

NO. 68993-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EVRRARD GONDO,

Appellant.

FILED  
Feb 21, 2013  
Court of Appeals  
Division I  
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA A. MACK

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Under Criminal Rule (CrR) 3.1, a defendant has a right to counsel as soon as is practicable after arrest. Courts have interpreted this to mean that defendants must be admonished of this right immediately after being placed into custody. Evidence taken in violation of the rule must be suppressed at trial if it is "tainted" by the violation. Here, Evrard Gondo was arrested at a mall for criminal trespass and minor in possession of alcohol (MIP). After arrest, he was asked his identity and age so that the arresting officer could properly book him. Where a defendant has not previously been admonished of his right to counsel under CrR 3.1, is biographical information elicited as part of routine booking procedures admissible at trial?

2. A CrR 3.1 violation is harmless when there is no reasonable likelihood that it affected the outcome of trial. Here, Gondo claims that the police violated CrR 3.1 after his arrest by asking him his biographical information without notifying him of his right to counsel. The trial judge explicitly found that evidence of Gondo's age was also admissible via a certified copy of Gondo's Washington State Identification. Even if Gondo's statement regarding his age was improperly obtained in violation of CrR 3.1,

did the trial court's finding that Gondo's age was independently proven render any error harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Gondo and his older brother were charged with minor in possession of alcohol and criminal trespass at Southcenter Mall in Tukwila, Washington. CP 10. After a bench trial in King County's Juvenile Court, the Honorable Judge Barbara Mack found both brothers guilty of both charges. RP 204.<sup>1</sup> CP 15-19.

2. SUBSTANTIVE FACTS.

Dion Fernandez, the Southcenter Mall Security Director, testified that he approached Gondo and his older brother at the mall on "black Friday," the busiest shopping day of the year, because the two brothers were exposing their underpants in violation of mall rules. RP 20-21. He asked them to pull up their pants, and they responded with expletives, asking him "who the fuck" he was. RP 27. Fernandez testified that he could smell the alcohol on their breath and that they appeared underage. RP 28. They were

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<sup>1</sup> This brief will refer to the Verbatim Report of Proceedings from 5/29, 6/4 and 6/20/2012 as RP.

"belligerent" and appeared to be under the influence of alcohol.

RP 28-32.

Based on their violation of mall rules, the indicators that they had been drinking and appeared underage, and their refusal to pull up their pants, Fernandez "evicted" them from the mall. RP 33. He told them that they would have to leave for the day and that, if they did not, they would be criminally trespassed for a year. RP 36. They responded by telling Fernandez that they didn't "give a fuck." RP 36. Other mall security officers assisted in ensuring that both brothers left the mall. RP 36-37.

About one hour later, Fernandez saw that Gondo and his brother had returned, and asked the Tukwila Police Department to come and issue a criminal trespass notice. RP 39. Tukwila Police Officer Murphy testified that when he arrived, both brothers had watery, bloodshot eyes and poor coordination. RP 83. Officer Murphy testified that his priority at this point was getting the two brothers safely into custody, because the mall was packed with people and Gondo and his brother were argumentative and resistant when approached by police. RP 97-99.

Officer Murphy transported both siblings to the mall security office, about a three-minute walk from where he first confronted

them. RP 100. The police officer testified that at that point he believed that they had committed the crime of criminal trespass. They were not read their Miranda<sup>2</sup> warnings. RP 86.

Inside the office, Officer Murphy asked their names, their ages, and their guardian's contact information. RP 84. The trial judge captured this in her CrR 3.5 findings, where she said that "Officer Murphy asked [both siblings] identifying information as part of his routine booking process, including name, height, weight, date of birth, and mother's information so they could be released to her" and "[b]oth provided that information." CP 2. Once he determined that they were minors, Officer Murphy called the Juvenile Detention Center to see if he could bring the brothers there to be booked, but the detention center would not accept them. RP 87.

While the siblings waited in the office, another police officer entered and Gondo said, "Look at this big, ugly F-er." CP 2. That police officer transported Gondo and his brother to the police station, where they were picked up by their mother. RP 87, 115; CP 2.

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

3. FACTS REGARDING THE CrR 3.1 HEARING.

During the bench trial, counsels for both siblings objected to the admissibility of the statements made by their clients to the police, including the biographical information they gave. RP 91. The defense attorneys argued that Officer Murphy not only failed to read the defendants their Miranda rights, but that he also violated Criminal Rule 3.1, which reads in pertinent part, “[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody...” CrR 3.1(b)(1).

After briefing and argument, the trial court made oral factual findings and conclusions of law regarding the CrR 3.1 motion. RP 160-61. Officer Murphy, the trial court found, needed to know Gondo’s name and birthday, not because he wanted to elicit incriminating information, but because he “had to know whether to take these young men to jail or juvenile detention or release them to a parent...” RP 160-61.

The purpose of 3.1 is to ensure that people who are arrested know of their right to counsel in time to determine whether to acquire exculpatory evidence. And in this case, regardless of – there was no other evidence acquired here [sic]. The only issue was their age and their contact information, so their mother could be contacted.

RP 66.

While the trial judge acknowledged that the officers could have simply transported Gondo and his brother directly to the King County Jail, she found that that “would not have been consistent with the goals of the Juvenile Justice Act.” RP 161. The court found that neither Gondo nor his brother was ever formally questioned by police; instead, they were merely asked for their “basic booking information” as part of the “routine booking procedures.” RP 161. The court ruled that “the officers really had no choice but to ask them their age as general booking information.” RP 167.

At trial, the trial court admitted certified copies of both siblings' Washington State Identification, indicating that each was under the age of 21. RP 209. The trial judge also ruled that, as far as evidence of age went, any suppression under CrR 3.1 of the siblings' statement regarding their age was really “a moot point” because the certified copy of the Washington State Identification was “sufficient information” for the court to find that they were under the age of 21 at the time that they were arrested. RP 167.

C. ARGUMENT

1. THE STATEMENTS MADE BY GONDO TO POLICE WERE NOT "TAINTED" BY A CrR 3.1 VIOLATION AND WERE THEREFORE ADMISSIBLE.

Gondo argues that because police officers did not inform Gondo of his CrR 3.1 rights before asking him his biographical information, the resulting information was inadmissible tainted evidence. But the inquiry by police was merely part of a routine booking procedure, and was not in violation of CrR 3.1.

A defendant has the right to a lawyer as "soon as is feasible" after arrest. CrR 3.1(b)(1). Courts have interpreted this rule to mean that a defendant in every criminal case must be advised of the right to a lawyer "immediately" after arrest. State v. Templeton, 148 Wn.2d 193, 211, 59 P.3d 632 (2002). The remedy for violating the rule is suppression of evidence gathered in violation of the rule, but suppression is a "harsh and extraordinary remedy" that only applies to CrR 3.1 violations where evidence is actually tainted. Id. at 221.

Gondo contends that the trial court erred in holding that CrR 3.1 was not violated, and that the court should have suppressed evidence regarding Gondo's statements to police and his "behavior" at the time of arrest. Brief of Appellant at 7. But

while Officer Murphy did not advise Gondo of his right to counsel “immediately” upon arrest, the biographical information elicited from Gondo regarding his birthdate was not “tainted” evidence; it was a necessary part of the routine booking process. Further, Gondo’s “behavior” at the time of arrest was appropriately admitted regardless of CrR 3.1.

In Templeton, a case referenced by the trial judge in her CrR 3.1 findings, the defendants were arrested for driving under the influence (DUI), read their Miranda rights, and asked to take a breathalyzer test. Id. at 204-05. In an admonishment form, they were advised regarding their right to counsel only for purposes of police questioning, and not with regard to whether or not they should take the breathalyzer test; the court found that this violated CrR 3.1. Id. at 213. Despite this violation, because each defendant was advised of his right to counsel via the Miranda warnings and never requested counsel, the court found that the “combined effect was to inform each defendant that he or she had a right to counsel *right now* – in other words as soon as feasible after [being] taken into custody.” Id. at 221-22 (emphasis in original).

Templeton held that CrR 3.1 is a rule that “affects and regulates the process of taking and obtaining evidence,” and only where the evidence taken in violation of the rule is “tainted,” is suppression the warranted remedy. Id. at 222. Because the breathalyzer results produced by the defendants were not “tainted” – the defendants knew that they had a right to counsel then and there and elected not to invoke their right – the court held that the breathalyzer results were still admissible. Id.

In State v. Kruger, another DUI case, the court upheld the trial court’s refusal to suppress a blood sample taken from a defendant even though CrR 3.1 had been violated, because the blood test was not “tainted” by the violation (the blood test sample was mandatory, regardless of the defendant’s access to counsel). 116 Wn.2d 135, 146, 803 P.2d 305 (1991). Had the defendant spoken with an attorney, the attorney could not have instructed him to refuse to provide a blood sample. Id.

Washington courts have also addressed the issue of whether arrestees must be informed of their right to counsel prior to eliciting narrow questions that were asked only for purposes of booking them into custody. The Washington Supreme Court has held that questions regarding necessary booking procedures do not

require Miranda warnings. State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1998); State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). This is true even where the information revealed is incriminating. State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992). While CrR 3.1 is not precisely parallel to Miranda rights, the procedural necessity of eliciting booking information regardless of the defendant's right to counsel remains the same for either analysis.

As the trial court here ruled, Officer Murphy had no choice but to ask Gondo his birthday. RP 167. Gondo had been criminally trespassed from the mall and was under arrest – the police officer had to transport him either to jail or to the juvenile detention center, or release him to a guardian; Officer Murphy needed to confirm both his identity and his age to pursue any of these options. RP 166-67. While Gondo's admission that he was younger than 21 years old may have been incriminatory, it was a necessary part of the booking procedure that would have occurred whether or not Gondo had been provided access to counsel. His acknowledgement of his date of birth was not tainted by any perceived CrR 3.1 violation, so the extraordinary remedy of suppression should not be applied.

While Gondo contends that evidence of his "behavior" should also be suppressed because of the trial court's perceived CrR 3.1 violation, this argument is nonsensical. Gondo's "behavior," after all, refers to his belligerent response to mall security when first approached, and his continued lack of cooperation with police throughout their interaction, presumably because he was intoxicated. RP 30-33, 97-98. Even if a CrR 3.1 admonishment had been read to Gondo, this "behavior" is unrelated to his right to counsel and had already been displayed prior to Gondo's arrest. A conversation with a defense counsel at the right time can help in many ways, but it cannot make a person less drunk, and would not have made a difference here. The trial court's ruling should be affirmed.

2. **EVEN IF GONDO'S STATEMENTS WERE TAINTED BY A CrR 3.1 VIOLATION, THE ERROR WAS HARMLESS BECAUSE THE SAME EVIDENCE WAS ADMITTED VIA OTHER MEANS.**

The remedy for a violation of CrR 3.1 is suppression of the tainted evidence, but a violation is harmless if there is no reasonable probability that the error materially affected the outcome

of the trial. State v. Copeland, 130 Wn.2d 193, 220, 59 P.3d 632 (2002). Even if this Court somehow holds that Gondo's statement regarding his age was tainted by a violation of CrR 3.1, the same evidence was admitted via certified copies of Gondo's Washington State Identification, so the error was harmless. RP 209.

Gondo contends that, because the State "relied heavily on Gondo's statements for conviction," there existed a probability that, had the error not occurred, the "outcome of the trial would have been materially affected." Brief of Appellant at 7. But Gondo ignores the most damning age evidence that was admitted at trial from his analysis: the trial court reviewed a properly admitted certified copy of a Washington State ID that established, beyond any doubt, that Gondo was under the age of 21. RP 209. This satisfied the age element of the charge of minor in possession even without Gondo's stated acknowledgment that he was underage.

It was the admission of this piece of evidence that led the trial court to find that any CrR 3.1 violation was a "moot point" because the ID exhibit, in and of itself, provided a sufficient basis for finding that Gondo was underage. RP 167. Because the trial judge, who was also the trier of fact in this bench trial, found that there was other evidence that proved Gondo's age besides his

statement, it cannot be convincingly argued that there was any probability that the trial outcome would have been "materially affected" had his statement been suppressed. The verdicts should be affirmed.

D. CONCLUSION

For the foregoing reasons, the defendant's convictions should be affirmed.

DATED this 21 day of February, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

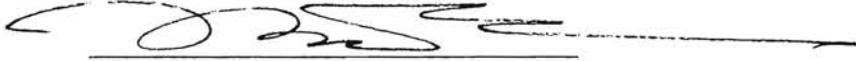
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the RESPONDENT'S BRIEF in STATE V. EVRARD GONDO., Cause No. 68993-2 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 11 day of February, 2013

A handwritten signature in black ink, appearing to be "Jan Trasen", written over a horizontal line.

Name  
Done in Seattle, Washington