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NO. 63149-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ASFAWESAN DRES,

Appellant.

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FILED
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE CHRIS WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The Fifth Amendment does not require the suppression of physical evidence derived from an un-Mirandized confession unless the statement was actually coerced. The test in determining whether a confession was actually coerced is whether the behavior of the state's law enforcement officials overbore the defendant's will to resist and bring about confessions not freely self-determined. Believing that Dres had swallowed the narcotic evidence, Officer Vaca asked Dres if he swallowed drugs or if he tossed drugs. Dres responded, "back there" and pointed in the direction from which he came. Did the trial court correctly find that suppression of the drug evidence was not appropriate under these circumstances?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Asfawesan Dres with Possession with Intent to Deliver a Controlled Substance (cocaine) in violation of RCW 69.50.401(1), (2)(a). CP 1-4. Dres set his case for trial and moved to suppress his statements and all evidence of the cocaine found, arguing the statements were elicited in violation of Miranda¹

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

and the cocaine was recovered as a product of the Miranda violation. CP 6-14. Officer Raul Vaca testified at the CrR 3.5/3.6 hearing. 3RP 3-15. Dres declined to testify and there were no further pretrial witnesses for the State or defense. 3RP 15-19. After hearing testimony from Officer Vaca and the argument of counsel, the court suppressed Dres's statement and assertive conduct indicating the location of the cocaine. 3RP 44. The court denied the motion to suppress the cocaine itself. 3RP 44. The first trial ended in a mistrial when the jury could not reach a unanimous verdict. 4RP 2; CP 64.

On retrial, the parties agreed that the trial court was not bound by its previous rulings. 4RP 3-5. The parties further agreed to the undisputed facts presented at the first pretrial hearing and that no further testimony was necessary for pretrial purposes. 4RP 4-6, 13. The trial court again suppressed Dres's statements and assertive conduct indicating the location of the cocaine but denied suppression of the cocaine itself. 4RP 17-18. The court entered written findings and conclusions reflecting its rulings. CP 118-20. A jury found Dres guilty as charged, and the trial court imposed a standard range sentence. CP 106; CP 109-17. Dres timely appealed. CP 121.

2. SUBSTANTIVE FACTS

The State incorporates by reference the undisputed findings of fact attached as Appendix A. CP 118-19. Also included in Officer Vaca's undisputed pretrial testimony was the fact that the officer made neither threats nor promises to Dres in exchange for Dres's response to his questions and that in his opinion, Dres's response was freely and voluntarily given. 3RP 11.²

C. ARGUMENT

The Fifth Amendment does not require the suppression of physical evidence derived from an un-Mirandized confession unless the statement was actually coerced. State v. Wethered, 110 Wn.2d 466, 473-75, 755 P.2d 797 (1988) (citing Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) and Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974)); United States v. Patane, 542 U.S. 630, 639-40, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2003). Wethered was seen by an officer selling hashish out of his car. Id. at 467. Other officers arrived, arrested

² For continuity, the State refers to the nine volumes of verbatim report of proceedings in the same manner as Dres: 1RP - 1/9/08; 2RP - 9/17/08 a.m.; 3RP - 9/17/08 (CrR 3.5/3.6 hearing); 4RP - 12/9/08; 5RP - 12/10/08; 6RP - 12/11/08; 7RP - 12/12/08; 8RP - 1/23/09; and 9RP - 2/25/09 (sentencing). Brief of Appellant at 1, fn. 2.

Wethered, and told him pre-Miranda that he could either "do it the easy way or the hard way" (referring to production of the hashish). Id. at 467-68. After assurances from the officers that the other vehicle occupants could leave and the car would not be impounded if he turned over the hashish, Wethered retrieved the hashish from one of the vehicle occupants and handed it to officers. Id. at 468. The court held that Wethered's statement and act of producing the hashish was a confession obtained in violation of Miranda and was not admissible. Id. at 471. The court went on to hold, however, that suppression of the hashish itself was not a remedy for the Fifth Amendment violation absent actual coercion. Id. at 471. The court found that under the totality of the circumstances, Wethered's production of the hashish was voluntary and thus denied his motion to suppress the hashish. Id. at 474.

Dres contends that the trial court should have suppressed the drug evidence in his case as his statement to Officer Vaca indicating the location of the drugs was coerced. Brief of Appellant at 9-10. At the suppression hearings below, Dres did not contend that his confession had been actually coerced nor did he testify or his counsel argue that he was incapable of voluntarily responding. See 3RP, 4RP.

The test in determining whether a confession is voluntary is whether the behavior of the state's law enforcement officials overbore the defendant's will to resist and bring about confessions not freely self-determined. State v. Tucker, 32 Wn. App. 83, 85, 645 P.2d 711 (1982). Interrogative tactics found to overbear a defendant's will and render a confession involuntary include confessions obtained by physical abuse, Beecher v. Alabama, 389 U.S. 35, 88 S. Ct. 189, 19 L. Ed. 2d 35 (1967) (confession found to be involuntary where police held gun to the head of wounded confessant to extract confession), isolation, Davis v. North Carolina, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966) (confession obtained after 16 days of incommunicado interrogation in closed cell with no windows, limited food, and coercive tactics); Culombe V. Connecticut, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961) (confession from defendant who was held for five days of repeated questioning during which police employed coercive tactics), withholding of sleep, food, or medical care; Greenwald v. Wisconsin, 390 U.S. 519, 88 S. Ct. 1152, 20 L. Ed. 2d 77 (1968) (defendant on medication interrogated for 18 hours without food or sleep); Reck v. Pate, 367 U.S. 433, 81 S. Ct. 1541, 6 L. Ed. 2d 948 (1961) (defendant held four days with inadequate food and medical

attention until confession obtained); Ashcraft v. Tennessee, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 2d 1192 (1944) (defendant questioned by relays of officers for 36 hours without an opportunity for sleep), or intoxication rising to the level of mania; State v. Cuzzetto, 76 Wn.2d. 378, 383, 457 P.2d 204 (1969) ("mania" in this context means the defendant was unable to comprehend what he was saying or doing).

Intoxication alone does not render a defendant's confession involuntary. State v. Turner, 31 Wn. App. 843, 845-46, 644 P.2d 1224 (1982); United States v. Cristobal, 293 F.3d 134, 142 (4th Cir.) (confession voluntary because defendant, although medicated, was alert and coherent), cert. denied, 537 U.S. 963, 123 S. Ct. 396, 154 L. Ed. 2d 319 (2002); Pagan v. Keane, 984 F.2d 61, 63 (2d Cir. 1993) (confession voluntary despite defendant's gunshot wounds and morphine treatment three hours before confession because defendant alert and not disoriented); United States v. Kelley, 953 F.2d 562, 565 (9th Cir. 1992) (confession voluntary despite fact that defendant going through heroin withdrawal because he was coherent, responsive, and aware), disapproved of on other grounds, United States v. Kim, 105 F.3d 1579 (9th Cir. 1997); cf. Mincey v. Arizona, 437 U.S. 385, 398-99, 98 S. Ct. 2408,

57 L. Ed. 2d 290 (1978) (confession involuntary because defendant had just been seriously injured a few hours earlier, he suffered "unbearable" pain, and his written answers to the officer's questions were "not entirely coherent").

Here, Dres was subjected to an "interrogation" of a single, albeit compound, question by Officer Vaca as the officer thought Dres had swallowed narcotics. The officer made neither threats nor promises to elicit a response from Dres. Dres gave a coherent response, responding appropriately with his words and actions to the officer's question.

Nonetheless, Dres would have this Court hold his act to be "coerced" based on his characterization that he was in a "drug - or violent-fall-induced stupor." Brief of Appellant at 11. The evidence before the trial court does not support that conclusion.

There was no evidence presented during pretrial testimony confirming that Dres sustained any kind of injury. The fact that the narcotics were recovered from the roadway suggests that Dres did not in fact consume the narcotics. And, there was no testimony that Dres could not comprehend the question or what he himself was saying or doing.

Rather, Officer Vaca's question was designed to *determine* whether Dres had ingested drugs. That question was not part of a coercive tactic, but rather it was designed to help the officer learn whether Dres needed medical aid and whether dangerous narcotics were sitting unguarded on a nearby sidewalk. The conduct of the officers in this case falls far short of those tactics which have been held to be so coercive as to render a confession involuntary.

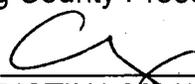
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to find that the trial court properly denied Dres's motion to suppress the cocaine evidence as suppression was not an appropriate remedy under the Fifth Amendment absent coercion. Dres's statement was not coerced. This Court should therefore affirm Dres's conviction.

DATED this 11th day of October, 2010.

Respectfully submitted,

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Appendix A

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KING COUNTY
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ASFAWESAN DRES,

Defendant,

No. 07-1-06482-2 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on December 9, 2008 before the Honorable Judge Chris Washington. After considering the evidence stipulated to by the parties and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. On August 21, 2007 at approximately 12:30 a.m., Seattle Police Sergeant Mark Hazard, Officer Daina Boggs, and Officer Jason Diamond were patrolling the Pike Place Market area of downtown Seattle.
- b. The officers were in an unmarked Chevy Tahoe and were in plain clothes with police vests over their clothing and their badges clearly displayed.
- c. After observing a suspected narcotics transaction between the Defendant and an individual later identified as Aaron Brown, Officer Boggs and Sergeant Hazard got out of the passenger side of the Tahoe and attempted to contact the two men.
- d. Both men fled, with Officer Boggs chasing Brown and Sergeant Hazard chasing the Defendant.
- e. Sergeant Hazard caught up to the Defendant after a Pike Place security guard tripped the Defendant.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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- 1 f. Sergeant Hazard took the Defendant into custody and walked him up the hill to a
transport vehicle.
- 2 g. Officer Raul Vaca arrived as Sergeant Hazard was walking the Defendant up the
hill.
- 3 h. Officer Vaca noticed the Defendant was sweating profusely, drooling, and
foaming at the mouth.
- 4 i. Concerned that the Defendant had swallowed narcotics, Officer Vaca asked the
Defendant if he swallowed any drugs or if he had tossed any drugs onto the
5 ground while he had been running.
- 6 j. Prior to asking this question, neither Officer Vaca, nor any other officer had
advised the Defendant of his Miranda warnings.
- 7 k. The Defendant acknowledged that he had tossed the drugs onto the ground while
he had been running, motioning to where he had been tripped and had fallen.
- 8 l. Officer Vaca relayed this information to Sergeant Hazard.
- 9 m. Sergeant Hazard returned to where the Defendant had fallen and found a small
piece of plastic surrounded by several pieces of suspected crack cocaine.

10 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
SOUGHT TO BE SUPPRESSED:

11 a. **Suppression of physical evidence is not a remedy under the Fifth**
Amendment.

12 Although this court finds a Miranda violation requiring suppression of the Defendant's
13 statements, suppression of the crack cocaine is not warranted. The Fifth Amendment does not
14 require the suppression of physical evidence derived from an un-Mirandized confession unless
15 the statement was actually coerced. State v. Wethered, 110 Wn.2d 466, 473-75, 755 P.2d 797
16 (1988). In Wethered, the defendant was seen by an officer selling hashish out of his car. Id. at
17 467. Other officers arrived, arrested the defendant, and told him pre-Miranda that he could
18 either "do it the easy way or the hard way" (referring to production of the hashish). Id. at 467-
19 68. After assurances from the officers that the car would not be impounded if he turned over the
20 hashish, the Defendant retrieved the hashish from one of the vehicle occupants and handed it to
21 the officers. Id. at 468. The court held that Wethered's statement and act of producing the
22 hashish was a confession obtained in violation of Miranda and was not admissible. Id. at 471.
23

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

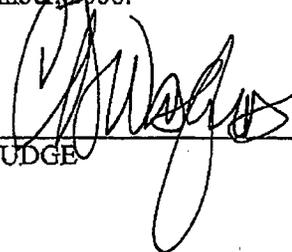
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1 The court went on to hold, however, that suppression of the hashish itself derived from the non-
2 Mirandized testimonial act was not a remedy for the Fifth Amendment violation. Id. at 474-75.

3 Here, the Defendant stated and gestured back to the location where he was tripped. At
4 that location, Sergeant Hazard found the piece of plastic with pieces of crack cocaine all around
5 it. Under Wethered, suppression of the plastic and crack cocaine found by Sergeant Hazard is
6 improper as suppression of physical evidence is not a remedy for a Miranda violation. This court
7 thus finds the crack cocaine and plastic admissible.

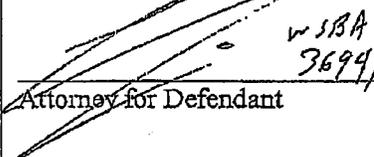
8 In addition to the above written findings and conclusions, the court incorporates by
9 reference its oral findings and conclusions. Defendant's motion to suppress is denied.

10 Signed this 2nd ^{March 2009} day of ~~December~~ 2008.

11
12 
13 _____
14 JUDGE

15 Presented by:

16 
17 _____
18 Deputy Prosecuting Attorney # 266271

19 
20 _____
21 Attorney for Defendant
22
23

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

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