

71843-6

71843-6

NO. 71843-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN OLHAVA,

Appellant.

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

The Honorable Gregory P. Canova, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorneys for Appellant

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

2011 SEP 26 PM 3:54
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Charge and CrR 3.5 Hearing</u>	2
2. <u>Trial Evidence and Sentencing</u>	5
C. <u>ARGUMENT</u>	10
THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION TO SUPPRESS OLHAVA'S STATEMENTS.	10
D. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Aten
130 Wn.2d 640, 927 P.2d 210 (1996)..... 11

State v. Gardner
28 Wn. App. 721, 626 P.2d 56
review denied, 95 Wn.2d 1027 (1981) 11

State v. Gregory
79 Wn.2d 637, 488 P.2d 757 (1971)..... 12

State v. Levy
156 Wn.2d 709, 132 P.3d 1076 (2006)..... 11

State v. Mendez
137 Wn.2d 208, 970 P.2d 722 (1999)..... 11

State v. Reuben
62 Wn. App. 620, 814 P.2d 1177
review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991)..... 11, 13

State v. Rogers
83 Wn.2d 553, 520 P.2d 159
cert. denied, 419 U.S. 1053 (1974) 12

FEDERAL CASES

Miranda v. Arizona
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)1, 11, 12, 13

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5..... 1, 2

RCW 9A.56.070 2

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress statements obtained by police.

2. The trial court erred in entering CrR 3.5 finding of fact 13, which indicates, "The testimony presented established the defendant had the presence of mind to validly waive his Constitutional rights."¹

3. The trial court erred when it entered conclusions of law 3 and 4, which indicate appellant's statements to police are admissible because they were given following a knowing, voluntary, and intelligent waiver of his Constitutional rights.

Issues Pertaining to Assignments of Error

1. It is the State's heavy burden to prove a knowing, intelligent, and voluntary waiver of Miranda² rights. Did the State satisfy this burden where the evidence revealed that appellant was impaired when he waived his rights and made statements used against him at trial?

¹ The court's findings and conclusions are attached to this brief as an appendix.

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

2. Several of the court's findings and conclusions indicate that appellant was not sufficiently impaired to undermine his waiver and that the waiver was knowing, intelligent, and voluntary. Did the court err in entering these findings and conclusions where they are not supported by the evidence below?

B. STATEMENT OF THE CASE

1. Charge and CrR 3.5 Hearing

The Snohomish County Prosecutor's Office charged Jonathan Olhava with one count of Taking a Motor Vehicle Without Permission in the First Degree.³ CP 42-43.

The Honorable David Kurtz presided at a hearing, under CrR 3.5, to determine the admissibility of statements Olhava made to

³ RCW 9A.56.070 provides:

(1) A person is guilty of taking a motor vehicle without permission in the first degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away an automobile or motor vehicle . . . that is the property of another, and he or she:

(b) Removes, or participates in the removal of, parts from the motor vehicle with the intent to sell the parts;

law enforcement officers following his arrest. 1RP⁴ 5. Two witnesses testified at the hearing: Snohomish County Deputy Sheriff Steven Dosch and Snohomish County Sheriff's Detective Terry Haldeman. 1RP 6, 14.

Deputy Dosch testified that, on October 29, 2012, he was dispatched to a trespass call on Rose Road, just north of Stanwood-Bryant Road. 1RP 7-8. Construction workers in the area reported seeing two cars drive through a cable barricade, continue up a closed road, and ultimately park in a wooded area, where it appeared they were in the process of "stripping cars." 1RP 8. After a second unit arrived, Deputy Dosch confronted the two men found with the cars. 1RP 8-9. Jonathan Olhava was standing between the cars. The second man, Kenneth Hoover, was underneath one of the cars – later determined to be stolen – and operating a blowtorch to remove parts. Both men were arrested. 1RP 9.

⁴ This brief refers to the verbatim report of proceedings as follows: 1RP – January 30 and March 10, 2014; 2RP – March 17 and 18, 2014; 3RP – April 2, 2014.

According to Dosch, Olhava was read his Miranda rights, indicated he understood them, and provided an oral statement concerning the circumstances. 1RP 10-11. Olhava said that one of the cars, an Acura, belonged to Hoover, who had picked him up that morning "to do some scrapping." 1RP 12. They had driven to that specific area for that purpose and, upon arrival, found the second car, a Honda, which he did not know was stolen. 1RP 13.

Detective Haldeman testified that he interviewed Olhava at the Marysville Precinct about an hour after Olhava had been read his Miranda rights at the scene. 1RP 17-18. Haldeman had Olhava confirm that he had previously been advised of his Miranda rights. Olhava indicated he remembered his rights, understood them, and was willing to speak. 1RP 17-18. He then spoke to Haldeman, but did not provide a written statement. 1RP 19.

Haldeman testified that he is trained to recognize when individuals are under the influence of alcohol or narcotics. 1RP 19-20. He recalled that Olhava was "nodding off" during their conversation, and complained about an abscessed tooth. 1RP 20-21, 24. Although Olhava denied using drugs, he had "pinpoint pupils," which are typically caused by narcotics. 1RP 21, 23. He also had slurred speech. 1RP 24. Based on his training and

observations, Detective Haldeman believed Olhava was under the influence of illegal narcotics when questioned. 1RP 21. Haldeman could not say whether the narcotics affected Olhava's ability to think, but Olhava responded coherently to the questions posed, he did not ramble, and he seemed oriented to place. 1RP 22-24.

Defense counsel argued Olhava's statements to the deputies should be suppressed based on the evidence indicating he was under the influence and, therefore, did not properly understand his Miranda rights. 1RP 27. Judge Kurtz disagreed, concluding that, regardless of the substances Olhava may have consumed, they did not negate his ability to voluntarily speak with the deputies at the scene and, later, at the precinct. 1RP 28-32. Consistent written findings were filed thereafter. CP 35-37.

2. Trial Evidence and Sentencing

On the morning of October 29, 2012, a dump truck driver for Currie Construction watched as a white Acura, pushing a white Honda Civic CRX, drove through a cable barrier designed to keep vehicles out of a construction site off Rose Road. 2RP 27-29. Each car contained one individual. 2RP 31.

The dump truck driver alerted others and blocked the entrance to the site while a co-worker walked up the road to find

the cars. 2RP 34, 39-40. From his vantage, the co-worker could see a portion of one of the cars, which was partially obscured by trees, and two people. He also could hear the sound of metal on metal. 2RP 40-41.

Deputy Dosch was dispatched to the scene, spoke with the construction workers, and watched from afar until backup arrived. 2RP 48-49. Deputies then approached the cars. The Acura was facing out from the tree line. The Honda was directly behind it, trunk to trunk, parked in the trees. 2RP 49-51. Hoover was underneath the Honda using an acetylene torch to remove a part from the car. 2RP 52. Olhava was walking around and standing between the two vehicles, but deputies did not see him working on the Honda. 2RP 52-53, 65-66. In the Acura, deputies found tanks strapped to the back seat and connected by hoses to the acetylene torch. 2RP 56-58. The Honda had been stolen 2RP 21-26, 55.

Deputy Dosch testified that after he handcuffed Olhava and read him his Miranda rights, he asked Olhava about the two cars. Olhava said that Hoover picked him up in the Acura, the two drove to the site to do some metal scrapping, and, upon finding the Honda already at the location, decided to scrap it. 2RP 53-54, 64. Dosch then spoke to Hoover, who said the Acura belonged to

Olhava. Olhava then changed his statement and said the Acura came from his parent's house and belonged to his brother. 2RP 55, 63.

Detective Haldeman interviewed both men at the precinct. 2RP 106-108. According to Haldeman, Hoover said he and Olhava took the Honda together and knew it was stolen. 2RP 107. In contrast, Olhava maintained that Hoover had driven him there in the Acura. He told Haldeman he had slept for most of the ride and that he and Hoover found the Honda at the construction site. 2RP 108. Haldeman, who serves on the Snohomish County Auto Theft Task Force, explained the process of "scrapping" cars to make money on the illegal sale of parts and precious metals. 2RP 97-106.

The defense called three witnesses. Kenneth Hoover testified that he alone stole the Honda the evening of October 28 with the intent to sell it to support his decade-long methamphetamine habit. 2RP 71-72, 80. Hoover admitted stealing cars in the past. 2RP 76. Indeed, Detective Haldeman was already familiar with Hoover's history in this regard before the events of October 28. 2RP 106, 120-122.

Olhava had done part-time work for Hoover in the past. 2RP 73. According to Hoover, on the morning of October 29, he drove the Acura to Olhava's home, asked Olhava to help him drop off a car, drove Olhava back to Hoover's home, and had Olhava follow him in the Acura while Hoover drove the Honda to an interested buyer. 2RP 76-78, 80. The Honda ran out of gas, however, on the way to the buyer's home. 2RP 79. Hoover then had Olhava use the Acura to push the Honda, which Hoover steered through the cable blocking the construction site. 2RP 79.

Once inside the site, Hoover told Olhava he wanted to hide the car so that no one would vandalize it and had Olhava push the Honda behind the tree line. 2RP 79. Because he needed money, Hoover decided to remove some parts on site and was in the process of removing the Honda's catalytic converter when deputies arrived. 2RP 80. Hoover testified that Olhava never rode in the Honda and did not assist in cutting it up. 2RP 90. In fact, he believed he told Olhava the Honda was not stolen; otherwise, Olhava would not have been involved. 2RP 89.

Hoover explained that he did not hold title to the Acura, but he had been given the vehicle by Olhava's brother, had made repairs to the car, and used it in his yard waste business – "Ken's

Cleanup.” Moreover, because Hoover also did a lot of scrapping, he kept the tank and torch in the car. 2RP 72-75.

When confronted with prior inconsistent statements about what happened – including his statement that the Honda was already at the construction site – Hoover explained that he was extremely high when arrested, had not given much thought to his prior statements, and admitted lying to Haldeman. He had put more thought into what actually happened prior to testifying. 2RP 84-89.

The second defense witness was Kimberly Raefield-Hunt. 2RP 124. Olhava lives with Raefield-Hunt and her husband. 2RP 125-127. Consistent with Hoover’s testimony, she testified that Hoover showed up in the Acura the morning of October 29, 2012, and asked Olhava if he wanted to make some money. Olhava was suffering from an abscessed tooth, had a 102-degree fever, and appeared to be overmedicated on Vicodin. Nonetheless, he left with Hoover. 2RP 125-129. Raefield-Hunt was certain Hoover drove the Acura to her home; Olhava did not have a vehicle at the time. 2RP 138.

The final defense witness was Olhava. 2RP 147. He testified that he had helped Hoover with a scrapping job before and

went with him on October 29 because he needed the money. 2RP 148-149. Olhava was in a lot of pain, dizzy, and groggy from the abscessed tooth and Vicodin, and he slept most of the ride to Hoover's home. 2RP 149, 151-152. Once there, Hoover drove the Honda and Olhava followed in the Acura. When the Honda ran out of fuel, Olhava used the Acura to push the car. 2RP 150-153. Olhava testified he was unaware Hoover had steered the Acura through the cable strung across the road, he never rode in the Honda, and he did not know it was stolen. 2RP 153-154. Olhava was in a lot of pain and incapable of thinking about anything else when speaking to deputies and did not recall saying the Honda was already at the construction site when he arrived. 2RP 156, 170-172.

Jurors convicted Olhava as charged. CP 13. He was sentenced to 9 months in prison and timely filed his Notice of Appeal. CP 1, 5.

C. ARGUMENT

THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION TO SUPPRESS OLHAVA'S STATEMENTS.

Whether a confession is voluntary depends on the totality of the circumstances. State v. Aten, 130 Wn.2d 640, 663-664, 927

P.2d 210 (1996). A custodial confession is admissible for Miranda purposes only where the State meets its heavy burden to prove a defendant was properly advised of the right to remain silent and the right to counsel, understood these rights, and knowingly and intelligently waived them. Miranda, 384 U.S. at 473-475; Aten, 130 Wn.2d 640 at 663; State v. Reuben, 62 Wn. App. 620, 625, 814 P.2d 1177, review denied, 118 Wn.2d 1006, 822 P.2d 288 (1991).

When a trial court determines a confession is voluntary, that decision will be upheld only “if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence.” Aten, 130 Wn.2d at 664. Evidence is “substantial” if it is “sufficient to persuade a fair-minded rational person of the truth of the finding.” State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

While the influence of drugs, by itself, does not render a confession involuntary as a matter of law, it is one factor in the analysis. Aten, 130 Wn.2d at 664; Reuben, 62 Wn. App. at 625; State v. Gardner, 28 Wn. App. 721, 723, 626 P.2d 56, review denied, 95 Wn.2d 1027 (1981). The admission of statements made under the influence of intoxicants must be determined on the

individual facts of each case. State v. Gregory, 79 Wn.2d 637, 642, 488 P.2d 757 (1971), overruled on other grounds, State v. Rogers, 83 Wn.2d 553, 556, 520 P.2d 159, cert. denied, 419 U.S. 1053, 95 S. Ct. 633, 42 L. Ed. 2d 650 (1974).

In ruling that Olhava validly waived his Miranda rights, Judge Kurtz found that he “had the presence of mind to validly waive his Constitutional rights” and, therefore, found the statements admissible as the product of a knowing, voluntary, and intelligent waiver. CP 37. The court’s decision is not supported by substantial evidence.

According to Detective Haldeman, who is trained to identify individuals under the influence of drugs or alcohol, Olhava had “pinpoint pupils,” was slurring his words, and was nodding off during their conversation. He conceded Olhava’s condition was consistent with narcotics use. 1RP 19-21, 23-24. Indeed, it was Haldeman’s expert opinion that Olhava was under the influence during questioning at the precinct. 1RP 21. And, if Olhava was under the influence at the precinct, he was also under the influence about an hour earlier when speaking with Deputy Dosch at the scene.

Although Olhava indicated he was aware of his Miranda rights from the earlier advisement, Haldeman simply could not say whether the narcotics affected Olhava's ability to think during their interaction. 1RP 22 ("I can't really speak to that."). Under these circumstances, the State did not meet its heavy burden to establish, with substantial evidence, a valid waiver at the scene or at the precinct.

The erroneous admission of evidence in violation of Miranda requires reversal unless it is deemed harmless beyond a reasonable doubt, i.e., the untainted evidence is so overwhelming it necessarily leads to a finding of guilty. Reuben, 62 Wn. App. at 626-627. The State cannot make this showing, either.

At trial, Olhava denied any knowledge that the Honda was stolen, denied riding in that car, and denied participation in its disassembly. 2RP 153-154. Hoover's testimony supported these denials. 2RP 76-80, 89-90. Similarly, Raefield-Hunt's testimony supported Olhava's version of events that Hoover had possession and use of the Acura, Olhava had nothing to do with stealing the Honda, and he was simply helping Hoover with what he thought was a legitimate job to make a bit of money. 2RP 125-132, 138.

Jurors were more likely to reject this version of events, however, once they heard the evidence of Olhava's statements to deputies. Specifically, he told Deputy Dosch the Honda was already at the construction site when he and Hoover arrived (contrary to the construction worker who saw them enter the property with both cars) and admitted they had decided to scrap it. Moreover, Olhava first said the Acura belonged to Hoover, but then changed his story and said the Acura was actually his car. See 2RP 54-56, 63. According to Detective Haldeman, Olhava claimed he was asleep on the entire ride to the construction site and, upon arrival, the Honda was already there. He made no mention of driving the Acura or pushing the Honda. 2RP 108.

Not surprisingly, the prosecution focused extensively on these statements during closing argument in seeking to convince jurors of Olhava's guilt. 2RP 187-191. They conflicted not only with the State's evidence, but also with the defense evidence, theory, and arguments at trial. Without them, the evidence against Olhava was not overwhelming.

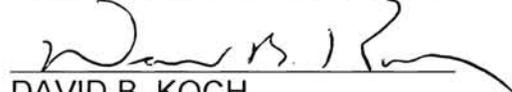
D. CONCLUSION

The trial court erred when it denied the defense motion to suppress. The admission of Olhava's statements to deputies is not harmless and requires reversal.

DATED this 26th day of September, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH

WSBA No. 23789

Office ID No. 91051

Attorneys for Appellant

APPENDIX

FILED

Feb 10, 2014

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH.

AB



CL16655050

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SNOHOMISH COUNTY**

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
JONATHAN M. OLHAVA)
Defendant.)

No. 13-1-00026-6

COURT'S FINDING OF FACT AND
CONCLUSION OF LAW PURSUANT
TO Cr.R 3.5

The matter having been heard before this Court on the 30th day of January, 2014 and the defendant having been present, out of custody, and represented by counsel, Thomas Cunnane, and the State represented by Deputy Prosecuting Attorney Mona Clarkson, and the Court having heard and considered the testimony of Detective Terry Haldeman and Deputy Steven Dosch of the Snohomish County Sheriff's Department, and the Court having advised the defendant of his right to testify at this hearing and the court finding that the defendant knowingly, voluntarily and intelligently waived his right to testify at this hearing, and the Court having reviewed the case file and with due deliberation thereupon and for good cause shown the Court enters the following:

34

FINDING OF FACTS

- 1
2
3 1. October 29, 2012 Deputy Steven Dosch of the Snohomish County Sheriff's
4 Department was dispatched to Rose Road in Snohomish County, WA in
5 response to a trespass complaint.
- 6
7 2. When Deputy Dosch arrived he spoke with construction workers who said
8 they had seen two cars drive through a cable gate and that two men were
9 stripping one of the cars.
- 10
11 3. Deputy Dosch investigated and saw a Honda and an Acura parked in a
12 wooded area with a man with an acetylene torch underneath. The man
13 underneath the car was cutting the catalytic converter off the car. Another
14 man, identified as the defendant was standing between the two cars.
- 15
16 4. One of the cars had been reported stolen.
- 17
18 5. Deputy Dosch detained the defendant and handcuffed him for investigation
19 regarding the stolen car.
- 20
21 6. Deputy Dosch read the defendant the Constitutional rights from his
22 department issued card. A copy of the card was admitted into evidence as
23 Exhibit 1.
- 24
25 7. The defendant said he understood the rights and that he waived the rights
26 and agreed to speak to the Deputy.
- 27
28 8. The defendant made statements to the Deputy after he was read the rights.
29 The Deputy did not recall if the defendant made statements prior to the rights
being read to him.
9. Later that same day, at least an hour after the defendant was read the rights
Detective Haldeman interviewed the defendant at the North Precinct of the
Snohomish County Sheriff's Department in Marysville, WA.
10. The Detective asked the defendant if he had been read the Constitutional
rights. The defendant said he remembered his rights and he agreed to talk to
the officer.
11. The defendant made statements to Detective Haldeman. Detective
Haldeman testified the defendant was coherent and responsive to his
questions.
12. The degree of the defendant's being under the influence of an illegal
substance at the time of the interview is disputed by the defendant.

1 13. The testimony presented established the defendant had the presence of mind
2 to validly waive his Constitutional rights.

3 14. The officers did not threaten or make any promises to the defendant to
4 compel him to give the statements.

5 **CONCLUSIONS OF LAW**

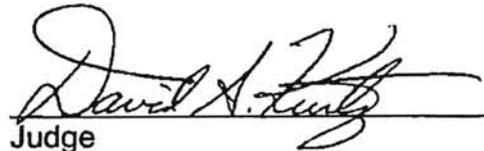
6 1. On October 29, 2012 the defendant was under custodial arrest when he
7 spoke with Deputy Dosch and Detective Haldeman.

8 2. Deputy Dosch properly read the Constitutional rights to the defendant.

9 3. The statements of the defendant were given following a knowing, voluntary
10 and intelligent waiver of his Constitutional rights.

11 4. The statements of the defendant to Deputy Dosch and Detective Haldeman
12 are admissible at trial subject to the rules of evidence.

13 Dated this 10th day of February, 2014.

14 
15
16 Judge

17
18
19
20
21
22
23 Mona Clarkson
24 DPA #33484

25
26
27
28
29 
DEFENSE

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 71843-6-1
)	
JONATHAN OLHAVA,)	
)	
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 26TH DAY OF SEPTEMBER 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.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] JONATHAN OLHAVA 97802
SNOHOMISH COUNTY COMMUNITY CORRECTIONS
1918 WALL STREET
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF SEPTEMBER 2014.

X *Patrick Mayovsky*