

No. 37835-3-II

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

COURT OF APPEALS
DIVISION II

COPIED 13 FEB 1988
STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

ROBERT ASHENBRENNER JR.,
Appellant.

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

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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BY: [Signature]
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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Procedural History.

The defendant was charged by Information on December 27, 2007, with Possession of a Stolen Motor Vehicle, RCW 9A.56.068. A CrR 3.5 hearing was held before the Honorable F. Mark McCauley. Findings were entered determining the statements to be admissible. (CP 21-23). Judge McCauley specifically found that, contrary to the assertion of the defendant, that there was no mental or physical condition that prohibited the defendant from waiving his Miranda rights and making a voluntary statement. (RP 34-35):

So, when I look at all the facts and circumstances and the testimony presented, I believe that he was capable of understanding what was going on, that he understood his rights, that he freely and voluntarily waived his rights, that he made statements voluntarily without any kind of coercion. He wasn't under the effect of any illegal drugs or alcohol and there was really no evidence for me to conclude that he was under the effects of the pain killer to the point where he couldn't understand and comprehend and communicate. In fact Detective Kolilis' testimony establishes he did understand his rights and went forward and made a statement.

The court also went to make a gratuitous statement concerning the evidentiary admissibility of the out-of-court written statement of the defendant stating that it did not appear to be in an adoptive admission because it was not signed by the defendant. The issue of the admissibility of the written statement was never addressed by the parties at the CrR 3.5 hearing. No attempt was made to establish the foundation for admissibility under the Rules of Evidence, i.e.: No testimony was offered concerning whether the defendant “adopted” the contents of the written statement even though he did not sign it. (RP 35). The State pointed out to the court that it was a evidentiary matter and not a CrR 3.5 issue. (RP 35). That “ruling” was never reduced to writing. The statements of the defendant were found to be available for use by the State in its case-in-chief “subject to admissibility pursuant to the rules of evidence.” (CP 23).

The trial in the matter commenced on April 1, 2008, before the Honorable Gordon L. Godfrey. A pretrial conference was held in the courtroom on the record in which the parties discussed issues concerning how the trial would proceed and potential evidentiary matters. Defense counsel made no mention of Judge McCauley's remarks at the CrR 3.5 hearing. No motion in limine was made regarding the written statement of the defendant.

During trial the defendant objected when the State made reference to the written statement. Detective Kolilis was allowed to testify to the

foundational requirements under ER 801(d)(2)(ii): that he had prepared a written statement in the defendant's presence and that the defendant had reviewed this statement and advised him that it was correct. Kolilis explained why the defendant had not signed the statement. (RP 71-72).

Counsel asked for a side bar, which was granted. It was during this side bar that Judge Godfrey was first made aware of the remark made by Judge McCauley at the CrR 3.5 hearing. Judge Godfrey ruled that since the statement had not been signed and Kolilis had testified to the contents of the statement, he would not admit the written statement. He found the statement to be cumulative of the oral testimony concerning the statement's contents. . (RP 77-80). The jury never did see the written statement itself.

Factual Background.

Michael Brehm is the vice-president for Paul Construction Company located in Bellevue, Washington. (RP 43-44). When he arrived at work on December 17, 2007, one of his employees asked about the location of their Ford F-50 flatbed dump truck. Brehm looked outside and realized that it had been stolen. (RP 45). Brehm did not locate the vehicle until he received a call from Deputy Wallace telling him that it had been recovered. (RP 48-49).

On December 26, 2007, Deputy Wallace received information that a stolen vehicle was going to be at 3 Copalis Beach Road at 5 p.m. on that

date. (RP 53). Wallace parked along the road leading to 3 Copalis Beach Road. Brehm's vehicle drove past his location at about 4:30 p.m. (RP 54-55). Wallace initiated a traffic stop once the vehicle turned onto the Copalis Beach Road. The vehicle turned into the residence at 3 Copalis Beach Road and drove in about 100 yards, parking behind the shop. (RP 56). Wallace knew this to be the residence of Jeff Emery.

Wallace pulled in behind the vehicle. The defendant got out of the vehicle and began to walk off. (RP 57). Wallace called to the defendant several times. The defendant finally stopped and came back to his location. The defendant told Wallace that he could not find the proof of insurance or registration. (RP 58). Wallace told the defendant to stay in the vehicle.

During this time a second motor vehicle pulled into the driveway. Wallace walked over to get the license plate number from that vehicle. (RP 58). Wallace then contacted dispatch and confirmed that the truck he had stopped was Brehm's stolen vehicle. (RP 58-59). About that time the defendant got out of the truck and fled on foot. After a chase and struggle the defendant was taken into custody. (RP 59-60).

The defendant was transported from the scene to Grays Harbor Community Hospital. He was later contacted there by Detective Don Kolilis of the Grays Harbor County Sheriff's Office. The examination had been completed and the defendant was dressed. Kolilis explained that he was there to transport the defendant to jail and that he wanted to talk to the defendant about what had happened. (RP 64-65). Kolilis noted that

the defendant showed no signs of any mental or physical problems. The defendant complained of the bruising on his legs.

Kolilis began by advising the defendant of his Miranda rights, which the defendant acknowledged understanding. The defendant then agreed to speak with Kolilis. (RP 65-67). Kolilis began by asking the defendant if he could verbally "fill him in" on what was going on. The defendant explained that he knew that he was in a stolen car and that he did not want to get his girlfriend involved because she had followed him up there to give him a ride home. The defendant explained that he did not try to hurt Deputy Wallace, but that he was just trying to get away. (RP 67).

Following these initial remarks Kolilis asked the defendant how he came to be in possession of the vehicle. The defendant explained that about a week prior he had been at a swap meet at the Starlight Drive-in in Tacoma when he was approached by an individual who wanted to sell him tools and what turned out to be Brehm's flatbed truck. The defendant told Kolilis that it was immediately obvious to him that the tools and the truck were stolen. The defendant explained that he was being offered the opportunity to purchase a truck having a value of \$4,000 to \$5,000 "minimum" for \$300. (RP 67-68).

During the course of the interview the defendant told Kolilis more than once that he knew the truck was stolen. (RP 68-69). He explained that he had made arrangements to sell the truck to Jeff Emery and that he

had driven the truck to the location where he was arrested in the hope that he could sell it. The defendant insisted, again, that his girlfriend did not know the vehicle was stolen and that she only followed along so that he would have a ride home. (RP 69).

Kolilis explained that he made written notes and prepared a written statement following his initial oral interview. Once complete, Kolilis reviewed the statement with the defendant and acknowledged that it was true and correct. Following this process, Kolilis went to contact the nurse to get the medical release. He left the defendant with a pen, told the defendant that he could make changes to the statement and sign it. For what ever reason, the defendant never did sign the written statement.

The statement was offered at trial. The court sustained an objection. The court ruled that the statements of the defendant as related by Detective Kolilis were admissible. The written statement, because it was not signed and was cumulative, would not be admitted. (RP 77-80).

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The State did not commit misconduct in regard to the written statement of the defendant.**

To begin with, this court must focus on the purpose of a CrR 3.5 hearing. A CrR 3.5 hearing is not an evidentiary hearing regarding the admissibility of evidence pursuant to the Rules of Evidence. Rather, it is a procedure put in place so that the trial court can resolve any potential

issues regarding the voluntariness of the confession or the voluntariness of any waiver of Miranda rights. See Tegland, Washington Practice, Volume 4A, at p. 251-252.

CrR 3.5 was designed to implement the procedure required by *Jackson v. Denno*, U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964); see *State v. Rice*, 24 Wn.App. 562, 603 P.2d 835 (Div. 2 1969). The *Jackson* case stated that a defendant has a constitutional right to object the introduction into evidence of statements he has made while in custody and to have a hearing, outside the presence of the jury, to determine whether the statements were made voluntarily.

The purpose of CrR 3.5 is to provide a uniform procedure for the admission of voluntary confessions and other custodial statements in a fashion which will prevent the jury from hearing an involuntary confession. The rule's significant impact is that the trial judge resolves the issue of voluntariness in the absence of the jury, thereby obviating due process problems which would arise if the jury heard an involuntary confession. *State v. Myers*, 86 Wash. 2d 419, 545 P.2d 538 (1976).

A CrR 3.5 hearing enables the trial court to rule on the disputed question of whether the evidence was obtained in an unlawful manner. The pretrial determination permits the trial to proceed in an orderly fashion without interruptions to decide collateral issues. *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088 (Div. 2 1973). The pretrial hearing enables the parties to determine the weakness of their case, avoids midtrial surprises, and encourages settlement. *State v. Taylor*, 30 Wash. App. 89, 632 P.2d 892 (Div. 2 1981).

Neither party addressed the admissibility of the statement as an adoptive admission of the defendant at the CrR 3.5 hearing. The State did not offer testimony from Detective Kolilis to establish the foundational requirements for admissibility under ER 801(d)(2)(ii). This simply was not the purpose of the CrR 3.5 hearing. Judge McCauley's remarks regarding the statement were gratuitous and went beyond the purpose of the hearing. That is why the State made the remark to the court at the end of the hearing that this was an evidentiary matter and not a CrR 3.5 issue. (RP 35). That is why no written order was entered declaring the written statement inadmissible at trial. In fact, the CrR 3.5 order reserved on the issue of the evidentiary admissibility of the written statement at trial. (CP 23).

This alleged "ruling" excluding the written statement was never reduced to a written order or included in the CrR 3.5 findings. As it turned out, Judge McCauley was not the trial judge. The defendant did not make a motion in limine regarding the written statement nor address it with the trial court judge at the conference on the morning of the trial. In the end, however, Judge Godfrey allowed Detective Kolilis' testimony concerning the contents of the written statement, but declined to admit the written statement itself.

No one disputes that the defendant made oral statements to Detective Kolilis. Kolilis testified to these statements and they were properly admitted at trial. The oral statements of the defendant provided

direct evidence of the defendant's admission that he knew the truck that he was seen driving was stolen.

The written statement was not prepared until following the oral interview, as explained by Detective Kolilis. (RP 71):

A. Yes. At the end of my interview, I always sit down with the subject or have him go through it and make sure that what -- a lot of times it's difficult to completely understand what somebody says so when you write it down, you're taking what they say, putting it down on paper and they're verifying to make sure you got it correct. He went through the statement and advised me it was correct.

Q. Now, did Mr. Ashenbrenner sign it?

A. No, he did not.

Q. Okay. Tell me what happened.

A. Well, we had went through it and he told me it -- everything was fine, and at that time I was trying to get a medical release form from the nurse, and I left him a pen and said, if there's anything you need changed, go ahead, just go ahead and sign it on the bottom since we went over it. I went out to get the medical release form, and I brought it back in and there was a bunch of stuff we had to fill out and have him sign there. I don't know if he intentionally didn't sign it or forgot to sign it but I didn't check it because I was working on the medical form.

MR. CLAPPERTON: Objection.
Could we have a side bar?

THE COURT: Yes.

MR. FULLER: This is No. 9.

THE COURT: Side bar.

(Side bar conference held off the record.)

THE COURT: Proceed.

MR. FULLER: May I be allowed to have the witness identify the exhibit?

THE COURT: Yes, you may.

Q. This is No. 9. Do you recognize that?

A. Yeah. It's a copy of the statement.

At best, the "ruling" by Judge McCauley was an order in limine. The defendant characterizes Judge McCauley's remarks as such. The remarks were made at the CrR 3.5 hearing without any information concerning how matters would develop at trial. See Tegland, Washington Practice, Evidence, Section 103.5 at page 38:

In general, a ruling on a motion in limine is interlocutory in character. The court may modify or abandon the ruling during trial as justice so demands. Evidence may be admitted in violation of a pretrial order if it has become apparent that the evidence is in fact admissible under the normal rules of evidence.

Even though the written statement prepared by Detective Kolilis was not signed by the defendant, it may nevertheless be admissible as an admission. The written statement, though not signed, was a "statement of

which [the defendant] has manifested an adoption or belief in its truth.” ER 801(d)(2) (ii). Detective Kolilis specifically testified that the defendant reviewed it and told him that the contents were correct. See, for example, U. S. v. Scott, 804 F.2d 104, 107-108 (8th Cir. 1986). An adopted admission occurs when a defendant affirmatively agrees to a statement made in his presence. State v. Anderson, 210 Ariz. 327, 111 P.3 369, 381 (2005).

That is exactly what happened here. Kolilis prepared a written statement. The defendant examined the contents and told Kolilis that they were correct. Through inadvertence, the statement was never signed. This does not mean that the defendant did not affirmatively adopt the statement. In short, it would have been entirely proper under the Rules of Evidence for Judge Godfrey to have admitted the written statement.

There was no basis for mistrial. The written document itself was never presented to the jury. Its contents consisted of oral statements of the defendant that were reduced to writing by Detective Kolilis. The oral statements made by the defendant were his admissions. The officer was allowed to relate the contents of the written statement which were properly admissible as adoptive admissions of the defendant based upon his acknowledgment that the information placed in the written statement was true and correct.

There was no misconduct on the part of the prosecution. This assignment of error must be rejected.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

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