

NO. 4077<sup>7-</sup>-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PIERCE

Appellant.

FILED  
JUL 11 2011  
CLERK OF COURT  
SUPERIOR COURT  
JEFFERSON COUNTY  
WASHINGTON

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Craddock Verser, Judge

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SUPPLEMENTAL BRIEF SPECIFICALLY ADDRESSING  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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## I. PROCEDURAL BACKGROUND

On or about May 25, 2010, undersigned, as appellant counsel of record, filed with this Court a *Notice of Appeal* on behalf of Mr. Michael Pierce. To effectuate that appeal, the *Designation of Clerk's Papers* was filed on or about July 19, 2010. On January 18, 2011, the *Appellant's Opening Brief* (AOB) was filed.

On April 21, 2011, the Respondent requested to designate additional clerk's papers with *Findings of Fact and Conclusions of Law Pursuant to CrR 3.5* (hereinafter *CrR 3.5 Findings*).<sup>1</sup> Because the *CrR 3.5 Findings* were not entered until September 17, 2010, they were not part of the court file at the time Appellant filed its *Designation of Clerk's Papers*. Also since undersigned counsel was not advised or aware of the *CrR 3.5 Findings* until April 21, 2011, they were not considered, referenced or addressed in the AOB.<sup>2</sup>

On April 25, 2011, the Appellant filed a motion objecting to the designation of additional clerk's papers. The Respondent filed its response explaining the reasons for the delay in filing the *CrR 3.5 Findings*. On May 4, 2011, this Court denied the Appellant's motion, but permitted Appellant to file a supplementary brief addressing the *CrR 3.5 Findings*. Appellant appreciates and accepts this Court's invitation and files this supplementary brief.

## II. LEGAL CHALLENGE TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

As referenced in the AOB, there are three situations in which Mr. Pierce allegedly made statements that the state sought to introduce: (1) when he was initially arrested; (2) when he was interviewed again approximately five hours later; and (3) when the superintendant talked to him at the hospital a few days later. AOB at 92. Because the defense did not challenge the first, and

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<sup>1</sup> The *CrR 3.5 Findings* also references the findings regarding challenged under CrR 3.1.

<sup>2</sup> See AOB, pg. 94 ("Contrary to CrR 3.5(c), there are no formal written findings of fact or conclusions of law, so the court's findings are derived from the court transcripts.").

Appellant is not assigning error to the third, only the findings addressing the second situation are discussed. Appellant only lodged an assignment of error relating to the violation of CrR 3.1.

In its findings, the trial court concluded that CrR 3.1(c)(2) was either unnecessary or was satisfied because during the initial interrogation, Mr. Pierce never “expressly asked to contact an attorney” and because after Mr. Pierce was booked, he did not ask the jail officer to call an attorney. *CrR 3.5 Findings*, 10 – 13.<sup>3</sup> The *CrR 3.5 Findings* are both factually and legally erroneous. Factually, the *CrR 3.5 Findings* are based on an incomplete assessment of the testimony given at the pre-trial hearings. Legally, the *CrR 3.5 Findings* are erroneous because it misapplies CrR 3.1(c)(2).

1. Incomplete Factual Findings Resulted in Erroneous Legal Conclusion.

The trial court concluded that CrR 3.1(c)(2) was not required because Mr. Pierce never expressed a “desire” to talk to an attorney. *CrR Findings*, pg. 10. According to the trial court, Mr. Pierce’s statement that he was “gonna need a lawyer” was an equivocal request for an attorney. *Id.* pg. 11. This conclusion, however, is based on an incomplete review of the record.

At the CrR 3.5 pre-trial hearing, the detectives testified that Mr. Pierce expressly and unequivocally requested an attorney:

PROSECUTOR: Once you finished talking to him about that did you ask him any other questions surrounding the ATM card? Or did you move on to a different subject at that point?

DET. NOLE: He denied using the Yarr’s ATM card. So then I moved on to the . . .murdering the Yarrs.

PROSECUTOR: Okay. And what statements did he make at that point?

DET. NOLE: He said that wasn’t him. That he didn’t do it and, um, that

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<sup>3</sup> The *CrR 3.5 Findings* also makes reference to an alleged waiver of CrR 3.1. *CrR 3.5 Findings*, pg. 14, fn. 10. The Appellant does not address this conclusion here because it did so in its *Opening Brief* (pgs. 98 – 101).

*he wanted a lawyer.*<sup>4</sup>

On cross-examination, Detective Nole reiterated Mr. Pierce's request for an attorney:

DEF. COUNSEL: ...Detective Apeland was also present?

DET. NOLE: Yes.

DEF. COUNSEL: All right. At the close of your interrogation *Mr. Pierce requested to speak with an attorney, correct?*

DET. NOLE: *Yes.*

DEF. COUNSEL: And at that point you ended your interrogation of Mr. Pierce, correct?

DET. NOLE: Yes.

DEF. COUNSEL: Do you recall where Mr. Pierce was taken *after he invoked his right to speak with an attorney?*

DET. NOLE: As far as I know he was taken back over to the jail, or taken to the jail because it would have been the first time he was there.<sup>5</sup>

The detectives' conduct also clearly demonstrates that Mr. Pierce requested an attorney as they ceased the interview at the point he requested one.<sup>6</sup>

Because these facts are not included in the *CrR 3.5 Findings*, the conclusion that Mr. Pierce's request for an attorney was equivocal is based on an incomplete record. As such, the trial court's conclusion that the state was not required to comply with CrR 3.1(c)(2) because Mr. Piece never "asked to contact an attorney" is erroneous.

The *CrR 3.5 Findings* are also erroneous because it completely fails to include the fact that when the detectives ceased the interrogation because Mr. Pierce requested an attorney and he was transported to the Jefferson County Jail, the detectives told members of Jefferson County

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<sup>4</sup> RP (2/17/10) 227 (emphasis added). RP refers to the Verbatim Reports of the Proceedings.

<sup>5</sup> RP (2/17/10) 230. (emphasis added).

<sup>6</sup> RP (2/17/10) 230 – 231; 256.

Jail that Mr. Pierce requested an attorney. The *CrR 3.5 Findings* ignores this fact, merely stating that “the detectives immediately stopped the interview and turned Mr. Pierce over to the correction staff.” *CrR 3.5 Findings*, pg. 3, ¶24. But, the detectives’ testimony during the pre-trial hearing describes more:

DEF. COUNSEL: Did you *make any efforts to put Mr. Pierce in touch with the attorney that he had requested?*

DET. NOLE: *I told the jailer that he, he, or Mark, one of us told the jailer that he wanted to be, you know, that he wanted an attorney. That would be standard practice.*<sup>7</sup>

Had these facts been included in the *CrR 3.5 Findings*, it would demonstrate that: (1) Mr. Pierce, during the first interrogation, specifically and unequivocally requested an attorney; (2) the detectives did not provide one “at the earliest opportunity”<sup>8</sup>; and (3) the detectives, upon transporting Mr. Pierce to the Jefferson County Jail told the Jefferson County Jail staff that Mr. Pierce wanted to speak with an attorney. Thus, including these facts would explain why, contrary to the trial court’s conclusion, CrR 3.1(c)(2) was required.

## 2. The Misapplication of CrR 3.1(c)(2).

It is undisputed that because it was after regular business hours, in order to contact a public defender, an inmate must indicate that he wants to speak with an attorney, at which point a corrections officer escorts the defendant to the booking desk, dials the home phone number of the public defenders, and then hands the phone to the inmate. *CrR 3.5 Findings*, ¶29. The trial court concluded that since Mr. Pierce did not tell the jail officer that he wanted to speak with an attorney, then the jail officer was not obligated to provide the list of public defender numbers.

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<sup>7</sup> RP (2/17/10) 230-231(emphasis added); See also RP (2/17/10) 258: “I recall it [advising a jailer that Mr. Pierce wanted an attorney] mentioned to the corrections officer that Mr. Pierce didn’t want to talk to us any longer without an attorney.”

<sup>8</sup> There are not findings or conclusions set forth in the *CrR 3.5 Findings* to explain why the detectives or the Jefferson County Jail staff was prevented from placing Mr. Pierce with an attorney at the “earliest opportunity.”

*Id.* pgs 11 – 12. As noted above, however, this conclusion fails to acknowledge the undisputed facts that Mr. Pierce told the detectives that he wanted a lawyer and the detectives told an officer at the Jefferson County Jail of Mr. Pierce’s specific requests. The fact that the request was ignored doesn’t equate that it didn’t happen. Mr. Pierce is not obligated to repeat his request to each detective or jail officer.

The *CrR 3.5 Findings* also erroneously misconstrues CrR 3.1(c)(2) by requiring a person in custody to not only request an attorney but also specifically demand the means to effectuate that request. There is no legal authority in the *CrR 3.5 Findings* to support the proposition that CrR 3.1(c)(2) requires Mr. Pierce, after he already requested an attorney, that he had to re-request his desire for an attorney or the he had to specifically demand access to the means to effectuate that request (*i.e.*, the telephone numbers of the public defenders). There is no authority for this proposition because it is at odds with the specific directives of CrR 3.1(c)(2). The only affirmative condition that a person in custody must do under CrR 3.1(c)(2) is request an attorney. Once that request is made, it is the state’s obligation to provide a phone, phone numbers, and any other means necessary to effectuate that requests.<sup>9</sup>

The trial court’s conclusion that Mr. Pierce didn’t ask for an attorney and therefore CrR 3.1(c)(2) was not required is erroneous. Mr. Pierce did request an attorney and that request was imputed to members of the Jefferson County Jail. It was merely ignored. There is no authority to support the conclusion that he was required to reinstate that request or demand access to the means to effectuate it.<sup>10</sup>

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<sup>9</sup> See *e.g.*, *City of Seattle v. Carpenito*, 32 Wn.App. 809; 649 P.2d 861 (1982) *City of Bellevue v. Ohlson*, 60 Wn.App. 485, 487, 803 P.2d 1346 (1991); *City of Seattle v. Wakenight*, 24 Wn.App. 48, 49-50, 599 P.2d 5 (1979); *State v. Kirkpatrick*, 89 Wn.App. 407, 414, 948 P.2d 882 (1997).

<sup>10</sup> It is unclear from the record - and likely irrelevant - whether there were different jail staff officers involved and thus the one that provided Mr. Pierce a phone didn’t know that Mr. Pierce had previously requested an attorney. See *e.g.*, *State v. Earls*, 116 Wash.2d 364, 383, 805 P.2d 211, 221 (1991)(dissent, J. Utter)( Although the booking officer

For these reasons as well as those set forth in Section VII of the AOB, CrR 3.1(c)(2) was not complied with and the statements should be excluded.

DATED this 9<sup>th</sup> day of May, 2011.

Respectfully Submitted:



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did not relay this information to anyone else, his knowledge of the call is imputed to all officers involved); citing *State v. Middleton*, 135 Wis.2d 297, 312, 399 N.W.2d 917 (1986) (one officer's knowledge of a fact is generally imputed to entire police force whether or not he failed to pass it on) *overruled on other grounds*, *State v. Anson*, 282 Wis.2d 629, 698 N.W.2d 776 (Wis.,2005).

CERTIFICATE OF SERVICE:

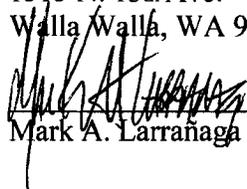
I certify that on the 9<sup>th</sup> day of May, 2011, I caused a true and correct copy of the SUPPLEMENTAL BRIEF SPECIFICALLY ADDRESSING FINDINGS OF FACT AND CONCLUSIONS OF LAW, was served upon the following individuals by depositing same in the United States Mail, first class, postage prepaid:

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