70323-4

70323-4

NO. 70323-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FELIPE MAGNEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis R. Hill, Judge

BRIEF OF APPELLANT

MARTI McCALEB
CHRISTOPHER H. GIBSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting the appellant's statements made during interrogation in violation of his Miranda[1] rights.

2. The trial court erred by failing to enter written findings of facts and conclusions of law as required by CrR 3.5.

3. The trial court erred by allowing a juror to continue serving after disclosing his brother worked as a security guard at the crime scene during the time of the alleged incident.

Issues Pertaining to Assignments of Error

1. Did the trial court err by admitting appellant's statements to police made during custodial interrogation, where the appellant unequivocally invoked his constitutional right to counsel and that demand was ignored and questioning continued multiple times over the next twelve hours?

2. CrR 3.5 requires the entry of written findings of facts and conclusions of law following a hearing on the admissibility of a defendant's statements to police. Did the trial court err by failing to enter the required findings and conclusion?

---

[1] Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3. Did the trial court deprive appellant of his constitutionally right to a fair and impartial jury when it allowed a juror to continue to serve after revealing his brother worked at the scene of the crime during the time of the incident?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged appellant Felipe Magney with two counts of first degree robbery, two counts of second degree assault, drive-by shooting, and first degree unlawful possession of a firearm. CP 36-39. After the court dismissed one count of robbery, a jury convicted Magney of all remaining charges. CP 108. Magney received a 303-month sentence, including 132 months in firearm enhancements. CP 109. Magney appeals. CP 349.

2. Substantive Facts

On the evening of April 24, 2010, Magney and his wife Alyssa had a heated verbal argument. 15RP 22.[2] Not wanting their children to witness the fight, Magney decided to leave the house until his temper cooled off. 15RP 23. Magney had recently been released from Clallam Bay Correctional Facility, where he had successfully completed numerous life skills classes and was attempting to extricate himself from several years of involvement in gang life. 15RP 29-31. However, because of his time incarcerated, Magney did not know many people in his community, and all but one of the several friends he tried to call for help that day did not answer. 15RP 24. The only person Magney was able to reach was Julian Patton, whom Magney had met while at Clallam Bay. 15RP 24. In prison, Patton had been an enforcer for the Hoover Crips, but had always been supportive of Magney's decision to leave gang life. 15RP 34-35. Although Patton was still an active gang member, because of his

[2] There are 20 volumes of verbatim transcripts of proceedings referenced as follows: 1RP – November 17, 2011; 2RP – November 21, 2011; 3RP – November 22, 2011; 4RP – November 30, 2011; 5RP – December 6, 2011; 6RP – December 7, 2011; 7RP – December 8, 2011; 8RP – December 10, 2011; 9RP – December 15, 2011; 10RP – December 19, 2011; 11RP – December 20, 2011; 12RP – January 9, 2012; 13RP – January 10, 2012; 14RP – January 11, 2012; 15RP – January 12, 2012; 16RP – January 17, 2012; 17RP – January 23, 2012; 18RP – January 24, 2012; 19RP – January 25, 2012; and 20RP – March 2, 2012.

demonstrated support for Magney, Magney asked Patton to pick him up to get out of the house for a while. 15RP 36-37.

Patton, his friend Keenan "Fatty" Stell, and an unidentified woman picked Magney up at his home. 15RP 37-38. After dropping the woman off, the three men drove to Federal Way to meet Patton's girlfriend, Amber Clifton, at her home. 15RP 39. After about an hour, Patton decided they should go to The Palace, a nearby Asian restaurant and bar. 15RP 39-40. Because no one had much money, the group did not stay long and then Patton had the idea to go to Poppa's Pub. 15RP 40.

Magney decided that the dispute with his wife Alyssa had blown over enough for him to go home and talk things over, so he asked Patton to take him home instead of to Poppa's Pub. 15RP 40. Patton, who worked as a bouncer at Poppa's, refused Magney's request. 15RP 40-41. While Patton was hoping his friends and coworkers would let him into the bar for free, he also stated he could help Magney get a job. 15RP 41.

When they arrived at Poppa's the bar was very busy and security denied them entry. 15RP 42. As they walked away, Clifton was unhappy; she and Patton were arguing, so Magney fell back to give them some privacy. 15RP 44. Patton saw several acquaintances drive by in a distinctive car—a dark burgundy Buick Regal with large tires and hydraulic lifts. 15RP 46. He told Magney to follow him to talk to the car's

occupants. 15RP 45. "Fatty" Stell and Clifton had already walked back toward their car, and Magney again asked Patton to take him home. 15RP 45-46. Magney followed Patton to a rear alley parking area behind the bar, where a dark blue Monte Carlo with large rims was parked. 15RP 46. Magney wondered if his eyes were playing tricks on him because the car both did and did not look like the one he'd originally seen drive past. 15RP 46.

Because he had no interest in talking to any of Patton's friends, Magney lagged behind and spoke on his cell phone to give Patton extra space, essentially just killing time until he could get a ride home. 15RP 47. As they approached the car, Magney again told Patton to take him home. 15RP 48. Patton told Magney to "chill out." 15RP 48. Then Magney saw Patton draw a gun, open the door of the car and order the driver out of the car. 15RP 48-49. After the young woman got out of the car, he looked at Magney and said "get your bitch ass in the car. You already know what it is." 15RP 50. Magney, confronted with an armed gang enforcer who knew where he and his family lived, and knowing Patton's reputation for violent retribution in the Hoover Crips, had no choice but to get in the car. 15RP 65-66. He opened the passenger door and told a second woman who had been sitting in the rear passenger seat,

to get out before Patton shot her. 15RP 51-52. Fearing Patton would shoot him as well, Magney got into the car. 15RP 55.

As Patton started the car, the two women ran toward the front of the club. 15RP 53. Patton ordered Magney to take the gun and start shooting. 15RP 58-59. Not wanting to harm anyone, but again unable to resist Patton's orders or safely flee the situation, Magney rolled down the car window and fired several shots straight up into the air. 15RP 60. As Patton pulled the car out of the parking lot and onto the street, Magney fired maybe two more shots straight up into the air. 15RP 67.

Kent police officers Miller and McQuilkin, both working bicycle patrol, were in the parking lot across from Poppa's addressing parking congestion in the area. 5RP 16-23. They heard the gunshots and ran toward the scene. 5RP 24. Both officers testified that the muzzle flashes they saw coming from the car were directed up in the air. 5RP 26, 105. They began firing at the vehicle and continued firing until the car was well out of range. 5RP 107.

Several other police units pursued the car. 9RP 15. The chase lasted approximately half a mile. 9RP 16. Inside the car, again Magney asked Patton to just let him go and Patton continued to threaten him, saying he would "smoke" Magney if he got out of the car. 15RP 71. Ultimately, police ended the pursuit by forcing the car into a guardrail.

15RP 73. Police pulled Patton out of the driver's seat and placed him under arrest. 15RP 74. Magney, seated in the passenger seat, had head injuries from hitting the window during the crashed. 15RP 73. He looked back at the officers and saw a machine gun pointed at him. 15RP 75. Feeling helpless and in shock, Magney kept nodding at the officers giving him directions. 15RP 75-76. They tazered him in the chest and pulled him from the car. 15RP 76. As an officer slammed Magney onto the concrete into a pile of broken glass, he put his hands underneath him to brace his fall, and officers began punching and kneeing him. 15RP 76.

Officer Michael Eaton transported Magney to Valley Medical Center for treatment for the facial lacerations he sustained during the arrest. 3RP 61; 15RP 77-78. In a treatment room at the hospital, Officer Eaton read Magney his Miranda rights and Magney invoked his Fifth Amendment right to counsel. 3RP 65. Eaton stopped questioning Magney immediately after he asked for an attorney. 3RP 65. He did not attempt to contact an attorney while at the hospital and once he transported Magney to the Kent jail, he did not inform jail staff that Magney had requested an attorney. 3RP 66. Thus, one was not provided.

Lt. Stan Gordon and Lt. Thomas Robinson with the Federal Way Police Department were called in to assist the Kent Police Department in the investigation. They arrived at the Kent jail at about 4 a.m. to interview

both Magney and Patton. 3RP 33-34. Robinson read Magney his Miranda rights at this time. 3RP 15-16. He had not been informed that Magney had previously invoked his right to counsel. 3RP 13. Magney initially spoke with the detectives but after about 30 minutes again unequivocally requested to speak to an attorney and the detectives terminated the interview. 3RP 17. As before, there is no indication anyone attempted to provide Magney with the assistance of an attorney as requested.

More than six hours later, the detectives returned to the jail to speak to Magney again. 3RP 21. Again, Robinson reminded Magney of his rights, at which time Magney agreed to speak with them and to have the conversation recorded. 3RP 21-22.

During the CrR 3.5 hearing, both Gordon and Robinson acknowledged that they had no idea whether Magney had been informed of his Miranda rights upon being taken into custody, or before or during his treatment at Valley Medical Center. 3RP 15, 35. No one knew whether counsel had been provided at any time after Magney's request. The State argued that regardless of Magney's unequivocal request for counsel, first at the hospital and again at the jail, the intervening time between the request and the next statement to police made the statements admissible. 3RP 74-75. The trial court found Magney's statements to be

voluntary, but did not set forth any written findings of fact or conclusions of law to support the findings of fact, as required by CrR 3.5(c). 3RP 76.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY ADMITTING MAGNEY'S CUSTODIAL STATEMENTS MADE AFTER HE INVOKED HIS RIGHT TO COUNSEL BUT WAS NOT PROVIDED AN OPPORTUNITY TO SPEAK WITH AN ATTORNEY.

The trial court admitted Magney's custodial statements despite clear evidence police obtained those statements in disregard of Magney's repeated requests for counsel. This constitutes reversible error.

This Court reviews the trial court's findings of fact from a CrR 3.5 hearing to determine if they are supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). It then reviews de novo whether the trial court's conclusions of law are properly derived from its findings of fact. State v. Pierce, 169 Wn. App. 533, 544, 280 P.3d 1158 (2012) (citing State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008)).

Miranda provides that prior to any custodial interrogation, a suspect must be informed that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning." 384 U.S.

at 479. A suspect's waiver of any of these constitutional rights must be knowing, voluntary, and intelligent. State v. Radcliffe, 164 Wn.2d 900, 905-06, 194 P.3d 250 (2008). Invocation of these rights must be unequivocal. State v. Hodges, 118 Wn. App. 668, 672, 77 P.3d 375 (2003) (citing Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L.Ed.2d 362 (1994)).

To be unequivocal, the suspect "'must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" State v. Nysta, 168 Wn. App. 30, 40-41, 275 P.3d 1162 (2012) (quoting Davis, 512 U.S. at 459). If the suspect invokes that right at any time, the police must immediately cease questioning him until an attorney is present. Edwards v. Arizona, 451 U.S 477, 484-485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). This clearly did not occur here.

While Magney was in custody at the hospital receiving treatment for his injuries, Officer Eaton began questioning him about the incident. Magney declined to discuss it and specifically asked to speak to an attorney. 3RP 64. Officer Eaton and his partner, Officer Ross, immediately stopped questioning Magney. 3RP 64-65. Based on their actions, there can be no question they considered Magney's request for counsel unequivocal. The only question is whether Magney later waived

that right by speaking with detectives at the jail, and if so, was that waiver knowing, intelligent, and voluntary. It was not.

In Edwards v. Arizona, the U.S. Supreme Court found that the use of a defendant's confession against him violated the Fifth and Fourteenth Amendments where the defendant has requested and not received advice of counsel prior to making the confession. 451 U.S. at 484-85. While under custodial interrogation and after having been informed of his Miranda rights, Edwards requested to speak to an attorney. 451 U.S. at 479. Interrogation ceased, but the next morning, detectives returned to question Edwards again. 451 U.S. at 479. He was again advised of his Miranda rights but eventually agreed to answer their questions and implicated himself in the crime. 451 U.S. at 480.

The Arizona Supreme Court found Edwards's confession to be voluntary. 451 U.S. at 480. That court concluded that while his initial invocation of Miranda was valid, Edwards later waived his rights by speaking with the police the next day. 451 U.S. at 480. The United State's Supreme Court reversed, finding that the lower court had applied an erroneous legal standard for waiver by considering only whether the statement was voluntary. 451 U.S. at 480. The trial court here made the identical error. In considering the suppression motion, the court

characterized the issue as one of "voluntariness and not whether he had waived his Miranda rights." 3RP 76.

The rule that once a suspect invokes his right to counsel, questioning must cease until counsel is present is intended to prevent investigators from badgering a suspect into waiving previously asserted Miranda rights. Edwards, 451 U.S. at 491. That rule was clearly not followed in this case. Magney unequivocally invoked his right to counsel to Officer Eaton. While he discontinued questioning, neither Officer Eaton nor anyone else did anything to follow up with ensuring Magney received the assistance of counsel prior to any further questioning. Therefore, when Lt. Harrison and Lt. Gordon came to the jail several hours later, they had no authority to question Magney. The fact that Magney spoke to them at this time is immaterial.

This situation is clearly controlled by Edwards. Magney unequivocally requested to speak to an attorney and was never provided that opportunity. Because the police disregarded Magney's Fifth Amendment rights in this regard, any statements he made to the detectives later are inadmissible and the violation of Magney's constitutional rights is reversible error. Edwards, 451 U.S. at 487. All Magney's statements to police while in custody should have been suppressed and because they were not Magney's convictions should be overturned.

2. THE TRIAL COURT ERRED WHEN IT NEGLECTED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A CrR 3.5 HEARING.

The trial court failed to enter the required written findings of fact and conclusions of law after conducting a CrR 3.5 hearing. Remand for entry of such findings is required.

CrR 3.5(c) states:

> After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor."

As this Court has noted, "the timely filing of findings and conclusions after a suppression hearing is not an empty formality. It is required by the rule CrR 3.5(c). Written findings and conclusions facilitate and expedite appellate review of the issues." State v. Cunningham, 116 Wn. App. 219, 227, 65 P. 3d 325 (2003).

In State v. Thompson, 73 Wn. App. 122, 130, 867 P.2d 691 (1994), this Court stated that a trial court's failure to provide written conclusions "is harmless as long as oral findings are sufficient to allow appellate review." Here, the trial court made the following oral ruling at the CrR 3.5 hearing:

> With respect to Mr. Magney's statement. The spontaneous statement made in the hospital will be admitted. That was voluntary, unsolicited spontaneous as I said. With respect

> to the second statement in the Federal Way police department. I don't have any evidence before me that that was not voluntary. I don't find that the fact that he had invoked his rights previously is an indication that his statements – unrecorded statements at the Federal Way police department were involuntary. And with respect to the third recorded statement that was not only voluntary but at the – was made at the request of Mr. Magney himself.

3RP at 76-77. This oral ruling fails to provide sufficient information to allow this Court to consider whether substantial evidence supports the trial court's findings of fact. Thus the court's failure to issue written findings and conclusions is not harmless and remand is necessary.

3. THE COURT ERRED BY ALLOWING A JUROR TO SERVE AFTER HE REVEALED HIS BROTHER WORKED AS A BOUNCER AT POPPA'S PUB.

The federal and state constitutions guarantee criminal defendants the right to an impartial jury. U.S. Const, amend. VI; Wash. Const, art. I, § 22; State v. Davis, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Washington statute and court rules further enshrine this right. RCW 2.36.110 states:

> It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

The statute "provides the grounds for which the court may dismiss a juror," while the court rule establishes procedures governing the

replacement of excused jurors. State v. Depaz, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). Specifically, CrR 6.5 provides that "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury."

After jury selection was completed, one juror, unidentified by number, indicated to the bailiff that his brother worked as a security guard at Poppa's Pub, where many of the events discussed at trial occurred, at approximately the same time the event occurred. 4RP 6-7. The court questioned the juror off the record. 4RP 7. After questioning, defense counsel for both Magney and Patton expressed concerns about the juror's familiarity with the case and the court reserved on the issue for consideration the next day. 4RP 7-8. The court never returned to address the potential conflict.

While the juror's connection should not have automatically disqualified him from service, the court failed in its responsibility to question the juror's fitness to serve fairly and impartially. Counsel's expression of concern and the reservation on the issue should be sufficient to preserve this error for review. However, the court's failure to examine the juror's late disclosure and reconsider his fitness to serve, given the evidence of potential bias, is also a manifest constitutional error that may

be addressed for the first time on appeal. State v. Cho, 108 Wn. App. 315, 330, 30 P.3d 496 (2001).

Together, the constitution, court rules, and state statutes place a "continuous obligation" on the court to investigate and excuse jurors who are unfit to serve. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). "The question for the judge is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially." Hough v. Stockbridge, 152 Wn. App. 328, 341, 216 P.3d 1077 (2009). The court made no such finding.

The presence of a juror with personal knowledge of security issues at Poppa's Pub became even more problematic during the trial, given evidence presented that Magney's co-defendant, Julian Patton also worked as a bouncer at Poppa's. The possibility of this direct connection and bias between a co-defendant and a juror was never investigated, and that constitutes a manifest injustice affecting Magney's constitutional right to trial by a fair, impartial jury.

This Court considered similar questions of juror bias in State v. Cho, 108 Wn. App. at 318. There, a juror in a criminal trial failed to timely disclose that he was a retired police officer. Given the strong possibility of bias, the defendant requested a new trial. Cho, 108 Wn. App. at 329. This Court noted that such a remedy was not unprecedented

and indicated a willingness to grant the request.[3] Cho, 108 Wn. App. at 329 (citing U.S. v. Scott, 854 F.2d 697, 699 (5th Cir.1988)). As the Cho court stated, "Doubts regarding bias must be resolved against the juror." Cho, 108 Wn. App. at 330.

Here, Magney's right to an impartial, unbiased jury is in direct conflict with the presence of a juror with direct family ties to the co-defendant who placed Magney under duress and forced him to participate in the crimes. Reversal is required. Cho, 108 Wn. App. at 330.

D. CONCLUSION

For the reasons stated, this Court should reverse Magney's convictions.

DATED this 30th day of May 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

18487 for

MARTI McCALEB
WSBA No. 43303

18487 for

CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051
Attorneys for Appellant

[3] Because the parties had not briefed the issue of implied bias, the court first remanded for an evidentiary hearing and entry of further findings. Cho, 108 Wn. App. at 329.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70323-4-I
	)	
FELIPE MAGNEY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF MAY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] FELIPE MAGNEY
DOC NO. 786812
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MAY 2014.

X Patrick Mayovsky