr. Sanchez had no option but to enter the interview room in the barracks when police summoned in for their interviews.
6. At the time of the interview that is the subject of this hearing, the defendant was in the barracks at JBLM but was not under arrest, nor was he in custody. That is, his freedom was not restricted to a degree that could be reasonably associated with formal arrest. Therefore, the statements that he provided to law enforcement were not custodial statements for purposes of *Miranda*.
7. When the defendant first contacted police, police advised him of his constitutional rights. The defendant was orally advised of his rights under *Miranda* prior to the interview. Costello testified that he provided a complete advisement. Consistent with his commander's order to cooperate with the police, Mr. Sanchez stated that he understood his rights and agreed to waive them to make a statement to police.
8. The defendant was advised incompletely of his rights during the taped portion of the interview and but again followed his commander's orders and stated that he understood that flawed advisement, and, consistent with the commander's orders to cooperate, waived those rights.

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9. For the foregoing reasons, this court finds that Mr. Sanchez's statements resulted from direct orders from his military commander. The statements were not made by the exercise of Mr. Sanchez's free will in any capacity.
10. Therefore, this court finds that the statements are INADMISSIBLE at trial.

DONE IN OPEN COURT THIS ____ day of April, 2014

JUDGE

PRESENTED BY:

APPROVED FOR ENTRY:

BARBARA COREY, WSBA#11778
Attorney for A.J. Sanchez

JON TUNHEIM, WSBA #19783
Prosecuting Attorney

APPENDIX B

MR. TUNHEIM: I doubt that he has, Your Honor. It corrected a typographical error in the information.

MS. JOHNSTON: Your Honor, then I move that we strike this new count and that we proceed on count one.

THE COURT: Counsel.

MR. TUNHEIM: There's no basis to strike a count, Your Honor. This was a scribner's error. There's no prejudice to the defense. It clarifies that there's a count one and a count two, which I think clearly was the inference in the original information. It's just a typographical error.

THE COURT: Anything else?

MS. JOHNSTON: No, Ma'am.

THE COURT: Anything else?

MR. TUNHEIM: I think the cases that are actually closest to this, Your Honor, support the notion that the statement comes in. I agree it's not an inculpatory statement. It is an exculpatory statement, and the defendant's trying to minimize his involvement and is denying any involvement in the stabbing which was the subject of the investigation. It's relevant because as it turns out, some of the statements in the taped statement were untrue. But there's nothing about that statement that's an admission.

THE COURT: I'm going to allow the recorded

statement in. It is, number one, the court finds -- has a duty to make findings. I find that he was in the barracks. I find he was not in custody. I find it to be a non-custodial statement. I find that he was given his rights. I find his officer told him you get in there as a direct order to get in there and to cooperate. But that direct order is not sufficient. I find that he understood his rights. He was told his rights by Detective Costello and gave a statement. I find it not custodial in nature and it should come in.

Is there anything else?

MS. JOHNSTON: Yes, Your Honor. How does the court rule on burglary?

THE COURT: What do you mean?

MS. JOHNSTON: We've asked that the court strike count two.

THE COURT: I'm not going to strike count two. I believe it's a scribner's error in looking at it. The difference between it is that there's one little niche. If you want to sever the counts, that would be a different thing, but you're not moving that. You're moving to strike it and I'm not going to strike it.

Does he enter a plea of not guilty to count one and count two?

MS. JOHNSTON: Yes, Your Honor.