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NO. 52761-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR SHCHUKIN,
Appellant.

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

The Honorable Robert A. Lewis, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it found that Mr. Shchukin's statements were admissible because they were spontaneous rather than the result of questioning by Deputy Brannan. Finding of Fact 7 from the 3.5/3.6 hearing.

2. The trial court erred when it concluded that Mr. Shchukin's statements at the scene of the crash were admissible even though they were made without *Miranda* warnings and while being questioned by the police.

3. The trial court erred when it denied Mr. Shchukin's request for a *Franks*¹ hearing because Detective Preston omitted critical details from the search warrant affidavit that negated the magistrate's finding of probable cause.

4. Mr. Shchukin assigns error to Findings of Fact 3, 7 and 8. He also assigns error to Conclusions of Law 3, 4, and 9.

¹ 1 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Issues Presented on Appeal

1. Did the trial court err when it found that Mr. Shchukin's statements at the scene of the crash were admissible without *Miranda* warnings and "without being prompted" where Deputy Brannan admitted that he had asked questions to determine how the crash had happened?
2. Did the trial court err when it concluded that Mr. Shchukin's statements at the scene of the crash were admissible at trial when they were made in response to police questioning while in custody and before *Miranda* warnings were given?
3. Did the trial court err when it denied Mr. Shchukin's request for a *Franks* hearing where Detective Preston omitted critical details from the search warrant affidavit that negated the magistrate's finding of probable cause?

B. STATEMENT OF THE CASE

Substantive facts

On December 17, 2016, Kirsten Larkin and Crystal Sherrill were driving from their home to the Fern Prairie Market along Cabot Road near Camas, Washington. RP 314-15, 331-33. As they

approached the 3400 block of Cabot Road, they heard a car horn blaring. RP 315, 333. They rounded a corner and saw that a car had gone off the road and struck a tree on the passenger's side. RP 333. There was a male trying to climb out of the driver's seat yelling for Ms. Larkin and Ms. Sherrill to "save her." RP 318-19. Ms. Larkin noticed a hand on the passenger seat's armrest and realized there was a deceased female passenger in the car. RP 318. Ms. Sherrill called 911 for medical aid. RP 322, 334.

Clark County Sheriff's deputy Seth Brannan was dispatched to the scene of the crash. RP 301. Deputy Brannan arrived on scene and found the deceased female inside the car. RP 304. He also contacted a male on scene who identified himself as Arthur Shchukin. RP 306. Mr. Shchukin was distraught and emotional at the scene. RP 305. He advised the deputy that he had been driving the car and asked for his girlfriend to be removed from inside the vehicle. RP 305-06. Deputy Brannan began to ask Mr. Shchukin questions about what had happened. RP 57. Mr. Shchukin told Deputy Brannan that he had been showing off for his girlfriend, driving too fast, and that he had "killed her." RP 306. Deputy Brannan noticed the faint odor of alcohol coming from Mr.

Shchukin's breath as he spoke. RP 306.

Emergency medical personnel arrived on scene and contacted Mr. Shchukin. RP 236-37. Mr. Shchukin was extremely agitated and initially refused any medical attention. RP 238. He asked the emergency medical technician (EMT) at the scene to take him to jail and repeatedly asked if the woman in the car was dead. RP 241. Mr. Shchukin eventually calmed down enough to be assessed and was treated for facial abrasions and a broken collarbone. RP 239. He was transported to the hospital for further evaluation. RP 240-41.

Deputy Brannan relayed his observations from the scene to Detective Ryan Preston, who was then dispatched to the hospital to meet the ambulance transporting Mr. Shchukin. RP 364-66. Detective Preston sought and was granted a search warrant for Mr. Shchukin's blood. RP 371. Detective Preston executed the search warrant and acquired two vials of Mr. Shchukin's blood approximately three hours after the crash. RP 379. Mr. Shchukin waived his *Miranda* rights and agreed to answer Detective Preston's questions. RP 373.

At the hospital, Mr. Shchukin told Detective Preston that he

and his girlfriend, Alina Pozhar, had spent the day together near Jantzen Beach in Portland, Oregon. RP 373. They had gone to a bar near the beach and drank some wine. RP 373. They then drove eastbound on Washington Highway 14 toward “the mountains” and were drinking wine as Mr. Shchukin drove. RP 374. He told Detective Preston that they approached the scene of the crash on Cabot Road and he lost control of the car going around a corner. RP 374. Mr. Shchukin told the detective that he applied the brakes, but the car continued to slide and struck a tree. RP 375.

Mr. Shchukin’s blood tested positive for alcohol at 0.10 g/100mL and THC at 1.5 ng/mL. RP 433-36. At trial, an accident reconstructionist opined that Mr. Shchukin lost control of the car when its back end began to rotate while taking the corner on Cabot Road, causing the car to lose traction and slide onto the snow-covered shoulder and eventually into the tree. RP 291. The accident reconstructionist was not able to determine the car’s speed at impact, but opined that Mr. Shchukin was driving in excess of the 20 miles-per-hour advisory speed limit in effect on that stretch of Cabot Road. RP 296-97. Detectives discovered shattered glass from a bottle of wine inside the car. RP 255. Ms.

Pozhar suffered numerous injuries in the crash, including a skull fracture that killed her instantly. RP 411-14.

Statements from 3.5/3.6 hearing

The trial court held an evidentiary hearing pursuant to CrR 3.5 and CrR 3.6 to determine the admissibility of Mr. Shchukin's statements to three people involved in the investigation and to determine whether Mr. Shchukin was entitled to a *Franks* hearing. RP 19-20. The first statements at issue were those made to Deputy Brannan at the scene of the crash. RP 19. Deputy Brannan testified that Mr. Shchukin was emotional at the scene and asked him to remove the deceased passenger from the vehicle. RP 35. Mr. Shchukin then made the following statements about the crash:

[PROSECUTOR]: Did he make any other statements to you?

[DEPUTY BRANNAN]: Yes, he did.

[PROSECUTOR]: What?

[DEPUTY BRANNAN]: I documented in my report he said he was showing off for her. He went too fast and looped out in a corner. And he said "I killed her."

RP 35. The trial court determined that these statements were admissible because they were made spontaneously. RP 150; CP 151.

The second group of statements admitted at Mr. Shchukin's trial were made to paramedic Alexander Mounsey. RP 19. Mounsey arrived on scene and asked Mr. Shchukin what had happened:

[PROSECUTOR]: Can you describe any statements that were made either by you or by him or who started it?

[MR. MOUNSEY]: Yeah. As I approached him I asked him what happened and if he was okay. The statements were that he did it-or, in quotes, "I did it. I killed her."

RP 77. Mr. Mounsey eventually asked Mr. Shchukin to accompany the paramedics to a hospital:

[PROSECUTOR]: And did Mr. Shchukin agree to go to the hospital with you at all?

[MR. MOUNSEY]: Initially Mr. Shchukin said he just wanted to go to jail, um, because he felt that's where he needed to be.

RP 81. The trial court concluded these statements were admissible because the paramedics were not acting at the behest of law enforcement, therefore Mr. Shchukin was not subjected to custodial interrogation. CP 155.

The final statements at issue were Mr. Shchukin's statements to Detective Preston at the hospital after he was read his *Miranda* rights. RP 19. The trial court found these statements to be admissible as they were made after Mr. Shchukin made a

knowing and voluntary waiver of his right to remain silent. CP 156.

At the same hearing, Mr. Shchukin requested that the court hold a *Franks* hearing based on omissions from Detective Preston's search warrant affidavit. RP 20. Mr. Shchukin alleged that Detective Preston deliberately omitted in the search warrant affidavit the fact that Mr. Shchukin was not displaying the traditional indicators of alcohol impairment based on the fact that Mr. Shchukin was steady on his feet, was not slurring his speech, and did not have noticeably bloodshot or watery eyes. RP 124-26. The trial court found these omissions to be "negligible" and "not material." CP 157. The trial court denied Mr. Shchukin's request for a *Franks* hearing. CP 157.

Procedural facts

The state charged Ms. Shchukin with one count of vehicular homicide while under the influence of alcohol and/or drugs. CP 32. Mr. Shchukin waived his right to a jury trial and proceeded to a bench trial. CP 129.

The trial court found Mr. Shchukin guilty as charged based on him having a blood alcohol content of 0.10 g/100mL, which is over the per se legal limit of 0.08 g/100mL of alcohol. RP 488-90. The court also entered a finding that Mr. Shchukin was affected by

alcohol. CP 61. The trial court entered findings of fact and conclusions of law relating to the bench trial and suppression hearing. CP 149-57. The trial court found that:

1. Mr. Shchukin's statements to Deputy Brannan at the scene of the collision were "unprompted";
2. The medical personnel asked Mr. Shchukin questions about the collision to assess his condition and provide medical treatment; and
3. Deputy Brannan never arrested Mr. Shchukin.

CP 150-51. Based on these findings, the trial court concluded that Mr. Shchukin's statements to both Deputy Brannan and Alexander Mounsey were admissible at trial. CP 154-55. It also concluded that Mr. Shchukin was not entitled to a *Franks* hearing because any omissions from the search warrant affidavit were not material to a finding of probable cause. CP 156.

The trial court imposed a mid-range sentence of 95 months. RP 505. Mr. Shchukin filed a timely notice of appeal. CP 179.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT CONCLUDED MR. SHCHUKIN'S STATEMENTS TO DEPUTY BRANNAN AND THE PARAMEDICS WERE ADMISSIBLE AT TRIAL BECAUSE MR. SHCHUKIN MADE THE STATEMENTS WHILE IN CUSTODY BUT BEFORE RECEIVING *MIRANDA* WARNINGS

Police must give *Miranda* warnings when a suspect is questioned while in police custody. *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013) (citing *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004)). “Without *Miranda* warnings, a suspect’s statements during custodial interrogation are presumed involuntary.” *Rosas-Miranda*, 176 Wn. App. at 779 (citing *Heritage*, 152 Wn.2d at 214).

A suspect is “in custody” for the purposes of *Miranda* when “a reasonable person in [the] suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest.” *Rosas-Miranda*, 176 Wn. App. at 779 (citing *Heritage*, 152 Wn.2d at 218). Courts examine the totality of the circumstances in determining whether a suspect was in custody. *Rosas-Miranda*, 176 Wn. App. at 779 (citing *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008)).

The trial court entered conclusions of law ruling that the statements Mr. Shchukin made at the scene and in the ambulance to Deputy Brannan and paramedic Alexander Mounsey were admissible at trial. CP 156-57. The trial court concluded that Mr. Shchukin was not in custody for the purposes of *Miranda* when he made the statements and that the statements were spontaneous, therefore warnings were not required. CP 156-57.

“Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014) (citing *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). “Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Homan*, 181 Wn.2d at 106.

Custody

In analyzing whether Mr. Shchukin was in custody, the crucial inquiry is whether a reasonable person in his position would believe he or she was being subjected to a custodial interrogation. *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004) (citing

State v. Post, 118 Wn.2d 596, 607, 837 P.2d 599 (1992)). Under the circumstances of this case, a reasonable person would believe they were not free to leave, their movement had been restrained, and they were now in police custody.

At the time Deputy Brannan arrived at the scene of the crash, Mr. Shchukin was on his knees roughly 20 feet from the car and sobbing. RP 33. Deputy Brannan verified that Ms. Pozhar was deceased inside the car and then contacted Mr. Shchukin, who identified himself as the driver of the car. RP 34-35. Mr. Shchukin was not free to leave, he was not read his *Miranda* rights, and Deputy Brannan began to ask him questions about what had happened. RP 55-57. Paramedics on scene also asked Mr. Shchukin questions about the crash and whether he had consumed an intoxicant, and the record shows the paramedics arrived after Deputy Brannan. RP 74, 76-79. Mr. Shchukin's statements establish he had observed that Ms. Pozhar was deceased inside the car and the record also shows he identified himself as the driver. RP 35.

Mr. Shchukin was at a crime scene involving a car, a deceased person, and himself, and had offered that he was the

driver. Under these circumstances, a reasonable person would not feel free to leave. The state failed to establish with substantial evidence that Mr. Shchukin was not in custody, and additionally, Mr. Shchukin's subsequent statements were made in response to police prompting, in violation of *Miranda*. CP 151 (Finding of Fact 7). CP 151, 155-56 (Conclusions of Law 3-4).

Interrogation

Although the record shows that Mr. Shchukin made some spontaneous statements such as telling the deputy his name, Deputy Brannan admitted that he questioned Mr. Shchukin after Mr. Shchukin admitted that he had been driving during a fatality collision. An "interrogation" is "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)). In the context of this case, Deputy Brannan should have known any questions about the collision would be likely to elicit an incriminating response due to the death of Mr. Shchukin's passenger. Deputy Brannan's questions about the circumstances of

the collision constitute “interrogation” under *Miranda*.

Substantial evidence does not support the trial court’s finding that Mr. Shchukin’s made the statements while out of police custody and “without being prompted.” CP 151 (Finding of Fact 7). Accordingly, the trial court also erred when it concluded that *Miranda* warnings were not required because Mr. Shchukin was not in custody and made the statements spontaneously. CP 155-56 (Conclusions of Law 3-4).

The trial court’s findings of fact are not supported by substantial evidence and therefore do not support its conclusions of law.

The remedy for a *Miranda* violation is the suppression of the unwarned statements at trial. *State v. Rhoden*, 189 Wn. App. 193, 199, 356 P.3d 242 (2015) (citing *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010)). Admitting statements in violation of *Miranda* can be harmless error, but the court must determine that the error was harmless beyond a reasonable doubt because it implicates a constitutional right. *State v. France*, 121 Wn. App. 394, 400-01, 88 P.3d 1003 (2004) (citing *State v. Cervantes*, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991)).

In this case, the admission of Mr. Shchukin's statements was not harmless beyond a reasonable doubt. Mr. Shchukin's statements at the scene that he had "killed her" and asking to be taken to jail were made before he was read *Miranda* warnings and while undergoing custodial interrogation. RP 238, 306. The prompted confession was included in the trial court's Findings of Fact from Mr. Shchukin's bench trial. CP 159 (Finding of Fact 6). The record demonstrates that the trial court took inculpatory statements into account while finding Mr. Shchukin guilty of vehicular homicide, the trial court relied on Mr. Shchukin's inadmissible custodial statements to find guilt beyond a reasonable doubt. Without these inadmissible statements, the court's finding of guilt is not supported by substantial evidence.

2. THE TRIAL COURT ERRED WHEN IT DENIED MR. SHCHUKIN'S REQUEST FOR A *FRANKS* HEARING BECAUSE DETECTIVE PRESTON OMITTED CRITICAL DETAILS FROM HIS SEARCH WARRANT AFFIDAVIT THAT NEGATE THE COURT'S FINDING OF PROBABLE CAUSE

The police sought and obtained a search warrant to determine Shchukin's blood alcohol level. RP 371. The United States Supreme Court's holding in *Franks v. Delaware* allows a

criminal defendant to challenge the validity of a search warrant affidavit when it is alleged to contain false statements or material omissions. *State v. Atchley*, 142 Wn. App. 147, 157-58, 173 P.3d 323 (2007). A defendant is entitled to an evidentiary hearing under *Franks* by making a “preliminary” showing that the warrant affiant omitted material facts or made “a false statement knowingly and intentionally, or with reckless disregard for the truth”, and those statements were “necessary to a finding of probable cause.” *Atchley*, 142 Wn. App. at 157 (quoting *Franks*, 438 U.S. at 155-56) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

“If the defendant succeeds in showing a deliberate or reckless omission, then the omitted material is considered part of the affidavit.” *Atchley*, 142 Wn. App. at 158 (citing *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992)). The court must grant a *Franks* hearing, if the affidavit, with the improper matter deleted or inserted, as appropriate, is insufficient to support a finding of probable cause *Garrison*, 118 Wn.2d at 873.

Mr. Shchukin requested a *Franks* hearing to challenge the validity of the search warrant because he alleged the affiant recklessly omitted the fact that he was not displaying any overt

indicators of intoxication from the warrant affidavit. RP 61; CP 35. The record shows that Deputy Brannan only smelled a mild scent of alcohol coming from Mr. Shchukin's person when he arrived on scene. RP 36, 55. Deputy Brannan noted that Mr. Shchukin was not slurring his words, was steady on his feet, and did not have bloodshot eyes. RP 58-59. Deputy Brannan and Detective Preston discussed Deputy Brannan's observations at the scene before applying for the search warrant. RP 103-04.

When applying for the search warrant, detective Preston omitted the facts suggesting Mr. Shchukin was not intoxicated at the time of the crash. Had Preston included the lack of visible signs of intoxication, the court would not have been able to find probable cause to support the search warrant.

The only evidence in the record suggesting the involvement of alcohol in the crash at the time Deputy Brannan first arrived on scene was a mild smell of alcohol coming from Mr. Shchukin's person. The value of this evidence in proving that Mr. Shchukin was intoxicated at the time of the crash is diminished when accompanied by the fact that he had just been riding in a vehicle where a partially-full wine bottle had shattered.

Deputy Brannan noticing the odor of alcohol coming from Mr. Shchukin's person is not sufficient on its own to establish probable cause based on suspicion of unlawful alcohol consumption. RP 36, 55. *See State v. Avery*, 103 Wn. App. 527, 539-41, 13 P.3d 226 (2000) (applying probable cause standard and finding the odor of alcohol alone was insufficient to find probable cause in vehicular homicide case). Under these facts, Mr. Shchukin was entitled to a *Franks* hearing and the opportunity to seek suppression of the fruits of the search warrant.

Additionally, Mr. Shchukin's admission to drinking wine earlier in the day does not provide the state with probable cause. Mr. Shchukin's statements at the scene about drinking wine are consistent with the statement he gave at the hospital where he described going to the beach and drinking wine with Ms. Pozhar many hours before the crash. RP 373. This fact does not prove impairment at the time the crash occurred, especially when the record also shows that Mr. Shchukin was not exhibiting the traditional indicators of impairment when speaking to Deputy Brannan. RP 58-59. Furthermore, the record contains evidence that the roadway was covered in snow and ice on the night of the crash,

suggesting an alternative explanation for the accident. RP 43; CP 56.

The search warrant affidavit submitted to draw Mr. Shchukin's blood contains material factual omissions regarding Mr. Shchukin's level of impairment. Had these omissions indicating a lack of intoxication been included in the original affidavit, the magistrate would have been unable to find of probable cause. Under these circumstances, the proper course would have been to grant Mr. Shchukin's request for a *Franks* hearing to establish the intentional omission of exculpatory facts, thereby undermining probable cause. *State v. Ollivier*, 178 Wn.2d 813, 847, 312 P.3d 1 (2013) (citing *Garrison*, 118 Wn.2d at 872).

If Mr. Shchukin established the police omission of exculpatory facts undermined the finding of probable cause, he would have had the opportunity to ask for suppression of the blood results. *Ollivier*, 178 Wn.2d at 847. This evidence was crucial to the trial court's determination of guilt because it found Mr. Shchukin guilty based on the fact that the blood draw tested positive for alcohol and cited this fact in finding the state met its burden on both the per se and "affected by" prongs of RCW 46.61.520(1)(a). The

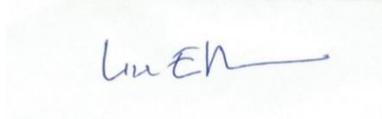
trial court's denial of Mr. Shchukin's request for a *Franks* hearing was prejudicial and this court should reverse his conviction and remand the case with instructions to hold a *Franks* hearing before a new trial.

D. CONCLUSION

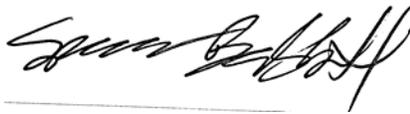
The trial court erred when it admitted Mr. Shchukin's statements at the scene of the crash following the 3.5/3.6 hearing because they were made while under custodial interrogation. These statements provided evidence of consciousness of guilt at Mr. Shchukin's trial and prejudiced his defense. Additionally, the trial court erred when it refused to hold a *Franks* hearing to determine whether Detective Preston deliberately omitted critical details from his search warrant affidavit. The trial court's refusal to hold a *Franks* hearing was prejudicial because it denied Mr. Shchukin to opportunity to suppress the results of the blood draw that were admitted to prove he had alcohol in his system at the time of the crash. These errors denied Mr. Shchukin his right to a fair trial and this court should reverse his conviction and remand for a new trial.

DATED this 25th day of April 2019.

Respectfully submitted,

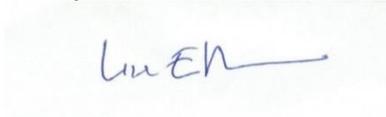


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I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office prosecutor@clark.wa.gov and Arthur Shchukin/DOC#349885, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on April 25, 2019. Service was made by electronically to the prosecutor and Arthur Shchukin by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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