NO. 95093-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COA No. 34094-5-III

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

v.

ROGELIO NUNEZ,

Respondent/Cross-Petitioner

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

The Honorable Alexander Ekstrom

ANSWER AND CROSS-PETITION FOR REVIEW

MICHELLE TROMBLEY
WSBA # 42912
Attorney for Respondent/Cross-Petitioner

TROMBLEY LAW PLLC
7135 West Hood Place
Kennewick, Washington 99336
(509) 491-3941

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2. Whether well-established case law supports the Court of Appeals' in upholding the decision that a hearing under CrR 3.5 is held for the purpose of determining whether a custodial statement was obtained with proper regard for a defendant's rights and therefore necessarily puts the state on notice?

B. ISSUES IN MR. NUNEZ' CROSS-PETITION

1. Does the question of whether the State waives any objection to the custodial nature of statements made by a defendant when this fact is not challenged prior to or at the time of the CrR 3.5 hearing raise a significant question of law involving an issue of substantial public interest which should be determined by this Court?
2. Does the question of whether the State bears the burden of disproving the custodial nature of a defendant's interrogation raise a significant question of law and an issue of substantial public interest necessitating review by this Court?

3. Did the Court of Appeals err in partially reversing the trial court when there had been no opportunity for the creation of a complete factual record because the issue of custody was not raised until after the trial court's original suppression decision? Does this error involve an issue of substantial public interest?

B. STATEMENT OF THE CASE

On January 19, 2016 a motion was held in accordance with CrR 3.5 as the State had indicated an intent to offer the defendant, Mr. Nunez', statements in their case in chief. CP 17. The State called two witnesses to testify, Deputy Ruben Bayona and Detective Jacinto Nunez. CP 17. Deputy Bayona testified that he had been informed by Detective Nunez that they would be interviewing Mr. Nunez [1] to investigate a sexual-related crime as a suspect. CP 20. The interrogation took place in Spanish. CP 21. Deputy Bayona was present when Detective Nunez read "rights" to Mr. Nunez. CP 21.

The State offered and entered the Spanish rights form that had been read to Mr. Nunez. CP 22-23. The advisement of "rights" was not recorded with the remainder of the interrogation. CP 32 &34. During Detective Nunez' testimony, he had in front of him, State's exhibit 1, the Spanish "rights" form. CP 39. Detective Nunez testified that he "read Nos. 1, 3, 4 and 5 to Mr. Nunez" CP 41. He testified further that when it came to No. 2 "I asked him how old he was. He

[1] Both the lead detective and the defendant share the same last name I will differentiate them as "Detecive Nunez" and "Mr. Nunez" respectively.

told me he was 47 years old, so I crossed it out. It's a warning to juveniles." CP 41. Detective Nunez then went on to describe that he puts a "checkmark" next to each of the rights read to Mr. Nunez. CP 41. He indicated on this form there were "checkmarks next to Paragraph 1, 3, 4 and 5". CP 41. Detective Nunez was asked by defense counsel "[w]as the intent of the September 15th interview to coerce a confession from Mr. Nunez?" to which Detective Nunez replied, "[y]es". CP 51. Detective Nunez was then excused and the factual record closed. CP 51.

The State indicated during oral argument that "there's no contested evidence." CP 52. Defense counsel brought to the court's attention that in Detective Nunez' very detailed recounting of the advisement of rights for Mr. Nunez, he failed to advise Mr. Nunez that "[a]nything you say can be used against you…" CP 53. Defense counsel then asked the court to find that the warnings were not accurately given and Mr. Nunez' statement should therefore be suppressed. CP 53. The trial court then asked for response argument from the State and the State attempted to salvage the error by adding information from Detective Nunez. CP 54. The court then clarified that the factual record for the hearing was closed. CP 54. The State then continued to attempt to add facts not in the record. CP 54.

The court recited his memory of the testimony given, that "Right No. 2 was not given. And the indication – and there was no differentiation made

between any portion of it." CP 55. The court continued; "the testimony that the Court recalls did not differentiate between a part of the right, which is inconsistent with Ms. Chen's argument, but the evidence in the record was that the second right was crossed out and not given due to the age of the defendant." CP 55. The State again requested the court reopen the record so she could have Detective Nunez make changes to his testimony. CP 55-56. The Court indicated the State could file a motion for reconsideration and would need to provide authority that the State could reopen the factual record. CP 56.

The court then went on to identify and rule on additional issues presented at the hearing, such as the fact that Detective Nunez indicated the intent was to coerce a statement from Mr. Nunez. CP 57. The court indicated that although Deputy Bayona had testified regarding the absence of threats or promises, he was not present for the entirety of the interview and Detective Nunez had not testified regarding threats or promises, creating a Due Process issue. CP 57.

On January 26, 2016 the State filed a Motion for Reconsideration. CP 6-13. In this Motion for Reconsideration the State raised a number of issues that it had not raised at the initial hearing. CP 6-13. On this same date the State also filed the self-serving affidavit of Detective Nunez addressing all the testimonial deficiencies previously outlined by the court after the initial CrR 3.5 hearing. CP 14-15. Defense counsel filed a response to the Motion for Reconsideration

and the State filed a reply. CP 65-76. Findings of Fact and Conclusions of Law for the CrR 3.5 hearing were entered on January 26, 2016.

On February 16, 2016 the court held a motion hearing regarding the State's Motion for Reconsideration. RP 1. The court clarified that the issue as now raised by the State is that Miranda was not required. RP 4-5. The court inquired of the State's implied concession that the interrogation was custodial. RP 7. The State asserted that a CrR 3.5 hearing is "not a Miranda hearing." RP 7. The State provided a citation to the court to support the assertion that the burden of proving the interrogation was "custodial" is on the defendant; *United States v. Bassignani*, 560 F. 3d 989 (2009). RP 10 & 14. The State did not inform the court that all references to the burden of proof were removed when the opinion was amended and superseded on denial of rehearing in *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009).

The Court ultimately ruled that "when the State fails to present sufficient evidence such that a confession could be deemed admissible, the State loses the opportunity to reopen." RP 14. The court indicated a need for finality as a matter of fairness: "[i]f we don't have finality, then the meaning of the hearing is that we continue to conduct it until the State wins. That's not the purpose of the hearing." RP 14. The court further reasoned that to find otherwise "would simply mean that the State of Washington would have multiple abilities to correct its evidence after it had had the opportunity to

present its case. And for that reason, I find the citations to other portions of the court rules unavailed." RP 18. The court also made findings that the interrogation was custodial. RP 14-15.

The State then filed a Motion for Discretionary Review with the Court of Appeals. CP 81. The motion was denied and the State filed a motion for reconsideration which was granted and an interlocutory review commenced. The Court of Appeals affirmed the trial court's decision denying the reopening of the record and reversed the suppression ruling in part. Unpub. Op. at 8-9. The State filed a Petition for Review. Respondent's Answer and Cross-Petition now follows.

D. ARGUMENT ON WHY REVIEW OF THE STATE'S PETITION SHOULD BE DENIED

1. THERE IS AN INSUFFICIENT RECORD REGARDING THE FACTS SURROUNDING THE CUSTODIAL NATURE OF THE INTERROGATION OF MR. NUNEZ WHICH PROHIBITS REVIEW OF THE QUESTION OF CUSTODY

It is clear from the comments made by the trial court that the question of whether Mr. Nunez was in custody, was not considered to be an issue before the court at the time of the CrR 3.5 hearing. The trial court expressed clear confusion about why the State was raising the issue in its Motion for Reconsideration:

> The Court: Well, let me ask you about that. Didn't you, didn't you, as part of your initial argument in this matter, concede that it was custodial through your argument regarding Miranda?
>
> Ms. Chen: No, I never made that concession....
>
> The Court: Well, why have a Miranda hearing?
>
> Ms Chen: We have a 3.5 hearing as a matter of course. It's not a Miranda hearing, it's a 3.5 hearing for the court to determine whether the statements were voluntary and therefore admissible. And Miranda is something of a factor to consider when considering voluntariness.
>
> The Court: Actually the due process voluntary prong and Miranda are separate inquiries, are they not?

RP 7. It is clear that the hearing held at the trial court level was held with the understanding that custody was an already established fact.

Due Process requires that a record of "sufficient completeness" be provided for appellate review of the errors raised by a criminal defendant. See *Draper v. Washington*, 372 U.S. 487, 496-498, 9 L. Ed. 2d 899, 83 S. Ct. 774, 779-780, cert. denied 374 U.S. 850, 10 L. Ed. 2d 1070, 83 S. Ct. 1914 and 374 U.S. 852, 83 S. Ct. 1919, 10 L. Ed. 2d 1073 (1963); *see also State v. Larson*, 62 Wn. 2d 64, 66-67, 381 P.2d 120 (1963). Although these cases discuss a defendant's access to records already in existence, it logically follows that if there was not a hearing addressing an issue there would not be a "sufficient record" which would therefore deny a defendant Due Process.

For these reasons there is not a record sufficient to make a determination on the issue raised by the State and review should be denied.

2. THE COURT OF APPEALS DECISION IS A CORRECT APPLICATION OF THE WELL-ESTABLISHED PRINCIPLE THAT A CrR 3.5 HEARING IS HELD FOR THE PURPOSE OF DETERMINING ADMISSIBILITY OF CUSTODIAL STATEMENTS

The CrR 3.5 hearing "is a threshold determination of whether a *custodial* statement was obtained with proper regard for the defendant's rights. That is, the issue in a CrR 3.5 hearing is constitutional, not evidentiary." *State v. Viney*, 52 Wn. App. 507, 510, 761 P.2d 75 (1988) (emphasis added.). By its very nature, the CrR 3.5 hearing applies only to those statements which are the product of custodial interrogation. *Id*; See also, *State v. DeCuir*, 19 Wn. App. 130, 574 P.2d 397 (1978) (CrR 3.5 hearings do not apply to non-custodial statements.); *State v. Faulk*, 17 Wn. App. 905, 909, 567 P.2d 235 (1977) ("The constitutional concerns exemplified by CrR 3.5 apply only to custodial statements."). This well-established principle was clearly in the mind of the trial court when it expressed confusion about why the State was raising the issue in its Motion for Reconsideration:

> The Court: Well, let me ask you about that. Didn't you, didn't you, as part of your initial argument in this matter, concede that it was custodial through your argument regarding Miranda?

> Ms. Chen: No, I never made that concession….
>
> The Court: Well, why have a Miranda hearing?
>
> Ms Chen: We have a 3.5 hearing as a matter of course. It's not a Miranda hearing, it's a 3.5 hearing for the court to determine whether the statements were voluntary and therefore admissible. And Miranda is something of a factor to consider when considering voluntariness.
>
> The Court: Actually the due process voluntary prong and Miranda are separate inquiries, are they not?

RP 7. Clearly, the trial court understood the purpose of the CrR 3.5 hearing even though the State did not. The State fails to establish that the Court of Appeals erred or that there is a basis for this Court to accept review in light of the well-established case-law on this issue. This Court should deny review.

E. ARGUMENT ON WHY REVIEW OF RESPONDENT'S CROSS-PETITION SHOULD BE GRANTED

1. THE STATE WAIVED ANY OBJECTION TO THE CUSTODIAL NATURE OF THE DEFENDANT'S STATEMENTS WHEN IT FAILED TO RAISE THIS ISSUE PRIOR TO OR DURING THE CrR 3.5 HEARING.

The Court rule regarding omnibus hearings, CrR 4.5, states that in regards to motions:

> All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. *Failure to raise or give notice at the hearing of any error of issue of which the party consented has knowledge may constitute waiver of such error or issue.*

CrR 4.5 (d) (emphasis added). Failure to raise an objection generally constitutes a waiver. See also, *State v. Rice*, 24 Wn. App. 562, 565-567, 603 P.2d 835 (1979) ("CrR 4.5 provides for an omnibus hearing for the resolution of preliminary matters prior to trial, and must be read in conjunction with CrR 3.5."). The efficient administration of justice requires that attorneys state any legal objections they might have to any proposed action by a court. Objections raised after the fact result in needless appeals and motions for reconsideration or revision.

The State did not object or raise the issue of the custodial nature of the statements at any time prior to or during the CrR 3.5 hearing, the purpose of which is specifically to address only "custodial" statements. By requesting the CrR 3.5 hearing the defendant has clearly indicated he believes the statements to be custodial in nature or there would be no need for the hearing. Just as a defendant could waive a CrR 3.5 hearing on the basis that his statements were not custodial, the State can waive objection to the custodial nature of the interrogation and has done so in this case.

In addition, the trial court record is clear that defense counsel and the court were under the reasonable belief that the custodial nature of the interrogation was not at issue and Due Process requires a hearing addressing that issue in order to create a complete record on review.

The Court of Appeals did not address the issue of waiver raised by the Respondent. This issue has not been addressed by a court in this state and would appear to be an issue that is likely to reoccur. The need for a CrR 3.5 hearing is addressed in every criminal matter and is an issue that is both a significant question of law as well as an issue of substantial public interest impacting criminal defendants throughout the state. This Court should accept review.

2. THE STATE BEARS THE BURDEN OF DISPROVING THE CUSTODIAL NATURE OF AN INTERROGATION AND FAILED TO DO SO IN THIS CASE

Although there appears to be no Washington State case dealing with this issue there are indicators that the 9th circuit has declined to follow the 5th circuit's holdings on this issue. The State initially cited the 9th circuit case, *United States v. Bassignani*, 560 F. 3d 989 (2009), to the trial court to support the assertion that it was the defendant who bore the burden of proving the custodial nature of the interrogation. RP 10 & 14. However, the State's citation to *United States v. Bassignani*, 560 F.3d 989, 993 (9th Cir. 2009), is unavailing because all references to the burden of proof were removed when the opinion was amended and superseded on denial of rehearing in *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009).

In the original opinion filed by the Ninth Circuit in *United States v. Bassignani*, the court addressed the specific issue regarding the burden of proof

in demonstrating whether a defendant is in custody for purposes of *Miranda*. *Bassignani*, 560 F.3d 989, 993 (9th Cir. 2009) (holding that defendant bore the burden of proof and noting that the language in the *Miranda* opinion regarding the government's "heavy burden" applied to determinations regarding waiver, not custody). However, this portion of the opinion was deleted in the amended opinion. *United States v. Bassignani*, 575 F.3d 879 (9th Cir. 2009).

Looking outside of Washington, our close neighbor and fellow 9th circuit jurisdiction partner, California, has made some clear and logical findings on this issue:

> Quite clearly, the burden of showing whether defendants were or were not in custody and whether or not the investigation had focused on defendants should rest on the prosecution. The evidence on these issues ordinarily is in possession of the prosecution, and not easily available to the defense. This is an important factor in determining who has the burden of proof (see Witkin, Cal. Evidence (1958) 56, p. 74; cf. *People v. Stockman*, supra, 63 Cal.2d at p. 499). This is part of the foundation that the prosecution must lay before the confessions are admissible.

People v. Davis, 66 Cal.2d 175, 180-181, 57 Cal. Rptr. 130, 424 P.2d 682 (1967). California's rationale is logical and Mr. Nunez would urge this court to follow the same path. Arguably, the United States Supreme Court case of *United States v. Matlock*, seems to support the assertion that the government bears the burden of proving by a preponderance of the evidence that the defendant was not subjected to custodial interrogation. *United States v.*

Matlock, 415 U.S. 164, 178-79, 94 S. Ct. 988, 39 L. Ed. 2d 242, and n. 14 (1974).

Taken together, these cases support a finding that it is the State that bears the burden of disproving custody. The facts established below indicate that the State failed to meet this burden. The Court of Appeals did not address the issue of burden raised by the Respondent. This issue has not been addressed by a court in this state and would appear to be an issue that is likely to reoccur. The admissibility of a confession is an issue frequently raised in criminal proceedings. As such, this is an issue that is both a significant question of law as well as an issue of substantial public interest and this Court should accept review.

3. MR. NUNEZ' DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT OF APPEALS PARTIALLY REVERSED THE TRIAL COURT'S SUPPRESSION WITHOUT A SUFFICIENT RECORD ON REVIEW

This issue is a mirror to the argument requesting the denial of issue one contained in the State's petition for review. Mr. Nunez' was denied Due Process when the Court of Appeals made a decision without a sufficient record. See *Draper v. Washington*, 372 U.S. 487, 496-498, 9 L. Ed. 2d 899, 83 S. Ct. 774, 779-780, cert. denied 374 U.S. 850, 10 L. Ed. 2d 1070, 83 S. Ct. 1914 and 374 U.S. 852, 83 S. Ct. 1919, 10 L. Ed. 2d 1073 (1963); see also *State v. Larson*, 62 Wn. 2d 64, 66-67, 381 P.2d 120 (1963).

Although interlocutory appeals are infrequent, the issue of the propriety of deciding questions of fact not thoroughly addressed at the trial court level is an issue of substantial public interest for all criminal defendants. This court should accept review.

F. CONCLUSION

For the reasons stated, Mr. Nunez asks this Court to deny the State's petition for review. Alternatively, Mr. Nunez asks this Court to grant review of the issues raised in his cross-petition, affirm the trial court and remand for trial.

November 9, 2017

Respectfully submitted,
TROMBLEY LAW PLLC.

Michelle Trombley
Attorney for Respondent, WSBA# 42912

TROMBLEY LAW PLLC

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