

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

35600-7-II

STATE OF WASHINGTON
RESPONDENT,

VS.

IDA C. PEREZ-DIAZ
APPELLANT.

BRIEF OF RESPONDENT

MICHAEL N. ROTHMAN
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A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. No post *Miranda* statements of Ida Perez Diaz to the police were introduced at trial. Therefore, assignment of error No 1 is without merit.
2. The trial court did not err in making a pretrial ruling that the state could introduce post *Miranda* statements of Ida Perez Diaz; however, since the State did not introduce these statements at the trial, any alleged error is *ipso facto* harmless.
3. The trial court did not err in entering Finding of Fact pertaining to the CrR 3.5 hearing.
4. The trial court did not err in entering Conclusions of Law pertaining to the CrR 3.5 hearing.

B.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Ida Perez Diaz contends that the *Miranda* warnings which were given to her were ineffective because the *Miranda* warnings were not read to her at the outset of the interrogation. None of the custodial statements of Ida

Perez Diaz were introduced by the State at trial. This issue had no bearing on the outcome of the trial.

C.

STATEMENT OF THE CASE

The State accepts the Statement of the Case as delineated by Ida Perez Diaz.

D.

ARGUMENT

1. PEREZ-DIAZ' POST-MIRANDA STATEMENTS WERE NEVER ADMITTED AT TRIAL.

A through review of the record indicates that the appellant's post-*Miranda* statements were ever admitted during the trial by either the prosecution or the defense. RP, *passim*. Therefore, the argument of Ida Perez Diaz that relies heavily on *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed. 2d 643 (2004) is inapposite. While the State believes that the facts of this case are closer to those found in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84L.Ed. 2d 222 (1985), than in *Seibert*, this issue is superfluous. Since the statements in question were not introduced at the trial,

Ida Perez Diaz suffered no disadvantage. Consequently, the conviction of Ida Perez Diaz should be upheld.

2. PEREZ-DIAZ' STATEMENTS AT THE CIVIL FORFEITURE HEARING WERE PROPERLY ADMITTED DURING THE PEREZ-DIAZ' TRIAL.

The Fifth Amendment commands that “[n]o person... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law.” The privilege of self-incrimination is protected by Article 1, section 9 of the Washington State Constitution, which provides that “[n]o person shall be compelled in any criminal case to give evidence against himself.” The protection against self-incrimination guaranteed by the state constitution is no greater than that provide by the federal constitution. *State v. Bledsoe*, 33 Wn. App. 720, 658 P.2d 674 (1983).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), the United States Supreme Court held that the prosecution could not use inculpatory statements stemming from custodial interrogation of a defendant without first showing that the

defendant was fully advised of his privilege against self-incrimination and of his right to counsel, and that the defendant had knowingly, voluntarily, and intelligently waived those rights. *Miranda* defined “custodial interrogation” as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444.

“In custody” for purposes of *Miranda* means freedom of action curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed 317 (1984). A suspect is “in custody” when taken into full custody or otherwise deprived of his or her freedom of action in a “significant way” *State v. McWatters*, 63 Wn. App. 911, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992). Telephone conversations do not require *Miranda* warnings. *State v. Denton*, 58 Wn. App. 251, 792 P.2d 537 (1990).

The record in this case clearly indicates that the Appellant appeared for the civil forfeiture telephonically. Furthermore, the record indicates that the Appellant was not

in custody at the time of the civil forfeiture. The Appellant was not physically present and was free to terminate the conversation at any time simply by hanging up the telephone. This conversation did not carry with it the coercive and intimidating factors that are normally present in jailhouse interrogations and that the *Miranda* Court sought to guard against.

‘Interrogation’ involves express questioning, as well as all words or actions on the part of the police, other than those attendant to arrest and custody, that are likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 64 L.Ed. 2d 297, 100 S.Ct. 1682 (1980). When not dealing with express questioning, the focus is primarily upon the perception of the suspect, rather than the intent of the police. *Id.*

The statements of the Appellant that were introduced at the trial were not in response to questions from police officers. Therefore, these statements do not constitute an interrogation for purposes of *Miranda*. Additionally, the entire purpose of the forfeiture hearing was to determine

whether assets that had been seized from the Appellant should be forfeited to the State as proceeds from drug sales. Under such circumstances the likelihood of an incriminating response is low because any such incriminating statement would lead to forfeiture of property.

In essence, the Appellant's statements at the civil forfeiture hearing were not the product of being "in custody" or of being subject to "interrogation." Hence, the privilege against self-incrimination was not violated.

Nevertheless, the State feels that it is necessary to address *State v. Post*, 118 Wash.2d 596, 826 P.2d 172 (1992) and *Minnesota v. Murphy*, 465 U.S. 420 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) which delineate a "penalty" exception to the general rule that the Fifth Amendment privilege against is not self-executing. As stated in *Post*:

[t]he "penalty" exception is available only if (1) the person gives answers that would incriminate him or her in a separate criminal proceeding and (2) the State makes express or implied assertions that the exercise of the Fifth Amendment privilege will result in the imposition of a penalty, be it economic loss or deprivation of liberty.

When the penalty exception is claimed, the analysis focuses on whether a particular disclosure that is later

used in a criminal prosecution is (1) incriminating, and (2) coerced by the threat of a penalty. 118 Wn.2d at 610.

In this case, there is no question that the statements of the Appellant at the civil forfeiture hearing were incriminating. The relevant inquiry is whether the statements were “coerced by the threat of a penalty.”

The State made no threat in this case regarding the defendant’s testimony. The civil forfeiture hearing took place at the request of the Appellant.

In short, the defendant voluntarily offered the testimony which she gave. No one on behalf of the State communicated to the defendant that she would be harmed if she did not testify. The defendant has the option of calling other witnesses to support her position. She chose not to put forth any evidence other than her testimony.

Moreover, this case is distinguishable from cases such as *Garrity v. New Jersey*, 385 U.S. 493 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), where an individual was threatened with discharge from employment if he exercised his Fifth Amendment privilege. In this case, the State did nothing

either directly or indirectly to coerce the defendant to testify.

The defendant's actions were voluntary. According to

Murphy:

As this Court has long acknowledged "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privileges, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment."

465 U.S. at 427.

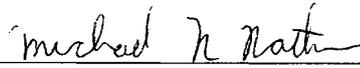
In sum, the Appellant has no basis for arguing that her statements at the forfeiture hearing should have been suppressed.

E.

CONCLUSION

For the reasons listed above, the Appellant's assignments of errors should be rejected and relief sought by the Appellant should be denied. The Appellant's convictions should be upheld.

RESPECTFULLY SUBMITTED:



MICHAEL N. ROTHMAN
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
) NO 35600-7-II
 Respondent.)
) AFFIDAVIT OF MAILING
 vs.)
)
 IDA C. PEREZ-DIAZ,)
)
 Petitioner.)
 _____)

STATE OF WASHINGTON)
) ss.
 COUNTY OF PACIFIC)

VICKI FLEMETIS, being first duly sworn on oath, deposes and says:

I am the Office Administrator for the Pacific County Prosecutor.

That on 7/10, 2007, I mailed a two copies of the State's Brief of Respondent to Peter B. Tiller, Attorney for Appellant at the following address:

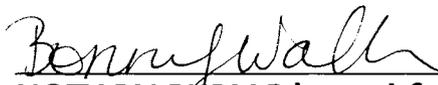
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VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 10th day of
JULY, 2007.


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