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COURT OF APPEALS

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NO. 33591-0-II

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STATE OF WASHINGTON

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

BY *fw*
DEPUTY

STATE OF WASHINGTON

Respondent,

v.

RICKY L. KNOKEY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before The Honorable David Foscue, Judge
and Before the Honorable F. Mark McCauley, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF THE CASE

The facts of this case are fully set forth in the Appellant's opening brief.

B. STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his Opening Brief.

C. ARGUMENT

1. KNOKEY'S STATEMENTS TO TROOPER BELT AT THE HOSPITAL WERE NOT MADE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY.

When Knokey made his statement to law within three hours of the wreck. He had been involved in a serious accident and was taken to the Grays Harbor Community Hospital. RP (12.15.03) at 12. He had lacerations to his head and was strapped to a backboard. Knokey had also sustained injuries to his chest and right lung, ribs, thoracic vertebra and right leg, for which he was treated. RP at (12.15.03) at 36. Dr. Rowe testified that Knokey would have felt "a lot of pain" during his hospitalization. RP (12.15.03) at 37.

After Knokey was returned from having x-rays, he was questioned by Trooper Belt. Trooper Belt testified that he read Knokey his rights; Knokey

testified that he was not warned of his rights. No written waiver was presented at the hearing.

The State in its Response Brief desires to overlook the testimony regarding Knokey's condition and instead focus on Trooper Belt's self-serving testimony that he read Knokey his rights. The State argued that Trooper Belt's testimony was not contradicted.

However, the argument fails to address the issue that even assuming that Trooper Belt read Knokey his rights, was his statement voluntarily and diligently made. Knokey argues that under the totality of the circumstances, it was not.

Despite the knowledge that Knokey had just been in a serious accident and was injured, Trooper Belt dealt with him as he would any normal adult suspect. He took no special precautions to insure that any confession given would be knowing, intelligent and voluntary.

Under these circumstances, Knokey's confession was not voluntary and should have been suppressed. U.S. Const. amends. V and XIV.

Involuntary confessions are inadmissible. All confessions are presumed involuntary. The State has a heavy burden in overcoming this presumption. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755,

60 L. Ed. 2d 286 (1978); *State v. Sargent*, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

In reviewing the question of voluntariness, the appellate court must make an independent examination of the whole record. *Clewis v. Texas*, 386 U.S. 707, 708, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967); *State v. Roth*, 30 Wn. App. 740, 746, 637 P.2d 1013 (1981). A trial court's determination that a confession was voluntary will be upheld on appeal only when there is substantial evidence in the record from which the trial court could find voluntariness by a preponderance of evidence. *State v. Vannoy*, 25 Wn. App. 464, 467, 610 P.2d 380 (1980), *decision after remand on other grounds*, 27 Wn.App. 527, 618 P.2d 1340 (1980). *See al*, *State v. Lanning*, 5 Wn. App. 426, 431, 487 P.2d 785, 792 (1971) (voluntariness a question of law); *Jurek v. Estelle*, 593 F.2d 672, 679 (5th Cir. 1979) (appellate court must carefully scrutinize circumstances surrounding confessions).

a. **Totality of Circumstances Test.**

No simple definition of "voluntariness" exists for purposes of determining the admissibility of confessions. Voluntariness cannot be taken literally to mean a "knowing" choice. If such were the case, even confessions made under brutal treatment would be admissible as they represent a knowing

choice of alternatives. Nor can voluntary be taken to incorporate a “but for” test. If such were the case virtually no confession would be voluntary, because very few people give incriminating statements in the absence of official action of some kind. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Instead, “voluntariness” reflects an accommodation of the complex values implicated in police questioning of a suspect. The acknowledged need for police questioning as a tool of effective law enforcement is balanced with society’s deep felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair police tactics poses a real and serious threat to civilized notions of justice. *Id.*, at 206-207.

The ultimate test remains that has been the only clearly established test in Anglo-American courts for 200 years: Is the confession the product of an essentially free and unconstrained choice by its maker? If it is the confession may be used against him. If it is not, if his will have been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Culcombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1990). *See also, State v. Rupe*, 101 Wn.2d664, 679, 683 P.2d 571 (1984) (to be voluntary a confession must

be the product of a rational intellect and a free will).

In determining voluntariness, “all the circumstances of the interrogation” must be evaluated. *Mincey v. Ariona*, 437 U.S. 385, 401, 98 S. Ct. 2408, 2416, 47 L. Ed. 2d 290 (1978); *State v. Rupe*, 101 Wn.2d at 679; *State v. Wolfer*, 39 Wn. App. 287, 290, 693 P.2d 154 (1984). The mere fact that *Miranda* warnings were read to the suspect does not prove that a subsequent confession was voluntary. *State v. Prater*, 77 Wn.2d 526, 463 P.2d 640 (1970). Likewise, the mere fact that a suspect signed a rights form does not prove a subsequent confession voluntary. *Miranda v. Arizona*, 384 U.S. at 492. Rather, the “totality of the circumstances” must be considered.

The totality of the circumstances test requires consideration of all pertinent factors. The common thread in every case considering the voluntariness of confessions is the goal of ensuring that the “engine of the criminal law is not be use to overreach individuals who stand helpless against it.” *Culcombe v. Connecticut*, 367 U.S. at 581. In each case, the prevailing concern is to guard against misuse of criminal investigatory power to obtain confessions from those unable to exercise their fundamental rights to silence and counsel either because of ignorance or because of other acts by state against which effectively overbear the will to exercise those rights.

Simple recitation of *Miranda* warnings is not sufficient to guarantee a subsequent knowing and intelligent waiver of constitutional rights. Rather there must be an effective appraisal of the constitutional rights, taking into account the suspect's capacity for understanding. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (accused must be adequately and effectively apprised of his rights). Courts uniformly require that the totality of the circumstances test be applied in light of the special circumstances and vulnerabilities of the particular defendant. *Vance v. Bordenkercher*, 692 F.2d 978, 982-986 (4th Cir. 1982) (Ervin, J., dissenting) (when the defendant is developmentally disabled without benefit of counsel, the police must take special precautions to ensure that any waiver is voluntary);

In this case, the police clearly know of Knokey's condition. However, absolutely no special precautions were taken to insure that any confession would be voluntary. Applying the totality of the circumstances test, taking into account Knokey's serious impairment, his confession was not voluntary and should have been suppressed.

b. The Error in Admitting Knokey's Statements Requires Reversal of His Conviction.

In *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263, 113 L. Ed. 2d 302 (1991), the Supreme Court held that admission of an involuntary confession is subject to “harmless error” analysis. In *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986), the Washington Supreme Court adopted the “overwhelming untainted evidence” standard in harmless error analysis. In order to determine whether the admission of Mr. Knokey’s statement in the instant case constituted harmless error, this Court must look only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilt.

2. **THE LACK OF WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW HAS DENIED KNOKEY HIS RIGHT TO MEANINGFUL APPELLATE REVIEW**

- a. **The trial court must enter written findings setting forth the facts necessary to material issues and ultimate conclusions.**

Court rules as well as due process principles require the trial court to explain the factual bases for its decisions. *State v. Dahl*, 139 Wn. 2d 678, 689, 990 P.2d 396 (1999). The purpose of the court’s findings is to resolve material factual issues so the appellate court has a clear record of the basis for the trial court’s decision on review. *Dahl*, 139 Wn.2d at 689; *State v. Smith*,

68 Wn. App 201, 208, 842 P.2d 494 (1992); *Bowman v. Webster*, 42 Wn.2d 129, 134, 253 P.2d 934 (1953). When the trial court fails to fully articulate the grounds for its determinations, its decisions is not amenable to judicial review. *Dahl*, 139 Wn.2d at 689; *Bowman*, 42 Wn.2d at 135; *Bowman*, 42 Wn.2d at 135.

Where a party seeks to offer statements of the accused at trial, a hearing is held to determine the admissibility of the statements. CrR 3. 5(a).

Under CrR 3.5(c):

After the hearing, the court *shall set forth in writing*: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the undisputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

(Emphasis added.) The term “shall” indicates a *mandatory* duty on the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (“the word ‘shall’ in a statute is presumptively imperative and operates to create a duty”).

It is the duty of the prevailing party to submit written findings of fact and conclusions of law following such a hearing. *See, State v. Wilks*, 70 Wn.2d 626, 628, 424 P.2d 663 (1967).

The importance of written findings and conclusions was reiterated by the Supreme Court decision *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998). In *Head*, the Court noted:

A trial court's oral opinion and memorandum opinion are no more than oral expressions and the court's informal opinion at the time rendered [Citations omitted.] An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusion, and judgment."

Head, 136 Wn.2d at 622, quoting *State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980) (construing similar provision of CrR 6.1(d)).

The *Head* Court determined that in adult bench trials where written findings and conclusions are not filed, remand for entry of findings is the appropriate remedy. *Head*, 136 Wn.2d at 622. But, at the hearing on remand, no additional evidence may be taken as the findings and conclusions are based solely on the evidence already presented. *Head*, 136 Wn.2d at 625.

We hold that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate "findings" have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Head, 136 Wn.2d at 624.

Appellate courts of this state have routinely condemned the failure of attorneys and trial courts to submit and enter written findings of fact and conclusions of law where required by court rule. *See State v. Smith*, 67 Wn. App. 81, 834 P.2d (1992), *aff'd*, 123 Wn.2d 51 (1993) (CrR 3.5 and CrR 3.6);

State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1299 (1997) (CrR3.6); *State v. Protomene*, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995), *rev denied*, 129 Wn.2d 1019 (1996) (CrR 6.1(d)); *State v. Naranjo*, 83 Wn. App. 300, 921 P.2d588 (1996) (CrR 3.6); *State v. Smith*, 69 Wn. App. 201, 842 P.2d 494 (1992)(JuCR 7.11(d)).

The prevailing party has the burden to draft and submit written findings of fact and conclusions of law following the hearing. *State v. Wilks*, 70 Wn.2d 626, 628, 424 P.2d 663 (1967). The State prevailed at both suppression hearings. 1/15/03RP 34. However, neither the prosecutor nor the court ensured written findings of fact and conclusions of law were entered following the hearings. The failure of the prosecution to submit and the court to enter written findings of fact and conclusion of law is “a serious lapse in appellate procedure.” *State v. Naranjo*, 83 Wn. App. 300, 302, 921, P.2d 588 (1996).

Written findings of fact and conclusions are the trial court’s definitive statement on the issues before it. *Dahl*, 139 Wn.2d at 689. The trial court’s oral opinion “is no more than oral expressions of the court’s informal opinion: and “has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.” *State v. Head*, 126 Wn.2d 619,

622, 964 P.2d 1187 (1998) (quoting *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966)). When facts are not included in the written findings, the reviewing court must presume the evidence was not sufficient to support the missing facts. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

b. This Court should not tolerate the trial court's failure to comply with the requirements of CrR 3.6.

There was no compelling reasons for this Court to overlook the absence of written findings in this case. The State failed to submit and enter CrR 3.5 and 3.6 findings following the suppression hearings and has failed to do so in the months since the Notice of Appeal was filed.

It is “inherently prejudicial” for this Court to sanction “the practice of allowing findings to be entered on remand, after the appellant has framed the issues in his or her brief.” *Naranjo*, 83 Wn. App. at 302; *see also State v. Witherspoon*, 60 Wn. App. 569, 572, 805 P.2d 248 (1991). Not only does this create an appearance of unfairness, but the risk of the State tailoring the written findings and conclusions is high. *Id.*; *Head*, 136 Wn.2d at 624-25.

Because a trial court's failure to enter written findings of fact and conclusions of law may prejudice an appellant, there is a “strong presumption that dismissal will be the appropriate remedy.” *Smith*, 68 Wn. App. at 209-

11. This Court must remand Knokey's case for the entry of the findings, or reverse and dismiss his adjudication of guilt.

3. **THE WARRANTLESS SEARCH OF THE CAR
MUST NOT BE CONSIDERED AN IMPOUND
SEARCH.**

The State in its response concedes that there is no controlling authority regarding a search of a vehicle in impound. The Appellant submits not only was a warrant required, but the search may not be considered an impound search. The warrantless inventory search of the car exceeded the permissible scope if an inventory search of an impounded vehicle. An inventory search may not be unlimited in scope. *State v. White*, 135 Wn.2d 761, 766, 958 P.2d 982 (1998). Because of the possibility for abuse, the scope of an inventory search is limited "to those areas necessary to fulfill its purpose." *Id.*, citing, *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980).

The search also runs afoul of the general rule in Washington regarding the admissibility of evidence discovered during an inventory search accompanying the impoundment of a vehicle. This rule is set forth in *State v. Montague*, 73 Wn.2d 381, 438 P.2d 571 (1968).

When ... the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or

following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, *and where the search is not made as a general exploratory search for the purpose of finding evidence of a crime* but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

Montague, 73 Wn.2d at 385, 438 P.2d 571.

Though the *Montague* court found inventory searches valid, the court firmly stated that inventory searches must be undertaken for lawful purposes.

[N]either would this court have any hesitancy in suppressing evidence of crime found during the taking of the inventory, if we found that either the arrest or the impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant.

Montague, 73 Wn.2d at 385, 438 P.2d 571.

Here, law enforcement was clearly looking for evidence of a crime. This is precisely the type of general exploratory search for the purpose of finding evidence of a crime that our courts have found unlawful.

C. CONCLUSION

For the above-stated reasons, and those set forth in Knokey's Opening Brief, this Court should grant the relief requested in the opening brief.

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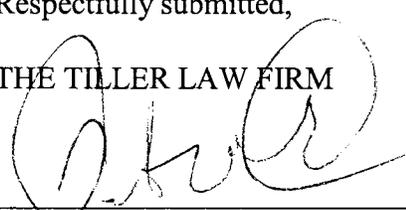
STATE OF WASHINGTON

BY _____
CITY

DATED: October 6, 2006.

Respectfully submitted,

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