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Court of Appeals
Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

LISA HURDE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 18-1-00304-05

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the methamphetamine should not be suppressed because Hurde waived any objection to its admission in evidence by pleading guilty and affirmatively stipulating to possession at trial?
2. Assuming the admission of the statement to Sgt. Bryant and act of handing over methamphetamine to Deputy Clark was error, whether the error was harmless because Hurde already entered a plea of guilty, stipulated to the admission of the methamphetamine, and argued it was whether she had intent to deliver that was issue rather than the fact of possession?
3. Whether Hurde's testimonial act of handing over the methamphetamine was not a product of custodial interrogation because after denying possession, she only handed it over when about to be strip searched?
4. Whether Hurde's statements about providing methamphetamine to other jail inmates should be not be suppressed because the statements were unrelated to the simple question of whether Hurde possessed methamphetamine?

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II. STATEMENT OF THE CASE

Ms. Hurde was booked into custody of the Clallam County Corrections Facility on June 23, 2018. RP 70. On July 20, 2018, the State filed an information charging Hurde with Count 1, Possession with intent to deliver a controlled substance, to wit: Methamphetamine, and count 2, Possession of a controlled substance by prisoner–county or local facility, to wit: Methamphetamine. CP 37–38. Both counts were alleged to have been committed on or about June 28, 2018. CP 37–38.

Bench Trial

Hurde waived her right to a trial by jury. CP 36. On Nov. 14, 2018, the case proceeded to a bench trial before Judge Rohrer and a CrR 3.5 hearing regarding the admissibility of Hurde’s statements was held during the trial. RP 29, 37.

Stipulation

Prior to opening arguments, defense counsel pointed out that there was a stipulation to the possession charge in Count 2 which Hurde pleaded guilty to. RP 35. The parties stipulated that the nature of the substance in State’s Ex. 2 was methamphetamine and that the test results of Ex. 2 would be admitted at trial as State’s Ex. 1. CP 25.

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Testimony

Clallam County Corrections Deputy Brooks testified that on June 28, 2018, he had contact with Hurde and removed her from her tank to inquiry whether she had anything she was not supposed to have. RP 40, 41–42. Ms. Hurde responded with a question, “like a pencil,” and Brooks clarified that he thinking of something more like narcotics. RP 42, 72–73.

Ms. Hurde denied having anything when asked by Deputy Brooks if she had something like narcotics or controlled substances on her person. RP 42, 73, 116. Brooks then informed Hurde that he was taking her to be strip searched by Deputy Clark. RP 42. Brooks walked Hurde over to the search and shower area where they were met by Deputy Clark and Sgt. Bryant. RP 42, 71. Deputy Brooks testified that he did not provide Hurde with any *Miranda* warnings. RP 44.

When Sgt. Bryant told her it would be better if she just turned it over if she had it because she was going to be strip searched, Ms. Hurde, said she had already been strip searched. RP 73. Sgt. Bryant told Hurde that she would be searched again and Hurde sighed and said she had something on her. RP 73. Sgt. Bryant did not provide Hurde with *Miranda* warnings. RP 72.

Then, Deputy Melissa Clark escorted Hurde into the shower room where the search was to occur and the door was closed. RP 43, 91. While

in the shower room, Deputy Clark told Hurde she was going to do an unclothed body search as she was instructed to by her Sergeant and that she didn't know any of the circumstances of the situation. RP 91. Clark informed Hurde how the search would proceed and that Hurde was to take off a piece of clothing and hand it to Clark piece by piece. RP 93 Before Hurde began removing any clothes, she removed from her bra a blue tupperware box later determined to contain methamphetamine and gave it to Deputy Clark. RP 93, 95.

Deputy Clark testified that Hurde said that "she didn't know what to do with it when she brought it in. That she wasn't using it. Um, that she had given it to the girls in the tank, that they were the ones using it, and if we needed to we could test her urine, but that she came to jail to get clean and -- just -- she just freely handed it over." RP 94.

Then the door opened a little bit and Deputy Clark handed Deputy Brooks the small blue container with methamphetamine in it. RP 43, 48. The container contained a rock of methamphetamine which Sgt. Bryant described as big as his thumb. RP 87. Sgt. Bryant testified that in his 30 years experience, he had seen a lot of stuff come in or attempted to come into the jail, and that when they find methamphetamine on a jail inmate, it is typically a lot less in amount. RP 68, 79–80, 86.

Later, Deputy Cortani inspected the packaged the evidence and then interviewed Hurde about the incident. RP 51. Cortani provided Hurde with *Miranda* warnings in an interview room. RP 58. Defense counsel asked Cortani if he asked Hurde about the nature of the substance and the deputy prosecutor objected on grounds of hearsay. RP 60. Defense counsel argued that Hurde had already admitted it was methamphetamine and referred to the stipulation. RP 60. The court inquired if there was a stipulation on this point and the prosecutor agreed there was. RP 61. The court pointed out that it was an admission against interest and that Hurde was admitting she was guilty of possession of methamphetamine and overruled the State's objection. RP 61–62.

Hurde admitted in direct testimony and cross examination that she possessed the methamphetamine at issue and handed the methamphetamine over to a corrections deputy. RP 118, 132–33, 135.

Findings of Fact and Conclusio[n] of Law on CrR 3.5 hearing

Findings of fact and conclusions of law were entered on the issue of the admissibility of Hurde's statements to the corrections deputies. CP 5. The court found that Hurde's statements to Deputy Clark were spontaneous, unprompted, and not in response to any questions from law enforcement. CP 5. "There was no use of force, threats, or intimidation to illicit responses from Hurde at any time." CP 5. "Hurde's statements to

Deputy Brooks and Deputy Clark were made knowingly, intelligently and voluntarily and were not the product of coercion, threats, or promises.” CP 6.

Court ruling on bench trial

After closing arguments were heard, the court pointed out that Hurde admitted to possession of methamphetamine and that therefore the only issue was related to the intent to deliver. RP 151. The court found Hurde guilty of possession with intent to deliver a controlled substance. RP 156.

III. ARGUMENT

A. HURDE WAIVED ANY OBJECTIONS TO HER STATEMENTS ADMITTING POSSESSION OF METHAMPHETAMINE AND THE ADMISSION OF HER STATEMENTS WERE HARMLESS AND THEY WERE NOT THE PRODUCT OF CUSTODIAL INTERROGATION.

- 1. Hurde waived her challenge to the admissibility of her admissions to possession of methamphetamine when she entered a plea of guilty to possession and stipulated to the admission of the methamphetamine and test results and the admission of the evidence was harmless.**

By affirmatively entering into a stipulation and pleading guilty to possession of the methamphetamine at issue, the issue of whether Hurde’s statements or conduct admitting possession should have been suppressed is waived on appeal. *See State v. Valladares*, 99 Wn.2d 663, 671–72, 664 P.2d 508 (1983) *called into doubt on other grounds in State v. Roberts*,

142 Wn.2d 471, 493 (2000) (citing *Johnson v. United States*, 318 U.S. 189, 200, 63 S.Ct. 549, 87 L.Ed. 704 (1943)); *see also State v. Rice*, 24 Wn. App. 562, 564 603 P.2d 835 (1979) (finding it “unnecessary to address the question of the statement's admissibility because defendant waived any objection to its admission.”).

In *Valladores*, the defense had initially challenged the search of the defendant's suitcase and briefcase. *Valladares*, 99 Wn.2d at 671. The defense affirmatively withdrew its challenge and proceeded to trial. The *Valladores* Court held that this affirmative act effectively waived the challenge of the search on appeal. *Id.* 671–72.

Here, defense counsel argued at closing as follows: “We're not denying the fact she had possession. That was stipulated to, it was already pled to, that ain't the issue. The issue is what her intent was with that methamphetamine.” RP 145. Hurde did in fact plead guilty to and admit possessing the methamphetamine by a prison in a local facility. RP 11; CP 33. Hurde also stipulated to the identity of the substance and possession. RP 34, 35. Furthermore, Hurde admitted in direct testimony and cross examination that she possessed the methamphetamine at issue and handed the methamphetamine over to a corrections deputy. RP 118, 132–33, 135.

Another way to analyze this issue is by assuming it was erroneous. If so, was it harmless error beyond a reasonable doubt. “A constitutional

error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988) (citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)).

Here, Hurde’s strategy was not to contest the fact she possessed the methamphetamine, but rather, to contest whether she had intent to deliver. Hurde entered a plea of guilty to possession of the methamphetamine at issue and stipulated to the nature of the substance and test results and admitted in direct testimony she possessed the methamphetamine.

Therefore, the suppression of Hurde’s statement that she had something and her act of handing over the meth was harmless.

Hurde waived her claim that the statement to Sgt. Bryant and act of handing over the methamphetamine should be suppressed.

2. Hurde’s statement to Sgt. Bryant and the testimonial act of handing over methamphetamine to Deputy Clark were compelled by the imminent body search and were not products of improper custodial interrogation.

“The general rule is that a statement is voluntary if it is made spontaneously, is not solicited, and not the product of custodial interrogation.” *State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985) (citing *State v. Miner*, 22 Wn. App. 480, 591 P.2d 812 (1979)).

Here, Ms. Hurde *denied* having any narcotics when asked by Deputy Brooks if she had controlled substances on her person. RP 42, 73. Even after Sgt. Bryant told her it would be better if she just turned it over if she had it because she was going to be strip searched, Ms. Hurde, replied that she had already been strip searched. RP 73. Sgt. Bryant said that she would be searched again and only then did Hurde sigh and say that she had something on her. RP 73.

These facts show that Ms. Hurde simply denied possession in response to Brooks and Bryant's inquiry. There was no admission at all until Sgt. Bryant informed Hurde that she would be searched again. Even after Hurde entered the shower room, it was only after Deputy Clark told Hurde she was going to proceed with the search that Hurde handed over the methamphetamine as its discovery was imminent.

For this reason, Hurde reliance upon *Lozano* is misplaced because in that case, the Lozano immediately produced the heroin after being asked if she had anything on her. *State v. Lozano*, 76 Wn. App. 116, 119, 882 P.2d 1191 (1994) (holding the act of handing over heroin was suppressed but not the heroin itself due to the absence of coercion).

Therefore, the statement that she had something on her and the act of handing over the methamphetamine to Deputy Clark were not the product of custodial interrogation. Rather, these statements were

compelled by Hurde's own knowledge of the imminent strip search just as it was about to occur.

Therefore, the statement to Sgt. Bryant and the act handing over the methamphetamine were not the product of custodial interrogation without the benefit of *Miranda* and should not be suppressed.

B. HURDE'S STATEMENT ABOUT PROVIDING METHAMPHETAMINE TO OTHER INMATES WAS UNRELATED TO THE QUESTION ASKED AND WAS OFFERED TO DEPUTY CLARK TO SET THE RECORD STRAIGHT.

1. Hurde's unsolicited statement to Deputy Clark regarding the provision of methamphetamine to other inmates was unrelated to Deputy Brooks' and Sgt. Bryant's limited inquiry as to whether Hurde possessed controlled substances.

A defendant's incriminating statement that is not a response to an officer's question is freely admissible. *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966); *Rhode Island v. Innis*, 446 U.S. 291, 299, 300, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980).

"It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 303.

Here, while in the shower room, Deputy Clark, without asking any questions of Hurde, told Hurde she was going to do an unclothed search

body search and before Hurde began removing any clothes, she turned over the container of methamphetamine to Deputy Clark.

Without any request for an explanation, Hurde told Clark “she didn't know what to do with it when she brought it in. That she wasn't using it. Um, that she had given it to the girls in the tank, that they were the ones using it, and if we needed to we could test her urine, but that she came to jail to get clean and -- just -- she just freely handed it over.” RP 94.

Hurde's statements to Clark were unrelated to the question by Brooks of whether she had controlled substances on her person. Hurde had already effectively answered Brooks question when she handed over the methamphetamine to Deputy Clark after Deputy Clark instructed Hurde how the search would proceed.

Further, Deputy Brooks and Sgt. Bryant could not anticipate Hurde would confess to Clark above and beyond what they were inquiring about, especially after Hurde denied possession.

Therefore, Hurde's statements to Deputy Clark do not fall within *Miranda* because they were not related to Deputy Brooks question of whether she had controlled substances on her person. The Court should uphold the admission of Hurde's statements to Deputy Clark.

2. Hurde’s statement after she handed over methamphetamine to Deputy Clark was volunteered as an attempt to set the record straight without any prompting or request for an explanation.

“Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by the rule of *Miranda*.” *State v. Roberts*, 14 Wn. App. 727, 731, 544 P.2d 754 (1976) (citing *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

State v. Roberts, although involving a non-custodial statement to a parole officer from an undisclosed location, is similar in regards to the finding that Roberts volunteered his statement to set the record straight. *See Roberts*, 14 Wn. App. at 728.

Roberts called his parole officer to inform that he had just been involved in the burglary of a camper in Moses Lake, Washington, in which he and his friend had stolen two firearms and also an automobile. *Id.* Roberts went to lengths to point out to his parole officer that it was his friend that stole the vehicle but that Roberts had ridden in it to Seattle knowing it was stolen making him an accessory. *Id.* Roberts knew his parole would be revoked but he wanted to “set the record straight on what he had or had not done.” *Id.*

The *Roberts* court, upholding the admission of Robert's statements, found Robert's volunteered his statements as he was "seeking upon his own initiative to 'set the record straight.'" *Id.* at 731.

Similarly, as in *Roberts*, Hurde volunteered her statements to Deputy Clark in an effort to set the record straight on what she had or had not done. As in *Roberts*, where he accused his friend of stealing the automobile, Hurde accused other inmates of the primary wrongdoing in her mind, the use of methamphetamine in jail. Hurde went to lengths to point out that she had not used any methamphetamine and was getting clean while in jail.

Hurde did not need to do this as there was no request for an explanation or any additional information and the methamphetamine had already been turned over to the corrections officers.

Hurde cites to *Spotted Elk* to support her argument that her statement to Clark was contemporaneous with the act of handing over the meth in response to Brooks' question and should be suppressed. *State v. Spotted Elk*, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). *Spotted Elk* is distinguishable from the facts of this case.

In Spotted Elk, after the officer asked Ms. Spotted Elk if she had anything on her, Ms. Spotted Elk not only handed over heroin, but she told the officer that the item was heroin belonging to a friend. *Id.* at 256.

Spotted Elk's statement was directly related to the question of knowing possession of heroin. Unlike the instant case, Spotted Elk did not state that she had shared the heroin with any one or had provided it with anyone nor did she admit to any other crime. Additionally, unlike in the instant case, Spotted Elk provided the heroin in direct response to the officers question when asked.

In this case, Hurde denied she had anything. When told she would be searched, she said she was already searched. Hurde did not produce the methamphetamine in response to any questioning. She only handed it over in the face of an imminent search. Spotted Elk does not apply.

Hurde volunteered additional statements regarding an additional crime after she handed the methamphetamine to Deputy Clark. These statements were not the product of custodial interrogation and they were unrelated to the question asked. The Court should uphold the admission of Hurde's statements to Deputy Clark.

IV. CONCLUSION

Hurde waived her objection to her statements admitting possession of methamphetamine when she entered a plea of guilty to possession of methamphetamine and when she stipulated to the admission of the methamphetamine at trial. Hurde's defense was clear and the only issue

was whether Hurde possessed the methamphetamine with intent to deliver.
For the same reasons, any error would have been harmless.

The statements that Hurde made to Deputy Clark after she handed over the methamphetamine admitted to an additional crime were unsolicited and unrelated to Brooks question of whether Hurde possessed a controlled substance. Therefore, the statements should not be suppressed under *Miranda*.

For all the foregoing reasons, the conviction should be affirmed.

Respectfully submitted this 22nd day of October, 2019.

MARK B. NICHOLS
Prosecuting Attorney

A handwritten signature in blue ink that reads "Jesse Espinoza". The signature is written in a cursive, flowing style.

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Catherine Glinski on October 22, 2019.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

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