

FILED
Court of Appeals
Division II
State of Washington
8/23/2019 10:59 AM

NO. 52879-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LISA HURDE,

Appellant.

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

The Honorable Erik S. Rohrer, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

| | | |
|----|--|---|
| A. | ASSIGNMENTS OF ERROR..... | 1 |
| | Issue pertaining to assignments of error | 1 |
| B. | STATEMENT OF THE CASE..... | 1 |
| C. | ARGUMENT..... | 4 |
| | HURDE’S STATEMENTS IN RESPONSE TO CUSTODIAL INTERROGATION SHOULD HAVE BEEN SUPPRESSED, BECAUSE SHE WAS NOT PROVIDED <i>MIRANDA</i> WARNINGS. ... | 4 |
| D. | CONCLUSION..... | 8 |

TABLE OF AUTHORITIES

Washington Cases

| | |
|--|------|
| <i>State v. Hagler</i> , 74 Wn. App. 232, 872 P.2d 85 (1994)..... | 8 |
| <i>State v. Harris</i> , 106 Wn.2d 784, 725 P.2d 975 (1986), <i>cert. denied</i> , 480 U.S. 940 (1987)..... | 4 |
| <i>State v. Heritage</i> , 152 Wn.2d 210, 95 P.3d 345 (2004)..... | 4 |
| <i>State v. Lozano</i> , 76 Wn. App. 116, 882 P.2d 1191 (1994) | 5 |
| <i>State v. Moore</i> , 79 Wn.2d 51, 483 P.2d 630 (1971) | 4 |
| <i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994)..... | 4 |
| <i>State v. Sargent</i> , 111 Wn.2d 641, 762 P.2d 1127 (1988)..... | 4 |
| <i>State v. Spotted Elk</i> , 109 Wn. App. 253, 34 P.3d 906 (2001)..... | 5, 7 |
| <i>State v. Wethered</i> , 110 Wn.2d 466, 755 P.2d 797 (1988)..... | 5 |

Federal Cases

| | |
|--|---|
| <i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) | 4 |
|--|---|

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding “The statements Hurde made to Deputy Clark were spontaneous, unprompted, and not in response to any questions from law enforcement.” CP 5 (Finding of Fact 8, Conclusion of Law 1).

2. The court erred in concluding appellant’s statements were made knowingly, intelligently, and voluntarily and not the product of coercion, threats, or promises. CP 6 (Conclusion of Law 2).

3. The court erred in ruling that appellant’s statements to law enforcement were admissible at trial.

Issue pertaining to assignments of error

While incarcerated, appellant was asked by correctional officers whether she had any controlled substances in her possession. In response to this questioning she handed over a container of methamphetamine and made statements explaining the circumstances of her possession. Where appellant was not provided *Miranda* warnings, should her statements have been excluded from evidence at trial?

B. STATEMENT OF THE CASE

Appellant Lisa Hurde was being held in Clallam County Jail when corrections staff decided to search her for controlled substances. RP 71.

Sergeant Bryant, Deputy Clark, and Deputy Wessel waited in the hallway outside the shower room while Deputy Brooks went to retrieve Hurde from her cell. RP 41, 43, 71-72. Brooks told Hurde that she was being taken for an attorney visit, so the other inmates would not know corrections deputies were looking for drugs. RP 72.

As he was walking Hurde down the hall toward the other officers, Brooks began interrogating her. RP 72. He first asked her if she had anything she shouldn't have. RP 42, 73. Hurde asked if he meant a pen or pencil, because she had been told she would be meeting with her attorney. RP 42, 46-47, 116. Brooks then asked specifically if she had any controlled substances, and Hurde said she did not. RP 42, 73, 116.

When Brooks and Hurde were in front of the shower room, Bryant joined in the interrogation. He told Hurde that if she had any controlled substances it would be better to turn them over, because she was going to be strip searched. RP 73. Hurde sighed, rubbed her face, and said she had something on her. RP 73. Clark then pulled Hurde into the shower room. RP 74. Hurde responded by immediately handing over a small container of methamphetamine and telling Clark she wasn't using the methamphetamine. According to Clark, Hurde said she had given some to the girls in the tank, but she hoped to get clean while in jail. RP 93-94, 102.

At no point during the entire encounter with corrections officers was Hurde provided *Miranda* warnings or otherwise advised of her right to remain silent. RP 44, 72.

Hurde was charged with possession with intent to deliver methamphetamine and possession of a controlled substance by a prisoner. CP 37; RCW 69.50.401(1); RCW 9.94.041(2). She pled guilty to possession by prisoner, stipulated to admission of test results to establish the controlled substance element, and waived her right to a jury trial. RP 11-12; CP 25-36. The court conducted a CrR 3.5 hearing concurrent with the bench trial. RP 37-38.

Following trial, the court found that Hurde's statements to Clark were spontaneous, since Clark had not asked Hurde any questions. RP 153. It concluded her statements regarding providing methamphetamine to other inmates were voluntary and admissible, and they established Hurde's intent to deliver. RP 153, 156. It entered findings of fact and conclusions of law in support of its CrR 3.5 ruling and the conviction. CP 4-6; Supp. CP (Findings of Fact and Conclusions of Law on Bench Trial, filed 8/19/19). Hurde filed this timely appeal. CP 10.

C. ARGUMENT

HURDE'S STATEMENTS IN RESPONSE TO CUSTODIAL INTERROGATION SHOULD HAVE BEEN SUPPRESSED, BECAUSE SHE WAS NOT PROVIDED *MIRANDA* WARNINGS.

The Fifth Amendment to the United States Constitution provides that “[n]o person shall ... be compelled in any criminal case to be a witness against himself.” This provision intends “to prohibit the compelling of self-incriminating testimony from a party or witness.” *State v. Russell*, 125 Wn.2d 24, 59, 882 P.2d 747 (1994) (citing *State v. Moore*, 79 Wn.2d 51, 56, 483 P.2d 630 (1971)), *cert. denied*, 514 U.S. 1129 (1995). *Miranda* warnings protect a defendant from making incriminating statements to police while in the coercive environment of police custody. *See State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987)). Police must advise suspects of their *Miranda* rights before questioning them in a custodial setting. *See Heritage*, 152 Wn.2d at 214 (citing *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988)); *see also Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Absent *Miranda* warnings, a suspect's statements during a custodial interrogation are presumed involuntary. *Heritage*, 152 Wn.2d at 214 (citing *Sargent*, 111 Wn.2d at 647-48). “Consequently, unwarned

statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*.” *State v. Lozano*, 76 Wn. App. 116, 119, 882 P.2d 1191 (1994).

In *Lozano*, the defendant was taken into custody by her community corrections officer. The officer did not provide *Miranda* warnings before asking if she had anything on her person, telling her she would be searched before she was placed in jail. She responded by reaching in her pocket, pulling out a container of heroin, and placing it on his desk. *Lozano*, 76 Wn. App. at 117-18. Because the defendant’s act of pulling the heroin from her pocket was compelled by the CCO’s request and preceded *Miranda* warnings, it was properly suppressed. *Id.* at 119; *see also State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988) (act of handing over contraband is confession of knowledge regarding that contraband).

A contemporaneous verbal statement acknowledging guilt must also be suppressed when obtained without *Miranda* warnings. *State v. Spotted Elk*, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). In *Spotted Elk*, a police officer arrested the defendant on outstanding warrants. Before cuffing and searching her, and without providing *Miranda* warnings, he asked if she had anything on her person he needed to be concerned about. In response, she removed a plastic container from her shirt pocket and told the officer it was heroin belonging to a friend. *Spotted Elk*, 109 Wn. App.

at 256. On appeal, the Court held that the defendant's testimonial act of handing the officer the heroin in response to his question should have been suppressed. *Id.* at 260-61. Moreover, her verbal statement, which amounted to a contemporaneous acknowledgment of guilt in response to the officer's question, should have been suppressed as well. Proceeding without giving *Miranda* warnings violated the defendant's constitutional right against self-incrimination. *Id.* at 261.

In this case, as in *Lozano* and *Spotted Elk*, Hurde was subjected to custodial interrogation without being provided *Miranda* warnings, in response to which she handed over controlled substances in her possession. It is undisputed that Brooks did not provide *Miranda* warnings before he asked Hurde whether she had any controlled substances on her person. RP 44. Bryant did not provide *Miranda* warnings when he joined in the interrogation, telling Hurde she was going to be searched and it would be better if she voluntarily turned over any contraband. RP 72-73. In response, Hurde acknowledged she had something, and she was taken behind a door where she handed over a container of methamphetamine. RP 73-74.

As in *Spotted Elk*, Hurde also made a contemporaneous verbal acknowledgment of guilt in response to the interrogation. Within seconds of the questioning by Brooks and Bryant, Hurde handed the container of

methamphetamine to Clark and started explaining the circumstances of her possession. RP 43, 93-94. The trial court characterized Hurde's statements to Clark as spontaneous, because Clark did not ask Hurde any questions. CP 5. But this finding ignores the fact that Clark was part of the interrogation, standing with Bryant and Brooks as they posed questions to Hurde. RP 41-43, 73-74, 117. The contact was still ongoing, and Hurde was responding to that interrogation, when Hurde handed the methamphetamine to Clark and made statements about it. Although Clark did not personally ask Hurde any questions, there can be no doubt Hurde's statements were elicited by the coercive environment of the custodial interrogation. Because Hurde was not provided *Miranda* warnings, admission of her statements violated her constitutional right against self-incrimination. *See Spotted Elk*, 109 Wn. App. at 261.

Without Hurde's statements, the evidence is insufficient to convict her of possession of methamphetamine with intent to deliver. While Hurde pled guilty to possession of methamphetamine by a prisoner and she stipulated that the substance she turned over contained methamphetamine, she testified that she had no intent to deliver the substance. RP 133. The only evidence to support the element of intent other than Hurde's statements was Bryant's testimony that the size of the rock in Hurde's possession was larger than typically seen for personal use. RP 86; Supp.

CP (Findings of Fact and Conclusions of Law on Bench Trial, filed 8/19/19). Washington cases have long recognized that possession of a larger quantity of drugs than typical for personal use is not sufficient to support an inference of intent to deliver, absent some other factor. *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994); *State v. Brown*, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993).

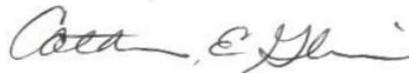
Because the evidence is insufficient to prove intent without Hurde's inadmissible statements, the conviction for possession of methamphetamine with intent to deliver must be reversed and the charge dismissed.

D. CONCLUSION

Because Hurde was not provided Miranda warnings, her statements in response to the custodial interrogation should have been suppressed. Her conviction for possession with intent must be reversed and the charge dismissed.

DATED August 23, 2019.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant
Supplemental Designation of Clerk's Papers in *State v. Lisa Hurde*, Cause
No. 52879-7-II as follows:

Lisa Hurde/DOC#828521
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
August 23, 2019

GLINSKI LAW FIRM PLLC

August 23, 2019 - 10:59 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52879-7
Appellate Court Case Title: State of Washington, Respondent v. Lisa J. Hurde, Appellant
Superior Court Case Number: 18-1-00304-0

The following documents have been uploaded:

- 528797_Briefs_20190823105843D2997758_0764.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 52879-7 State v Hurde Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- jespinoza@co.clallam.wa.us

Comments:

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com
Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
Phone: 360-876-2736

Note: The Filing Id is 20190823105843D2997758