

Original

No. 34771-1-II

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

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STATE OF WASHINGTON,
Respondent,

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

v.

SEAN M. MOINETTE,
Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Bryan E. Chushcoff, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion to suppress appellant's confession.

2. Appellant assigns error to the portions of the trial court's unnumbered written findings which provided that Detective Jimenez "reminded the defendant that his Miranda rights still applied and that he didn't have to talk with the defendant," and that the detective "again. . .reminded the defendant that his Miranda rights still applied[.]" Supp. CP ___ (findings and conclusions, filed 7/21/06)¹ (attached as Appendix A).

3. Appellant assigns error to the unnumbered conclusion of law which provided:

Because officers were conducting an initial investigation in their attempt to determine whether the defendant was involved in an assault, the officers had no duty to advise the defendant of her Miranda warnings/rights upon initial contact.

Supp. CP ___.

4. Appellant assigns error to the trial court's conclusion of law that statements made to the detective in a second interview were admissible as having been made "knowingly, voluntarily and intelligently." Supp. CP ___.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant, an inmate, was taken from his cell in the middle of the night and questioned about an assault which had occurred the

¹A supplemental designation of clerk's papers has been filed with the superior court and is being filed herewith.

previous evening in which he was believed to be involved. In the initial statement, a detective was unable to elicit any statements incriminating appellant, and, when appellant refused to give a recorded statement, the officer terminated the interrogation. Appellant was then ordered to be placed in the "hole," administrative segregation, and was taken out of the room, where preparations for such restraint began. At that point, appellant said he would talk, so he was returned to the interrogation room where he made a confession of his involvement in the crime.

Did the court err in admitting this statement despite the police-dominated atmosphere in which it was made and the evidence that it was coerced by the specter of being placed in the "hole?"

2. Further, is reversal required where the defendant's coerced statement was improperly admitted and that statement was the foundation for the prosecution's entire case?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Sean M. Moinette was charged by information with second-degree assault. CP 1-2; RCW 9A.36.021(1)(a).

Pretrial and trial proceedings were held before the Honorable Bryan E. Chuschcoff on March 6-10, 2006, after which Mr. Moinette was found guilty as charged. CP 49-50; 1RP 1, 2RP 1, 3RP 1, 4RP 1, 5RP 1, 6RP 1.² On April 28, 2006, Judge Chuschcoff ordered Mr. Moinette to

²The seven volumes of the verbatim report of proceedings will be referred to as follows:

March 7, 2006, as "1RP;"
March 8, 2006, as "2RP;"

serve a standard range sentence. CP 53-65; SRP 6-9.

Mr. Moinette appealed, and this pleading follows. See CP 70.

2. Facts relating to incident

On October 19, 2005, at about 5:30 in the evening, an inmate in the Pierce County Jail, Michael Rogers, was assaulted while he was sitting in a chair, watching television. 3RP 162-64, 4RP 45-53. Someone put something pink around his neck or head, and he was choked and yanked backwards before being repeatedly struck in the face for several seconds. 4RP 52.

Mr. Rogers testified that he received a fractured skull, broken occipital eye socket, fractured cheekbone, broken nose, two jaw fractures and neck injuries as a result of the assault. 4RP 47-48. He did not see who had assaulted him, nor did he hear anything during the assault which might identify his assailant or assailants. 4RP 95.

No corrections officers saw the incident but one of them was approached by Mr. Rogers, who was clearly injured and had lots of blood on him. 3RP 163-68. The unit was immediately locked down and all inmates were checked for scrapes or cuts and items or clothing with blood on them. 3RP 163-79. Nothing was found. 3RP 163-79.

Mr. Rogers testified that he had "problems" with another prisoner, Sean Moinette, prior to the incident. 4RP 57-59. Mr. Rogers claimed that

March 9, 2006, as "3RP;"
March 10, 2006, as "3ARP;"
March 14, 2006, as "4RP;"
March 21, 2006, as "5RP;"
April 12, 2006, as "SRP."

there was “some bad chemistry” going on between them for some unknown reason, that Mr. Moinette was “derogatory” and “offensive” to Mr. Rogers, and that he had once stepped on Mr. Rogers’ feet. 4RP 57-58. Mr. Rogers also stated that Mr. Moinette was a prison “trustee” who did duties and got extra “food and stuff,” and that Mr. Moinette “was abusive about it, you know, with other inmates.” 4RP 58.

A moment later, however, Mr. Rogers admitted that Mr. Moinette was not “abusive” about his position with Mr. Rogers. 4RP 58. When asked if Mr. Moinette had intentionally trod on Mr. Rogers’ feet, Mr. Rogers was not actually “for sure.” 4RP 58. Mr. Rogers was convinced that everyone knew he was disabled and that the stepping on his feet was a reflection of that. 4RP 86.

On cross-examination, Mr. Rogers denied that he had never told any of the detectives “about any bad blood between” him and Mr. Mendivil. 4RP 74. Instead, he said, he remembered picking out Mr. Mendivil’s photo as one of the people he was “having a hard time with,” and who he “felt was possibly somebody that assaulted” him. 4RP 74-75.

Mr. Rogers assumed that there were two men involved in the incident because he did not think one man could have held his face with the towel and hit him at the same time. 4RP 98. He admitted, however, that he was not bruised on both sides of his face, even though such bruising would likely occur if one man was doing nothing but hitting him while another held him. 4RP 98. Mr. Rogers only had injuries to the left side of his face. 4RP 98.

Mr. Rogers also testified about someone else he had trouble with, a

man named Mr. Zurelli who Mr. Rogers said was trying to falsely accuse him of being a “snitch,” so that he would get harmed. 4RP 60-61. Mr. Rogers admitted he had “problems with more than one individual” in the unit, including Mr. Zurelli, who Mr. Rogers said is an “instigator” and “does that kind of stuff.” 4RP 74, 80. Mr. Zurelli had once confronted Mr. Rogers in his cell, taking his shirt off and challenging Mr. Rogers to fight. 4RP 85. In addition, Mr. Rogers admitted, he had engaged in repeated “verbal exchanges” with Mr. Zurelli. 4RP 85.

In the early morning hours after the incident, a Pierce County Sheriff’s Office detective interviewed Sean Moinette about his potential involvement. 4RP 11-12. Mr. Moinette was awakened from sleep and taken to an interrogation room, where he was read his rights and asked about the incident. 4RP 14-17. Initially, he denied knowing anything about it. 4RP 17. After awhile, the detective terminated the interview. 4RP 17-19. Mr. Moinette was then told he was going to be placed in administrative segregation or “[i]solation,” and preparations for such confinement were begun. 4RP 18, 40.

At that point, Mr. Moinette suddenly decided to confess, ultimately saying he had come up behind Mr. Rogers and put a t-shirt over his head so that another inmate, David Wright, could hit him. 4RP 17, 40, 142.

Officers described Mr. Wright as a “good-sized gentleman” about 6 feet tall and about 260-70 pounds heavy, and as a “rather large,” “rather imposing” man. 3RP 176, 4RP 148.

Timothy Kelley, a fellow inmate, was talking to Mr. Moinette just before the assault and testified that, after they were through speaking, he

saw Mr. Moinette go up the stairs to the other floor of the jail. 5RP 21-24, 43. Mr. Kelley then got on the phone and almost immediately, “chaos broke out.” 5RP 30-42. He heard a “clunk,” looked towards the sound, and saw a man standing over another man, “swinging down” with his fists. 4RP 42. With reluctance, after initially declining to do so, Mr. Kelley gave the man’s name - David Wright. 5RP 29, 43-47.

Mr. Kelley, like all the other inmates, did not help Mr. Rogers but just walked away. 5RP 40-52. He explained that, if he had tried to intervene, he would also have been hurt, and he did not get involved as a “matter of survival.” 5RP 48-49.

Mr. Kelley freely admitted having made “poor choices” and having been in trouble in the past for residential burglary, possession of stolen property, and shoplifting. 5RP 22-23. He had only been interviewed on the Monday before trial but said he would have told the prosecutor what he had seen if he had been asked earlier. 5RP 32-35. He had received no “inducement” to testify, but said that it concerned him that the person who had committed the assault would “walk free” while Mr. Moinette was facing punishment for a crime he did not commit. 5RP 23-24, 27. A few years before, someone had tried to murder Mr. Kelley and he had seen that man “walk free.” 5RP 23-24, 27.

Mr. Kelley was concerned about being assaulted or risking his life by testifying. 5RP 30. He had known Mr. Wright for quite some time, actually, and had considered him a friend. 5RP 40-41. When asked about Mr. Moinette, Mr. Kelley admitted that, “[w]e don’t get along at all, to be honest with you,” and that they had previously had “heated” arguments

with each other. 5RP 41.

D. ARGUMENT

THE COURT ERRED IN FAILING TO SUPPRESS EVIDENCE
OF A COERCED CONFESSION

Both the state and federal constitutions guarantee the right against self-incrimination. See State v. Easter, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996); Miranda v. Arizona, 384 U.S. 436, 476, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); Fifth Amend.; Fourteenth Amend.; Article 1, § 9. As a result, a custodial statement made after interrogation is inadmissible if it is not the result of a knowing, voluntary and intelligent waiver of the self-incrimination right. See State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988). A confession is only voluntary if, given the totality of the circumstances, it is shown to “be the product of a rational intellect and a free will.” State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984).

In this case, the trial court erred in refusing to suppress Mr. Moinette’s confession, because it was coerced. Further, because the conviction depended upon the confession, reversal and dismissal is required.

a. Relevant facts

At the CrR 3.5 hearing, Detective John Jimenez of the Pierce County Sheriff’s office testified that he was called to the jail the early morning following the incident and shown a note accusing Mr. Moinette and Mr. Wright of the assault. 2RP 5-9. The detective had Mr. Moinette brought to a room in the jail at about 12:40 a.m., to interrogate him about the incident. 2RP 10. A corrections officer admitted that Mr. Moinette

was awakened in order to be brought up to be interrogated in the interview room. 3RP 4-8.

Detective Jimenez first asked Mr. Moinette why he had attacked the victim, and Mr. Moinette responded, "I did not hit that dude, man." 2RP 13. The detective then read Mr. Moinette his rights and continued the interrogation for about 20 minutes. 2RP 12-15. During that time, Mr. Moinette denied involvement, instead ultimately implicating Mr. Wright. See 4RP 141. When Mr. Moinette refused to give another statement on tape, the detective terminated the interview. 2RP 15.

Once the detective decided to end the interview, a corrections officer, Lieutenant Genga, called an escort officer into the room and told him to take Mr. Moinette to administrative segregation, also known as "isolation" or "the hole." 3RP 10-11. Prior to the interrogation, Mr. Moinette had not been in such segregation. 2RP 16. The lieutenant admitted that he did not tell Mr. Moinette he was going into administrative segregation or say anything about it until after the unsuccessful interview. 3RP 16-17. The lieutenant said the reason for putting Mr. Moinette in the "hole" was really "just to get him out of the unit," and because Mr. Moinette was accused of being involved in a violent assault. 3RP 10.

Mr. Moinette was told to stand up, had his hands constrained with handcuffs behind his back, and was taken out of the room. 3RP 11. A few minutes later, the escort officer returned, saying Mr. Moinette now wanted to talk. 3RP 11. Mr. Moinette was brought back into the room, had the handcuffs taken off, and was allowed to sit back down in a chair. 3RP 11. According to the detective, Mr. Moinette was advised of his rights again,

and he then confessed to his involvement in the assault, saying he had been the one to hold the t-shirt over the victim's head while Mr. Wright committed the assault. 2RP 16-18; 3RP 11.

The lieutenant never asked Mr. Moinette why he was suddenly interested in confessing. 3RP 18-19. The lieutenant also did not recall whether any promises were made that, if Mr. Moinette cooperated, he would not go into the "hole." 3RP 19. He did not believe Mr. Moinette was read his rights at the second interview, and did not remember if the Miranda warnings were even mentioned at that point. 3RP 19.

The detective was aware of the "difference" between a regular cell and a "disciplinary" cell, but admitted he never asked Mr. Moinette why he would change his mind and speak with them. 2RP 28. The detective also said he never had any discussions with other officers about why Mr. Moinette would suddenly have decided to confess after being told he was going to the "hole." 2RP 28.

Mr. Moinette testified that, after he was awakened from sleep and taken into the interrogation room, the detective did not read him his rights. 2RP 32-35. Instead, he was questioned about his involvement and the detective said he was "looking at a lot of time" but if he told them he "did it everything would be fine, everything would go away." 2RP 36-37. Once the detective ended the unsuccessful interview, Mr. Moinette was handcuffed and told he was being taken to the "hole." 2RP 37.

Mr. Moinette was taken out of the room and preparations began to put him in the hole. 2RP 37-38. The corrections officer escorting him told him he should have admitted his part of it so he would not "have

gotten put in the hole” or gotten “in trouble.” 2RP 38. At that point, Mr. Moinette understood that, if he spoke with the detective again, he would not go to the hole. 2RP 38.

Mr. Moinette then agreed to speak with the detective again. 2RP 40-41. When he was taken back into the interrogation room, the detective asked what Mr. Moinette now had to say, and Mr. Moinette told the detective, “if he wants anybody to blame, I don’t want to go in the hole, you can blame me.” 2RP 40. Mr. Moinette already knew he was being accused, because the detective had already made that clear “at length.” 2RP 40. Mr. Moinette was under the impression that, if he confessed, would not be sent to the hole. 2RP 40-41. Indeed, one of the officers had told Mr. Moinette during the first interview that if he told them what happened he could just go back to bed. 2RP 65.

Mr. Moinette also said that another reason for making the statement was to somehow atone for having implicated Mr. Wright in the first statement. 2RP 40-65.

In the oral ruling the court found that Mr. Moinette was read his rights at the initial interview. 3RP 35. The court then ruled that, although it was probably true that Mr. Moinette came back and talked to the detective in part because he did not want to go to the “hole,” the court did not believe that the escort officer or “anyone else” suggested that Mr. Moinette was going to “get out of this” or “not go to the hole” if he admitted his involvement in the assault. 3RP 35.

The court also said it did not believe that Mr. Moinette was read his rights again when he was brought back into the room, but that it was

not required for his rights to be read because Mr. Moinette “initiated the contact.” 3RP 36-37. The court held that Mr. Moinette did not have to say anything and had given the second statement “for his own reasons,” which the court did not think had to do with any promise not to go to the hole. 3RP 37.

b. The confession was coerced and inadmissible

The court erred in refusing to suppress the statement. As a threshold matter, the court’s written findings and conclusions are inadequate and, in fact, incorrect. CrR 3.5 requires a court to enter written findings and conclusions on the disputed facts, the undisputed facts, conclusions as to disputed facts and conclusions as to “whether the statement is admissible and the reasons therefor.” CrR 3.5(c). Below, there were several disputed facts, including whether Mr. Moinette was read his rights at the initial interrogation, whether he was read his rights when brought back in, whether anyone told Mr. Moinette that he should admit his guilt and he would then not be sent to the “hole.” 3RP 21-38.

The written findings, however, erroneously declare that there are *no* disputed facts. Supp. CP _____. There are no “conclusions as to disputed facts,” despite the very real disputes as to several facts below. Supp. CP _____. And the findings mischaracterize as “undisputed facts” that the detective “fully advised the defendant of his Miranda warnings” at the initial interrogation, that he “reminded the defendant that his Miranda rights still applied and he didn’t have to talk with the detective” when first brought back into the interrogation room, and that, after the defendant stated that he had something else he wanted to say, the detective again

“reminded the defendant that his Miranda rights still applied.” Supp. CP _____. Thus, the written findings and conclusions do not satisfy the requirements of CrR 3.5 and do not accurately reflect the proceedings below.

Further, the written findings do not properly represent the court’s ruling, or the evidence, below. Findings of fact must be supported by substantial evidence in the record, and should reflect the court’s true rulings. See State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Here, the findings state that, when Mr. Moinette was returned to the interrogation room, the handcuffs were removed, the detective “reminded the defendant that his Miranda rights still applied and that he didn’t have to talk with the detective,” that Mr. Moinette then said he had something else he wanted to say and that “again Det. Jimenez reminded the defendant that his Miranda rights still applied[.]” Supp. CP _____.

There was, however, *no* testimony at the suppression hearing that the detective *twice* reminded Mr. Moinette of his Miranda rights before the second interview. 2RP 1-70, 3RP 4-21. And in fact, the trial court specifically found unbelievable the detective’s testimony that Mr. Moinette was reminded of or reread his rights even *once* before the second statement. 3RP 38. Indeed, the prosecutor actually asked for “clarification” of whether the court was finding that the detective had read the warnings a second time or had “reminded the defendant that he had read them,” and the court said, “I don’t think that he did. I just don’t believe that he did.” 3RP 38. The prosecutor continued to inquire and the court stated its recollection that the detective had testified that the

defendant was brought back into the room and the detective “reminded the defendant again of his Miranda rights and told him that he could exercise them at any time.” 3RP 38. The prosecutor then inquired, “[y]ou are finding that he didn’t do that?” 3RP 38. The court responded,

I don’t think that he did that. I think Genga is correct on this point and so is Mr. Moinette. I think that it just - - given the brief - - the very brief time that he was out of the room, I suspect that didn’t happen that way. I also felt that Detective Jiminez was - - his memory did not appear to be great on that point.

3RP 39. That credibility determination, made by the court below but not correctly reflected by the findings the prosecutor drafted, is not reversible on appeal. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Indeed, it appears that the written findings and conclusions in this case were in part erroneously taken from a different case. The conclusions include a finding on whether the officers had a duty to advise “the defendant of her Miranda warnings/rights upon initial contact.” Supp. CP _____. This appears to be a finding from a case where a defendant was not questioned in custody in an interrogation room in a jail but rather had an out-of-custody investigative encounter with a suspect based upon reasonable suspicion that person was involved in a crime. See, e.g., State v Huynh, 49 Wn. App. 192, 201, 742 P.2d 160 (1987), review denied, 109 Wn.2d 1024 (1988). Those are, obviously, not the facts of this case. Where, as here, a defendant in jail is taken into an interrogation room for questioning and not free to leave, clearly, they are being subjected to custodial interrogation and the Miranda rights and warnings apply. Sargent, 111 Wn.2d at 649.

In any event, the court erred in admitting the confession, because it was coerced. A confession is coerced if, “based on the totality of the circumstances,” the defendant’s “will was overborne.” State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). A court examining this issue looks at the “totality of the circumstances,” including the defendant’s condition, his mental abilities, and the conduct of the state actors. Rupe, 101 Wn.2d at 678-79. It is not required that the defendant suffer a beating for a statement to be coerced. Instead, psychological pressure may also render a confession fact less than the product of “free choice.” Watts v. Indiana, 338 U.S. 49, 53, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949); State v. Cushing, 68 Wn. App. 388, 392, 842 P.2d 1035, review denied, 121 Wn.2d 1021 (1993). As the Miranda Court held, any evidence that the defendant was tricked, cajoled or threatened into waiving his rights against self-incrimination will show that the waiver and subsequent statement was not voluntarily made. 384 U.S. at 476. A confession extracted by “any sort of threats, violence, or direct or implied promises, however slight,” is involuntary and therefore inadmissible. State v. Riley, 17 Wn. App. 732, 735, 565 P.2d 105 (1977), review denied, 89 Wn.2d 1014 (1978).

Examination of the totality of the circumstances makes it clear that the incriminating second statement in this case was coerced. It is well-recognized that a police-dominated atmosphere generates “inherently compelling pressures which work to undermine the individual’s will to resist and compel him to speak where he would not otherwise do so freely.” Illinois v. Perkins, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed.

2d 243 (1990), quoting, Miranda, 384 U.S. at 467. Indeed, the purpose of the Miranda warnings is to ensure protection of the rights of a citizen in what is recognized as the “coercive environment of police custody.” See State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

Here, the court found that Mr. Moinette was properly given the warnings at the first interrogation. The problem, however, is what happened *after* that interrogation. Once Mr. Moinette had failed to incriminate himself and refused to make a taped statement, he was then told he was being sent to the “hole.” And on the way to the “hole,” he was told that he should have admitted his involvement in order to avoid going. The obvious import of all of this for someone in Mr. Moinette’s situation was that he was being sent to the hole for failing to confess, and, if was willing to confess, he would then not be subjected to the “hole.” The resulting confession was not voluntary but was instead the product of the implied promise - and threat - regarding going to the “hole.” See, e.g., Townsend v. Henderson, 405 F.2d 324, 327-29 (6th Cir. 1968) (confessions made based upon the threat of punishment inadmissible; solitary confinement is a “means of compulsion” when used to obtain confessions).

It is irrelevant that the officers testified that they had no improper purpose in ordering Mr. Moinette to administrative segregation after the first unsuccessful attempt to get him to confess. The issue is not the officer’s motivations but whether, as a result of their acts, the confession was coerced. Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S. Ct. 1682, 63 L. Ed. 2d 297 (1980); Sargeant, 111 Wn.2d at 650-51. If the

officers knew or should have known that Mr. Moinette was reasonably likely to confess as a result of their words or acts, that is sufficient. Sargeant, 111 Wn.2d at 650-51. Here, any reasonable officer in this situation would have known - or should have known - that, given the circumstances, Mr. Moinette would be given the clear impression that he was being sent to the "hole" for failing to confess, and would not be sent there if he confessed. Even without the officer's statements on the way to the hole, the circumstances "necessarily conveyed to the prisoner . . . the implied threat" of punishment for failing to confess. Townsend, 405 F.2d at 328. And there could be no question that the people whose acts conveyed that message had the power to impose that punishment.

It is important to remember that the issue is not whether the Court believes Mr. Moinette's confession might, ultimately, be the truth. See Rogers v. Richmond, 365 U.S. 534, 544, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961). The question is whether the "behavior of the State's law enforcement officials was such as to overbear . . . [the suspect's] will to resist and bring about confessions not freely self-determined - - a question to be answered with complete disregard of whether or not . . . [the suspect] in fact spoke the truth." Rogers, 365 U.S. at 544. Under the facts in this case, the confession was clearly the by-product of coercion, rather than the result of the exercise of free will. The trial court erred in holding otherwise and admitting the statement.

c. This Court should reverse

Reversal is required. Where an improper, coerced confession is admitted at trial, this Court must reverse unless it can determine the error

harmless by finding that the admission of the confession did not contribute to the conviction. Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). In Washington, the “overwhelming untainted evidence” test is used to determine whether admitting an involuntary, improper confession is harmless error. See State v. Reuben, 69 Wn. App. 620, 626, 814 P.2d 1177 (1991) (applying “overwhelming untainted evidence” test to the admission of an improper confession).

Here, the error cannot be said to be harmless. The only evidence actually linking Mr. Moinette to the crime was the confession. 5RP 65. Aside from the confession, there was only Mr. Rogers’ declaration that Mr. Moinette was someone with whom he had previously had some tension - one of *many*. Neither Mr. Rogers nor anyone else identified Mr. Moinette as being involved, and, in fact, a fellow inmate testified that he was *not*.

Indeed, the prosecution would have had no case without the confession, as it admitted in cross-examining Mr. Moinette at the suppression hearing, and essentially argued in closing argument. See 2RP 42-43, 5RP 65, 69, 72. Without the coerced confession, there was insufficient evidence to support a conviction, and this Court should therefore reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss
Mr. Moinette's conviction.

DATED this 30th day of December, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Sean Moinette, at his current address in DOC.

DATED this 30th day of December, 2006.

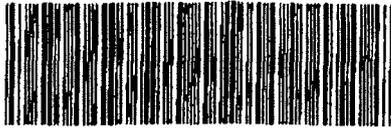


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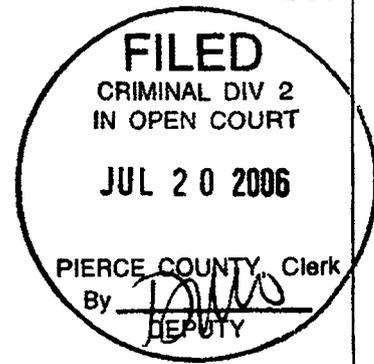
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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON



05-1-05298-0 25835073 FNFL 07-21-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-05298-0

vs.

SEAN MICHAEL MOINETTE

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING ADMISSIBILITY OF STATEMENTS UNDER CrR 3.5

Defendant.

THIS MATTER having come on for hearing before the honorable Bryan Chushcoff on the 6th day of March, 2006, and the court having ruled orally that the statements of the defendant are admissible, now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to admissibility.

UNDISPUTED FACTS

On October 19, 2005, at about 1735 hours, Pierce County Jail Corrections Officers became aware that an inmate identified as M. Rogers has sustained significant facial injuries as a result of an assault;

M. Rogers was in the 4 South Dayroom when the assault occurred;

M. Rogers had been watching television when someone placed something over his head from behind and someone else began beating him about the face;

The only thing M. Rogers remembers about the assault was that something was placed over his head before he began being hit in the face. M. Rogers woke up on the floor after being unconscious for a short period of time;

ORIGINAL

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1 As a result of the assault, M. Rogers suffered an orbital blowout fracture of bones near his left
2 eye;

3 M. Rogers did not see who assaulted him;

4 After the assault, a note written by an anonymous person was found on the jail floor indicating
5 that the defendant and another inmate had assaulted M. Rogers;

6 On October 20, 2005, at about 0040 hours, the defendant was brought to a jail office to be
7 questioned regarding the assault;

8 Present at the interview were Off. Tony Mastandrea and Lt. Luis Genga, from the Pierce County
9 Jail, and Det. John Jimenez from the Pierce County Sheriff's Department;

10 Once in the office, the defendant was asked what cell he lived in and the defendant responded "4-
11 S-C-26;"

12 The defendant was asked if he knew about the fight in the cell area and the defendant stated that
13 he did but he had been in his room when the fight occurred;

14 The defendant was then asked why he attacked the other inmate and the defendant stated "I did
15 not hit that dude, man;"

16 At 0045 hours, Det. Jimenez fully advised the defendant of his Miranda warnings from a
17 preprinted card;

18 The defendant understood his rights and didn't have any questions about the rights;

19 The defendant was asked if he wished to waive his rights and speak with the officers about the
20 incident and the defendant answered "yes;"

21 The defendant gave a statement and implicated the inmate in "27 house" as the person
22 responsible for the assault;

23 The defendant continued talking about the assault until 0100 when Det. Jimenez asked him if
24 he'd agree to make a tape-recorded statement and the defendant declined to do so;

25 After the defendant declined to make a tape-recorded statement the interview was terminated and
the defendant handcuffed and escorted out of the office;

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1 After asking a couple of simple introductory questions and the defendant denying he had been
2 involved in the assault, Det. Jimenez fully advised the defendant of his Miranda rights and the defendant
3 made a knowing, voluntary and intelligent waiver of those rights and gave a statement to the detective;

4 All statements made to the detective after the advisement of Miranda rights are admissible
5 because they were made knowingly, voluntarily and intelligently after fully understanding all of his
6 Miranda warnings/rights.

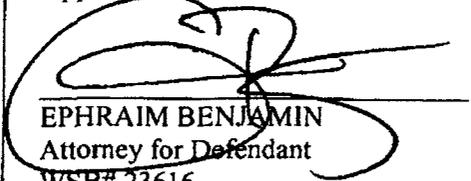
7 DONE IN OPEN COURT this 20th day of July, 2006.

8 
9 BRYAN CHUSHCOFF, JUDGE

10 Presented by:

11 
12 GREGORY L. GREER
13 Deputy Prosecuting Attorney
WSB# 22936

14 Approved as to Form:

15 
16 EPHRAIM BENJAMIN
17 Attorney for Defendant
WSB# 23616

18 glg



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