

**FILED**

**FEB 02 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 29067-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

CODY MILLER,  
Appellant.

---

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

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BRIEF OF APPELLANT

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GREGORY C. LINK  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in failing to suppress Mr. Miller's statements to police

2. The trial court erred in failing to enter findings of fact and conclusions of law as required by CrR 3.6.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Before police may conduct a custodial interrogation of a juvenile they must advise the juvenile of the rights set forth in Miranda v. Arizona, as well as an additional advisement that informs the juvenile that "criminal responsibility can result and that the questioning authorities are not operating as his friends but as his adversaries." Despite knowledge that Mr. Miller was 17 at the time of the custodial interrogation officers did not advise him of these additional rights. Did the trial court err in failing to suppress Mr. Miller's statements?

C. STATEMENT OF THE CASE.

Andrew Zastrow entered a convenience store in Ephrata. After lingering in the store for a few minutes, Mr. Zastrow approached the counter with a soda. 4/8/10 RP 175. As he did so a man with a bandana concealing his face entered the store. Id. 176-78. Mr. Zastrow quickly left the store. Id. 210. The armed

man pointed what appeared to be a gun at cashier Veronica Moreno and demanded she place the cash from the register in a small bag he was holding. Id. 179-80,184.

Shortly after the robbery, police officers viewing the store's surveillance video quickly recognized Mr. Zastrow and questioned him regarding the robbery. 4/9/10 RP 331. Based on Mr. Zastrow's detailed description of the robber as well as his behavior observed on the store's surveillance video, police detectives assumed he himself knew the robber and that he was involved in the robbery. 4/12/10 RP 76. Mr. Zastrow provided three separate and contradictory statements to the police. Id. at 69. Based upon their belief concerning his involvement and his untruthful statements, prior to taking the third statement, the police investigator told Mr. Zastrow it was his last chance to be a witness rather than a defendant in the case. 4/12/10 RP 62. Only then did Mr. Zastrow identify Mr. Miller as the alleged robber. Despite his admission that he drove the robber, whom he claimed to be Mr. Miller, away from the scene, Mr. Zastrow was never charged with any offense. 4/12/10 RP 71.

Mr. Miller, in a custodial statement provided to police, acknowledged he was with Mr. Zastrow prior to the robbery. 4/7/10

RP 15-17. However, Mr. Miller stated he was in the lobby of a nearby hotel, where his mother works, while Mr. Zastrow had gone to the store to purchase a soda. Id. The State charged Mr. Miller with first degree robbery. CP 39-40.

A jury convicted Mr. Miller of first degree robbery. CP 50, 133.

D. ARGUMENT

1. IN THE ABSENCE OF PRIOR WARNINGS, THE COURT ERRED IN FAILING TO SUPPRESS MR. MILLER'S CUSTODIAL STATEMENT.

a. The State bears the burden of establishing a defendant waived his rights following a proper advisement. Before a statement obtained during custodial interrogation could be used at a defendant's trial, the government must establish the defendant was advised of, understood, and waived his right to remain silent and to speak with an attorney. Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The requirement of Miranda is based on the right against self-incrimination found in the Fifth Amendment. Dickerson v. United States, 530 U.S. 428, 434-35, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

The government as the party seeking to admit the statement, and as the party which controlled the circumstances in which the statement was made, has the burden of establishing that any statement obtained was made only after a defendant “knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” Miranda, 384 U.S. at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490, n. 14, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.ed. 1461 (1938)). Miranda does not dictate the precise form that a waiver must take nor does it require that the prosecution establish an express oral or written waiver. North Carolina v. Butler, 441 U.S. 369, 372, 99 S.Ct. 60 L.Ed.2d 286 (1979).

b. The State did not establish the admissibility of Mr. Miller's statements. In State v. Prater, the Supreme Court found that Miranda warnings alone were insufficient when considering the admission of a custodial statement of a juvenile. 77 Wn.2d 526, 531-32, 463 P.2d 640 (1970). Instead, the Court borrowed a rule from the Oregon Supreme Court that a statement is admissible only if “it is made clear to the juvenile that criminal responsibility can result and that the questioning authorities are not operating as

his friends but as his adversaries.” 77 Wn.2d at 531-32 (quoting State v. Gullings, 244 Or. 173, 416 P.2d 311, 313-14 (1966)).

The “rights” card used by Corporal Koch in this case contained the additional juvenile warnings required by Prater. The card specifically provides:

If you are under the age of 18, anything you say can be used in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if you are tried as an adult.

4/7/10 RP at 22. The officer was aware Mr. Miller was 17 at the time of the offense. Id. The officer, however, did not read the juvenile portion of the warning to Mr. Miller. Id. at 22-23. The officer attempted to explain his failing as resulting from his desire not to detain Mr. Miller any longer than necessary. Id. at 25.

Based upon that omission, Mr. Miller sought to exclude his statements to Corporal Koch. 4/7/10 RP 34-37.

The court ruled there was no authority to expand the required warnings beyond what Miranda requires. 4/7/10 RP 41. But Prater has plainly done that, requiring the State show the juvenile understood the potential use of a statement in a criminal as opposed to juvenile proceeding. 77 Wn.2d at 531-32. Despite the requirement of Prater and despite the fact the warnings were

printed on the card he carried with him every day, Corporal Koch elected not to read them to Mr. Miller.

The State responded to Mr. Miller's argument that case law has concluded that Miranda warnings need not be in any specific form so long as they communicate the nature of the protections to the individual. 4/7/10 RP 32. But it is not a question of what words the officer used to communicate the required warnings to Mr. Miller, as he did not communicate them at all. Thus, unlike the cases on which the State relied this is not merely a dispute about the adequacy of the warnings but rather a case with no warnings at all.

But beyond the officer's failure to provide the required warnings, the State did not establish that Mr. Miller waived his rights. In determining the validity of a juvenile's waiver of his rights and the voluntariness of any resulting statement, a court must give particular consideration to factors such as the youth's age, intelligence and experience. Whether a juvenile has knowingly and voluntarily waived his Miranda rights is determined by a "totality-of-the-circumstances" approach. Fare v. Michael C., 442 U.S. 707, 725, 99 S.Ct. 2560, 2571, 61 L.Ed.2d 197 (1979); Dutil v. State, 93 Wash.2d 84, 606 P.2d 269 (1980); State v. Luoma, 88 Wash.2d 28, 558 P.2d 756 (1977).

The totality approach permits indeed, it mandates inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981) (quoting Michael C., 442 U.S. at 725).

Despite the “mandate” of Michael C. the trial court here concluded it need not inquire into Mr. Miller’s “subjective state of mind.” 4/7/10 RP 43. The trial court acknowledged Mr. Miller’s lack of experience in criminal matters but concluded that was irrelevant to the question of whether his statement could be admitted. Id. at 42. In fact, the court did not even apply a voluntariness analysis, simply concluding instead that proper Miranda warnings were sufficient to allow admission of the statements. RP 43.

The trial court’s oral findings are silent on the relevant factors of which Michael C. mandates consideration. And as is made clear below, the court did not enter written findings. In the absence of consideration of any of these factors by the court, or

even a record which would allow such consideration, the trial court erred in admitting Mr. Miller's statements.

c. Because the court erroneously admitted Mr. Miller's statement, this Court must reverse his conviction. Where a statement is admitted at trial in violation of Miranda, the State bears the burden of proving the erroneous admission was harmless beyond a reasonable doubt. Arizona v. Fulimante, 499 U.S. 279, 111 S.Ct. 1246, 1249, 113 L.Ed.2d 302 (1991). In assessing whether the error was harmless, this Court must look to the "untainted evidence" to determine if it overwhelmingly leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 435-36, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Here the erroneous admission of Mr. Miller's statements was not harmless.

d. The court erred in failing to enter written findings of fact and conclusions of law. CrR 3.6(b) requires entry of written findings of fact and conclusions of law at the conclusion of a hearing on a motion to suppress. The trial court here has failed to file the required findings.

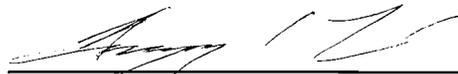
The requirement of entry of findings and conclusions is well-recognized and appellate courts have insisted on compliance with the rule. State v. Naranjo, 83 Wn.App. 300, 302, 921 P.2d 588

(1996) (complete lack of findings under JuCR 7.11(d) compels dismissal); State v. Taylor, 69 Wn.App. 474, 849 P.2d 692 (1993) (case dismissed where merits considered by Court of Appeals prior to entry of findings); State v. Bennett, 62 Wn.App. 702, 814 P.2d 1171 (1991) (sanctions recommended for failure to timely comply with JuCR 7.11(d)); State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (CrR 6.1(d) similarly requires entry of written findings and conclusions following bench trial). The failure to file written findings of fact and conclusions of law is alone a basis for appeal. See Naranjo, 83 Wn.App. at 302; contra Taylor, 69 Wn.App. 474 (case reversed for excessively delayed entry of findings and conclusions).

E. CONCLUSION

For the reasons above, this Court must reverse Mr. Miller's convictions.

Respectfully submitted this 31<sup>st</sup> day of January, 2011.



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