

**FILED**

SEP 21, 2015

Court of Appeals  
Division III  
State of Washington

COA No. 33099-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

DONALD G. SMITH, Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

1. The court erred by failing to hold a CrR 3.5 hearing before allowing statements made by Donald G. Smith to Deputy Patrick Pitt to be used at trial.

### *Issue Pertaining to Assignment of Error*

A. Did the court err by failing to hold a CrR 3.5 hearing before allowing statements made by Mr. Smith to Deputy Pitt to be used at trial?

## II. STATEMENT OF THE CASE

Mr. Smith was charged by information with second degree burglary and third degree theft. (CP 1). A CrR 3.5 hearing was held to determine the admissibility of statements made by Mr. Smith to Deputy Jacob Fisher. (5/29/14 RP 35). Only Deputy Fisher testified at the hearing. (*Id.* at 35). In its oral ruling, the court found Mr. Smith was in custody, given his *Miranda* rights, and waived them, so his statements to Deputy Fisher were admissible. (*Id.* at 42). The court entered written findings of fact and conclusions of law. (CP 37-28).

The State's statement of defendant to be used at trial, filed April 24, 2014, identified only Deputy Fisher as the law enforcement officer to whom statements were made. (CP 152). Deputy Pitt's

name had been crossed off. (*Id.*). A month later on May 28, 2014, the State filed an amended statement of defendant to be used at trial that identified the law enforcement officers as Deputy Fisher and Deputy Pitt. (CP 28). The addition of Deputy Pitt went unnoticed. (See CP 148). In the findings and conclusions on the CrR 3.5 hearing where only Deputy Fisher testified, Deputy Pitt's name is crossed off. (CP 37). At trial, Deputy Pitt testified as to statements Mr. Smith made to him. (9/11/14 RP 108).

Derik Sterling had lived at his Grandfather's home at 6670 Mae Valley Road in rural Moses Lake for about five years. (9/10/14 RP 56). He was not living there on March 28, 2014, when he went to put insulation lying outside the home into the garage since it was raining. (*Id.* at 56-57, 73). He saw a car parked between the home and garage. (*Id.* at 57). Mr. Sterling pulled up and asked the female inside the car what was up. (*Id.* at 57-58). He saw a male standing in front of the garage. (*Id.*).Mr. Sterling was on his phone with police as he checked to see if they had permission to be there. (9/10/14 RP 60). The female driver said they did. (*Id.*). The man took off and left. (*Id.*).

After police arrived, Mr. Sterling saw some of his items in the female's car. (9/10/14 RP 61). Those items were a tool box, power

tools, screws, building material, and a DVD player. (*Id.* at 61-62). He did not give Mr. Smith permission to go in the house or the garage. (*Id.* at 66-67). He also did not give Peggy Sangster permission to be there. (*Id.* at 67). Mr. Sterling's girlfriend, Cecily McFarland, did have permission. (*Id.*). There were signs the garage had been broken into, *i.e.*, the door was open with the bolt area shattered. (*Id.* at 68). The house had similar signs of being broken into as the back door was kept shut by a bar, but it had been completely bent. (*Id.*). Mr. Sterling said the garage had been broken into before. (*Id.* at 89).

Deputy Pitt was dispatched to a reported burglary at 6670 Mae Valley Road. (9/10/14 RP 110). He said Deputy Fisher, Mr. Smith, Mr. Sterling, Marian Benavidez (the driver), and Deputy Miers were there. (*Id.* at 110-111). Deputy Pitt had minimal involvement since he was Deputy Mier's field training officer and was primarily overseeing him. (*Id.* at 111). Deputy Pitt made contact with Mr. Smith, but there was no testimony about the circumstances or the how and when of the contact. (*Id.* at 108-15). The deputy did testify about statements made by Mr. Smith. (*Id.* at 111-13).

On March 28, 2014, Deputy Fisher responded to the dispatch about a burglary at 6670 Mae Valley Road, where he made contact with Mr. Smith, Ms. Benavidez, and Mr. Sterling. (9/10/14 RP 116-17). The deputy saw Mr. Smith running through a field south of the house. (*Id.* at 118). Deputy Fisher caught up with him by a wood pile near a barn. (*Id.*). He determined it was Mr. Smith and asked him questions later in the investigation. (*Id.* at 119). Mr. Smith went into the garage, took stuff out, and put them in the back of Ms. Benavidez's car. (*Id.* at 119-20). Law enforcement seized those items, which were Mr. Sterling's. (*Id.* at 120). Mr. Smith said Mr. Sterling gave him permission to be there. (*Id.* at 121, 132).

Peggy Sangster knew Mr. Sterling through her friend, Cecily McFarland. (9/11/14 at 155). Ms. McFarland was his girlfriend. (*Id.*). Ms. Sangster also knew Mr. Smith. (*Id.*). She talked with Ms. McFarland, who asked Mr. Smith to go over to the Mae Valley house and pick up some of Ms. Sangster's stuff that had been left there. (*Id.* at 157-58). She recalled Ms. McFarland being at the house in late March 2014. (*Id.* at 158). Ms. Sangster gave Mr. Smith permission to go over to the Mae Valley house because Ms. McFarland said it was OK. (*Id.* at 160).

Mr. Smith did not know Mr. Sterling or Ms. McFarland, but he did know Ms. Sangster. (9/11/4 at 172). After talking with her, he thought he had permission to be at the Mae Valley house. (*Id.*).

The jury convicted Mr. Smith as charged. (CP 143-44). He moved for a new trial, based among other things on the failure of the court to hold a CrR 3.5 hearing on the admissibility of statements made to Deputy Pitt. (CP 148-56). The State conceded error on the failure to hold a CrR 3.5 hearing. (1/6/15 RP 125). Nonetheless, the court denied Mr. Smith's motion for new trial. (*Id.* at 127). He received a standard range sentence of 60 months on the second degree burglary and a suspended sentence of 364 days on the third degree theft. (CP 161). This appeal follows. (CP 179).

### III. ARGUMENT

A. The court erred by failing to hold a CrR 3.5 hearing before allowing statements by Mr. Smith to Deputy Pitt to be used at trial.

The provisions of CrR 3.5 are mandatory. *State v. McKeown*, 23 Wn. App. 582, 585, 596 P.2d 1100 (1979). Due process requires a pretrial hearing to deal with the admissibility of a

defendant's incriminating statements so the jury is prevented from hearing an involuntary confession. *State v. Lopez*, 67 Wn.2d 185, 188-89, 406 P.2d 941 (1965); *State v. Myers*, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976). But the appellate court can perform its own examination of the record and make its own determination of voluntariness. *Id.* Although Mr. Smith does not challenge on appeal the voluntariness of his statements to Deputy Fisher, he certainly does take issue with the voluntariness of the statements purportedly made to Deputy Pitt. (See 9/11/14 RP 178).

Deputy Pitt's testimony about Mr. Smith's statements is critical to the inquiry here:

Q. Okay. Did you ever make contact with defendant?

A. Yes, I did.

Q. And what were those statements?

A. Based on the circumstances of why we were there, he told me that he had an acquaintance who he identified as the name of Celeste. He explained that she was the girlfriend or significant other of the homeowner, Derik Sterling, and he had permission to be there.

Q. Okay. Now, he said the name Celeste?

A. Correct.

Q. Did you ever hear him say the name Cecily?

A. No, I did not.



Q. Did the defendant say whether he knew Mr. Sterling?

A. Yes. Did he say whether he did? Yes. Did he know him? No.

Q. Okay. So he told you he didn't know Mr. Sterling?

A. Mr.? Yes.

Q. And that would be Derik Sterling?

A. Yes.

Q. Did the defendant admit to taking any of the items out of the garage?

A. Yes, he did.

Q. And what exactly did he tell you about that?

A. He did mention, I believe it was a vacuum.

Q. Okay.

A. And some other miscellaneous garage items.

Q. Now, this Celeste person, was he able to provide you any contact information for her?

A. No, he was not.

Q. Was he able to give you an address where she lived?

A. No, he was not.

Q. Was he able to give you a phone number for her?

A. No.

Q. And he's telling you that she's the one who he's helping out?

A. Yes, that's correct.

Q. Did the defendant tell you why he ran from the scene?

A. Yeah, I asked him. He didn't really have an explanation other than he doesn't like law enforcement. (9/10/14 RP 111-12).

Nowhere in Deputy Pitt's testimony does he speak to the circumstances surrounding the taking of the statements or the how or when the statements were taken. He did not testify he gave Mr. Smith his *Miranda* rights or was aware Deputy Fisher had done so. Deputy Fisher's testimony is also silent as to Mr. Smith's contact with Deputy Pitt and the timing of it. On this record, or indeed the lack of one, this Court cannot make its own determination of voluntariness. *Myers*, 86 Wn.2d at 425-26. The record does not reflect whether Mr. Smith was in custody, whether he had been given his *Miranda* rights before making any purported statements to Deputy Pitt, and, if so, whether he had waived his rights.

By amending the statement of defendant to be used at trial to include Deputy Pitt when he did not testify at the CrR 3.5 hearing and his name had been crossed off the findings and conclusions entered thereafter, the State's gamesmanship is on the record.

When finally noticed by Mr. Smith's counsel, the State even conceded error for failure to hold a CrR 3.5 hearing on the statements to Deputy Pitt. Mr. Smith's due process rights were violated. The remedy is to reverse the convictions and remand for further proceedings. *McKeown*, 23 Wn. App. at 585.

#### IV. CONCLUSION

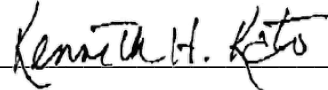
Based on the foregoing facts and authorities, Mr. Smith respectfully urges this Court to reverse his convictions and remand for further proceedings.

DATED this 21<sup>st</sup> day of September, 2015.

  
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#### CERTIFICATE OF SERVICE

I certify that on September 21, 2015, I served a copy of the brief of appellant by USPS on Donald G. Smith, # 737581, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA 99362; and by email, as agreed, on Garth Dano at [kburns@grantcountywa.gov](mailto:kburns@grantcountywa.gov).

  
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