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COURT OF APPEALS

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STATE OF WASHINGTON

BY *[Signature]*
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No. 33951-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

RICKY L. KNOKEY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK McCAULEY, JUDGE

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

The State accepts the defendant's statement of the case.

ARGUMENT

- 1. The State met its burden of proving that the defendant waived his privilege against self-incrimination.**

The defendant's statement of jurisprudence on the subject of *Miranda* waiver is generally correct. The only qualification the State makes is that *State v. Davis*, 73 Wn.2d 271, 438 P.2d 185 (1968), is not governing precedents in this case.

The Court of Appeals has clarified its ruling in *State v. Davis* by stating that *Davis* is only applicable in situations where a member of a law enforcement was present during the interrogation and was not called at the hearing. *State v. Ruud*, 6 Wn.App. 57, 491 P.2d 1351 (1972). The interrogation at issue in *Ruud* took place in the presence of many people, including a man named Bruce Hayes. *Id.*, at 1353. Mr. Hayes was not a police officer. The three police officers who were present at the time were called to testify at the suppression hearing. *Id.*, at 1354. The Court of Appeals ultimately held that the corroboration of this witness would most

likely have been cumulative, and that the witness was not a person of particular control of the prosecution. *Id.* At the heart of the ruling in *State v. Davis*, is the policy of the "missing witness rule" That is that when the prosecution fails to call a material witness under its particular control a presumption could be made that that witness's testimony would be adverse to the prosecution. The holding of *State v. Davis* was limited to situations where a second officer witnessed the interrogation but was not called.

In the case at hand, all persons who were present at the time of the defendant's statement were called to testify at the suppression hearing. (RP 12/15/03, at i.). Trooper Aaron Belt of the Washington State Patrol testified that prior to questioning he read the defendant his constitutional rights. (RP 16). After the defendant heard this recitation, he verbally responded that he understood these rights, the defendant freely answered questions made by the officer. The defendant seemed coherent to the trooper, and he was able to recite basic facts about the accident, which indicate an awareness of his then present situation and his understanding of recent past events. (RP 17).

This testimony was not contradicted. The defense called a number of witnesses, but none were able to say definitively that the trooper did not read the defendant his *Miranda* warnings. The defendant first called Bruce Hayes, who was not present at the time of the questioning. (RP 42-47). The next witness for the defendant was the defendant's father, Ken

Knokey. (RP 48). He explained that he was in the emergency room at the time of the interrogation. Mr. Knokey stated that he remembered the conversation that the trooper had with his son, but did not “remember him reading the rights.” (RP 50).

The defendant’s mother, Dixie Knokey, testified next. (RP 51). She stated that she was present during the questioning of her son, but made no statement as to whether or not the trooper read the *Miranda* warnings.

The defendant then took the stand and testified on his own behalf. (RP 54). He testified that he did not recall speaking with the trooper after his accident.

Clearly, *Davis* is inapplicable in this case. *Davis* stands for the proposition that when the court is confronted with the testimony of a single officer against that of the defendant, the State should be made to present any corroborating evidence that may exist or explain its absence. In this case there was no other witnesses to the interrogation. All witnesses were called during the hearing and the court heard testimony from all of them. Moreover, this is not a “swearing match” situation. No witness definitively stated that the officer did not read the defendant his *Miranda* warnings. The only statement that would suggest that he did not come from the defendant’s father, who simply stated he did not recall the officer reading his warnings.

Given these facts, and the essentially uncontested testimony of the officer, the court had substantial evidence in finding that the defendant

was, in fact, read his *Miranda* warnings and that he acknowledged understanding them prior to questioning.

2. The State did not have to obtain a second search warrant to research the vehicle that was in its custody.

The defendant claims that Detective Killeen's collection of evidence in June 2004 from the car was a search under the Fourth Amendment.

In order to claim the protection of the Fourth Amendment, a person must show that they have a legitimate expectation of privacy in the place or item to be searched. *State v. Francisco*, 107 Wn. App. 247 (2001). A legitimate expectation of privacy has both a subjective and objective component: a person must demonstrate an actual subjective expectation of privacy by seeking to preserve something as private, and society must recognize that expectation as reasonable. *Id.*

Washington law lacks any cases directly on point for vehicles seized as evidence. However, other states have held that a subsequent examination of a vehicle that was seized as evidence of a crime is not a search under the Fourth Amendment. For example, in California "any subsequent examination of a [car] for the purpose of determining its evidentiary value does not constitute a 'search'". *People v. Rodgers*, 579 P.2d 1048 (CA 1978). Indeed, a vehicle may be seized as evidence and can be held and subjected to later scientific examination and testing

without a warrant. *See People v. Teale*, 450 P.2d 564 (CA 1969). In Ohio, a vehicle that was lawfully in the custody of the police and that was to be used as evidence at trial provided the justification for examination of the vehicle without a warrant. *See State v. Curtis*, 375 N.E.2d 52 (1978).

The vehicle in this case was seized as evidence of a crime, specifically, Vehicular Homicide. Just as the evidence of any crime may be reexamined, so, too, can a vehicle. Undoubtedly, a gun in a homicide may be reexamined and retested while it is in police custody. A person can have no reasonable expectation of privacy in an implement of a crime, and society would not expect there to be such an expectation

As such, there was no “search” in this case, and no basis to exclude any evidence that the seatbelt, emergency brake and rear view mirror may yield.

3. The failure of the trial court to enter findings of fact was harmless error in this case.

The defendant’s statement of jurisprudence on the subject is accurate, but the court’s error in this case is harmless.

The Court of Appeals has been provided with a complete Report of Proceedings as to the issue of the defendant’s custodial statements. (RP 12/15/03). The trial court’s ruling began on page 61 and continued through to page 64. The court was very precise at its findings of fact and statements as to its understanding of the law. The court addressed the defendant’s mental state and specifically found that given the totality of

the evidence, the defendant was read his *Miranda* warnings, understood those warnings and answered ‘in a responsive and correction fashion to the questions.’ (RP 64).

In a similar case the Court of Appeals found that no written findings were necessary in order for it to make its finding. *State v. Miller*, 92 Wn.App. 693, 964 P.2d 1196 (1998). The court found an error on the part of the trial court to not make a written record of its findings, but was able to determine from the Report of Proceedings what those findings were. The court ended that the Report of Proceedings specifically indicated that the defendant was read his *Miranda* warnings, that he understood them and that he answered questions responsibly. *Id.*, at 1202.

In the case at bar, the prolonged ruling of the court provides ample information to the Court of Appeals for it to make its decision. For this reason this court should not remand for entry of findings, but basis its ruling on the record provided.

4. The jury instructions did not relieve the State of its burden of proving the crime as charged.

The defendant next argues that the instructions to the jury were improper. Specifically that the definition of “proximate cause” allowed the jury to conclude that the defendant’s actions were “a” proximate cause and not “the” proximate cause. This argument is faulty because the charging language in the amended information mirrors the statute, as does the jury instruction given in this case. There is no difference to argue.

The Revised Code of Washington 46.61.520 provides that when death is caused “as a proximate result of injury proximately caused by the driving of any vehicle by any person,” and where the driver was under the influence, the driver is guilty of Vehicular Homicide. The language of the charging document in this case mirrors this language in that it states that the driving “proximately cause injury to Richard Pinnell, a person who died within three years on or about as a proximate result of said injury.” The jury instruction, instruction No. 4, required that the defendant’s driving “proximately caused injury to Richard Pinnell.” The State understands no distinction in any of this language.

5. The State was not required to prove a causal connection between the defendant’s intoxication and the fatality.

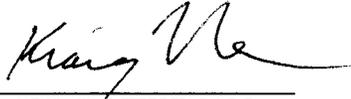
The defendant cites *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989), to argue the proposition that there is a court imposed requirement that a causal link be proven between the defendant’s intoxication and the fatality alleged.

The Court of Appeals has ruled on this issue in *State v. Morgan*, 123 Wn.App. 810, 99 P.3d 411 (2004). It is stated that the only causal connection the State must prove to support a charge of Vehicular Homicide is that connection between the act of driving and the accident. Causation between intoxication and death is not an element of Vehicular Homicide.

CONCLUSION

For the reasons stated above, the State asks the Court of Appeals to deny the defendant's claims of error.

Respectfully Submitted,

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