

No. 34073-2-III

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

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STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JOILENE TANYA MAXWELL,  
  
Appellant.

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**FILED**  
**Apr 26, 2016**  
Court of Appeals  
Division III  
State of Washington

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

The Honorable Judge Robert G. Swisher

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APPELLANT'S OPENING BRIEF

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JILL S. REUTER, Of Counsel  
KRISTINA M. NICHOLS  
Nichols Law Firm, PLLC  
Attorneys for Appellant  
P.O. Box 19203  
Spokane, WA 99219  
(509) 731-3279  
Wa.Appeals@gmail.com

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## **A. SUMMARY OF ARGUMENT**

Joilene Tanya Maxwell is required to register as a sex offender. She registered as a transient sex offender in Benton County, which required her to submit a weekly check-in sheet to the Benton County Sheriff's Office. After she complied with this requirement for many months, the Sheriff's office alleged Ms. Maxwell was not in compliance. The Sheriff's office sex offender registration clerk, Dianne McCants, contacted the prosecutor and obtained a 72-hour jail hold on Ms. Maxwell for a failure to register as a sex offender charge. Ms. McCants then went to the jail and questioned Ms. Maxwell regarding her weekly check-in sheets. Ms. Maxwell was not given *Miranda*<sup>1</sup> warnings prior to this in-custody questioning.

The State charged Ms. Maxwell with one count of failure to register as a sex offender, and the case proceeded to a bench trial. Defense counsel waived a CrR 3.5 hearing and did not move to suppress the statements Ms. Maxwell made to Dianne McCants. In finding Ms. Maxwell guilty as charged, the trial court relied on Ms. Maxwell's statements to Ms. McCants. Ms. Maxwell now appeals, challenging her defense counsel's waiver of a CrR 3.5 hearing and failure to move to suppress her statements to Ms. McCants. Ms. Maxwell requests this Court reverse her conviction.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966).

## **B. ASSIGNMENTS OF ERROR**

1. Ms. Maxwell was denied her constitutional right to effective assistance of counsel, when defense counsel waived a CrR 3.5 hearing.
2. Ms. Maxwell was denied her constitutional right to effective assistance of counsel, when defense counsel failed to move to suppress the statements Ms. Maxwell made to Dianne McCants.
3. The trial court erred in entering the following portion of Finding of Fact 6:

The defendant did not turn in weekly check-in sheets for September 9, September 16, September 23, September 30.

(CP 28).

4. The trial court erred in entering Finding of Fact 8:

Dianne McCants also testified that she informed the defendant that she was being held on a 72 hour hold for a Failure to Register charge. Dianne McCants testified that the defendant stated she had been “using” and thought she has put her check-in sheets in the box, but guessed she forgot.

(CP 29).

5. The trial court erred in entering Conclusion of Law 1:

The acts committed by the defendant occurred in Benton County, State of Washington, between the dates of September 9, 2015 to October 6, 2015.

(CP 29).

6. The trial court erred in entering Conclusion of Law 4:

The Court found the State's witnesses did not have an interest in the case. The Court found the Defense witnesses had an interest. The Court did not find it believable that the Benton County Sheriff's Office lost four (4) weekly transient check-in sheets in a row.

(CP 30).

7. The trial court erred in entering Conclusion of Law 5:

The defendant's statement that she had forgotten is consistent with the testimony of Dianne McCants and Detective Mike Wilson.

(CP 30).

8. The trial court erred in finding Ms. Maxwell guilty of failure to register as a sex offender.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether Ms. Maxwell was denied her constitutional right to effective assistance of counsel, when defense counsel waived a CrR 3.5 hearing and failed to move to suppress the statements Ms. Maxwell made to Dianne McCants.

**D. STATEMENT OF THE CASE**

Joilene Tanya Maxwell<sup>2</sup> is required to register as a sex offender.

(CP 28; RP 23, 35, 44; State's Ex. 2).<sup>3</sup> Dianne McCants is the sex

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<sup>2</sup> Ms. Maxwell is also referred to as "Ms. Eckert" throughout the record. For ease of reference, she will be referred to as Ms. Maxwell herein.

<sup>3</sup> The Report of Proceedings consists of two separate volumes. The first volume, transcribed by Joe King, contains a pretrial management hearing. The second volume, transcribed by Lisa Lang, contains the trial and sentencing. References to "RP" herein refer to the second volume.

offender registration clerk for the Benton County Sheriff's Office. (RP 10-11). She is the main contact for anyone in Benton County that has a sex offender registration requirement. (RP 11). When a person first registers as a sex offender in Benton County, Ms. McCants meets with the person face-to-face to explain their registration requirements. (RP 11, 14).

On February 20, 2015, Ms. Maxwell registered with the Benton County Sheriff's Office as a transient sex offender. (CP 28-29; RP 12-16, 39; State's Ex. 4). Ms. McCants met with her on that date and gave her the sex offender registration form to sign and initial. (CP 29; RP 12-16, 23-24; State's Ex. 4).

Ms. Maxwell is required to turn in weekly check-in sheets each Wednesday. (CP 28; RP 15, 29, 35, 45; State's Ex. 4)<sup>4</sup>. She turned in weekly check-in sheets from February 20, 2015 to September 2, 2015. (RP 16-17, 20; CP 28). According to Ms. McCants, she did not receive a weekly check-in sheet from Ms. Maxwell after this date. (RP 16-17). Ms. McCants' office then submitted a "fail-to-register request for charges." (RP 20-21).

Subsequently, Ms. McCants learned Ms. Maxwell was in jail. (RP 20-22). According to Ms. McCants, she then took the following action:

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<sup>4</sup> See also RCW 9A.44.130(6)(b) (stating that "[a] person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours.").

I got a notice she was going to be released from jail, and I knew the failure to register was outstanding, so I contacted [the prosecutor's office]. . . . Ended up talking with [a prosecutor] who approved a 72-hour hold. So I went over to the jail to speak with her personally and let her know that, you know, even though the Courts released her on the warrant, the 72-hour hold was going to be booked and that she wasn't going to be released at that time. So I spoke with her at that time and talked with her a little bit about that.

(RP 21-22).

Ms. McCants then questioned Ms. Maxwell about her weekly check-in sheets. (RP 22).

The State charged Ms. Maxwell with one count of failure to register as a sex offender, alleging she failed to turn in her weekly check-in sheets “during the time intervening between the 9th day of September, 2015, and the 6th day of October, 2015[.]” (CP 16-17). Defense counsel did not move to suppress the statements Ms. Maxwell made to Dianne McCants. The matter proceeded to a bench trial. (CP 12; RP 1-54).

On the morning of trial, defense counsel waived a CrR 3.5 hearing, stating:

There was a statement made to a sheriff's deputy when she was served with a 72-hour-hold document, and there was a statement that was made that was not responsive to any questioning at all, so it's not a custodial statement in response to interrogation, so there is not a 3.5 issue, Your Honor.

(RP 5-6).

Witnesses testified consistent with the facts stated above. (RP 1-54). In addition, Ms. McCants testified as follows regarding her questioning of Ms. Maxwell in the jail:

[The State:] Okay. And what did -- well, I guess what did she tell you? Did you ask her about her check-in?

[Ms. McCants:] I did.

[The State:] And what was her response?

[Ms. McCants:] I did. We had a conversation about that, and I let her know that there was a, you know, 72-hour hold for charges of failing to register. And I asked why -- you know, "Why didn't you check in? You know, you forgot to drop off your check-in sheets. We didn't get them." And at that time, she said, "Well, I was using -- I was using, so maybe I forgot."

[The State:] Okay. Did she ever tell you that she had brought them in and you must have lost them?

[Ms. McCants:] No.

(RP 22).

Ms. McCants explained how transient sex offenders turn in their weekly check-in sheets:

[T]here's a drop-off box that's locked. It's hanging on the wall of the Sheriff's business office. It's got a small slot in the top.

. . . .

They take a sheet. They fill out. They take it with them, and they fill out each night the address that they stayed or where they stayed, the best description that they can, and they turn it in the following Wednesday by coming into the Sheriff's Office and dropping that sheet in the transient check-in box.

. . . .

The box, like I said, is a lockbox, and there's one key to it, and it's in my office. I only -- the only two people that have access to that key are myself and my coworker Detective [Mike] Wilson.

(CP 28-29; RP 18-19, 26, 28).

Ms. McCants testified she did not have a recollection of a weekly check-in sheet being lost. (CP 29; RP 22, 26-27).

Detective Wilson, of the Benton County Sheriff's Office, testified only he and Ms. McCants remove the weekly check-in sheets from the drop-off box. (CP 29; RP 28-29). He testified he did not receive a weekly check-in sheet from Ms. Maxwell after September 2, 2015. (CP 29; RP 31-32).

Ms. Maxwell testified on her own behalf. (RP 34-44). She testified she dropped off her weekly check-in sheets in the drop-off box at the Sheriff's office on September 9, September 16, September 23, and September 30, 2015. (CP 29; RP 36-37, 40-41). Ms. Maxwell testified her fiancé Doug Barnes came with her to make sure she registered. (CP 29; RP 35-38, 42). She testified when Ms. McCants questioned her in the jail, she told Ms. McCants "I did bring them in and put them in the box." (RP 43).

Mr. Barnes testified he goes with Ms. Maxwell when she drops off her weekly check-in sheets. (CP 29; RP 45). He testified he was with her all through the month of September when she registered. (RP 46).

In its rebuttal closing argument, the State emphasized Ms. Maxwell's statements to Ms. McCants: "I don't know what [Ms. Maxwell] was doing on -- during the month of September, but, again, when [Ms.] McCants went in and talked to her, she said she must have forgotten, and there are four weeks unaccounted for." (RP 51).

The trial court found Ms. Maxwell guilty as charged. (CP 30, 32-41; RP 51-52). In its ruling, the trial court addressed Ms. Maxwell's statements to Ms. McCants:

Four or even three weeks of these sheets just disappeared. I could understand -- there are two sheets that had the same date on them, so I could understand if -- if it was just one week because then what the defendant said made sense; that she got the dates wrong. And I could understand that. But we have four weeks where they just disappeared, and her statement, the defendant's statement to Miss McCants up in the jail is consistent with them disappearing. She just forgot about it.

(RP 52).

The trial court entered written findings of fact and conclusions of law. (CP 28-30). The court entered a written finding that "[t]he defendant's statement that she had forgotten is consistent with the testimony of Dianne McCants and Detective Mike Wilson." (CP 30).

Ms. Maxwell timely appealed. (CP 43-44).

## **E. ARGUMENT**

**Issue 1: Whether Ms. Maxwell was denied her constitutional right to effective assistance of counsel, when defense counsel waived a CrR 3.5 hearing and failed to move to suppress the statements Ms. Maxwell made to Dianne McCants.**

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that “counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable.”” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

The purpose of CrR 3.5 is to provide a mechanism by which a defendant can have the voluntariness of an incriminating statement determined in a preliminary hearing, outside the presence of the jury. *State v. Williams*, 137 Wn.2d 746, 751, 975 P.2d 963 (1999) (quoting *State v. Wolfer*, 39 Wn. App. 287, 291, 693 P.2d 154 (1984)). CrR 3.5 provides, in relevant part, “[w]hen a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.” CrR 3.5(a).

Here, Ms. McCants obtained custodial statements from Ms. Maxwell without the benefit of *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966). *Miranda* applies when an interview is “(1) custodial (2) interrogation (3) by a state agent.” *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992). “Without *Miranda* warnings, a suspect's statements during custodial interrogation are presumed involuntary.”

*State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing *State v. Sargent*, 111 Wn.2d 641, 647-48, 762 P.2d 1127 (1988)).

“*Miranda* safeguards apply as soon as a suspect's freedom of action is curtailed to a . . . degree associated with formal arrest.” *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458, 460 (1989) (citations omitted) (internal quotation marks omitted). Therefore, a person is considered in custody if, based upon objective circumstances, a person reasonably believes her freedom of action is curtailed. *Id.* at 41.

“Interrogation” occurs when the state actor “should have known that his questioning would have provoked an incriminating response.” *Sargent*, 111 Wn.2d at 650–52 (citing *Post*, 118 Wn.2d at 606). An interview becomes an interrogation when some degree of compulsion is present. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995).

With respect to who is a “state actor” for purposes of *Miranda*, our Supreme Court held that *Miranda* “applies not only to law enforcement officers but to any ‘agent of the state’ who ‘testifie[s] for the prosecution’ regarding the defendant's custodial statements. *Heritage*, 152 Wn.2d at 216 (alteration in original); *see also Warner*, 125 Wn.2d at 885 (stating “[i]t is likely . . . any state employee that is conducting a ‘custodial interrogation’ would probably qualify as a state agent . . .”).

Here, at the time Ms. McCants interviewed Ms. Maxwell, she was in custody. Ms. Maxwell was in jail on a 72-hour hold for the charge she was being questioned on. (RP 21-22). She was formally under arrest. Under these circumstances, Ms. Maxwell would reasonably believe her freedom of action was curtailed. *See Short*, 113 Wn.2d at 40.

Ms. McCants' questioning of Ms. Maxwell was interrogation. She told Ms. Maxwell she was being held for charges of failure to register and asked her why she did not check in. (RP 22). Ms. McCants should have known this questioning would have provoked an incriminating response. *See Sargent*, 111 Wn.2d at 650-52 (citing *Post*, 118 Wn.2d at 606).

Ms. McCants was a state actor. She was an agent of the State, testifying for the prosecution regarding Ms. Maxwell's custodial statements. *See Heritage*, 152 Wn.2d at 216; *see also Warner*, 125 Wn.2d at 885.

Under these facts, the statements Ms. Maxwell made to Ms. McCants, a state actor, about her check-in slips in response to Ms. McCants' questioning were made during a custodial interrogation and are presumed to be involuntary. *See Heritage*, 152 Wn.2d at 214 (citing *Sargent*, 111 Wn.2d at 647-48). Because Ms. Maxwell did not receive her *Miranda* warnings, her statements to Ms. Cants should have been suppressed. Therefore, because *Miranda* was implicated, defense counsel

was deficient because he waived a CrR 3.5 hearing and failed to move to suppress the statements Ms. Maxwell made to Ms. McCants.

Although a CrR 3.5 hearing generally is not required in bench trials because a judge is presumed to rely only on admissible evidence in reaching a verdict, the judge did not do so here. *See Williams*, 137 Wn.2d at 752 (citing *Wolfer*, 39 Wn. App. at 292). The trial court's oral ruling and written findings indicate it treated Ms. Maxwell's involuntary incriminating statements as substantive evidence in making its determination of guilt. (CP 30; RP 52).

Defense counsel's deficient performance prejudiced Ms. Maxwell. *See McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26) (stating the two-part test for ineffective assistance of counsel). In order to establish prejudice, Ms. Maxwell must show that the trial court likely would have granted a motion to suppress her statements to Ms. McCants. *See, e.g., State v. Hamilton*, 179 Wn. App. 870, 882, 320 P.3d 142 (2014) (stating "[i]n order to establish actual prejudice, [the defendant] must show that the trial court likely would have granted a motion to suppress the seized evidence based on an unlawful warrantless search of her purse.") (citing *McFarland*, 127 Wn.2d at 337 n. 4). As argued above, Ms. Maxwell made to statements to Ms. McCants, a state actor, in response to custodial interrogation. (RP 22). Ms. Maxwell did

not receive her *Miranda* warnings. Under these circumstances, the trial court likely would have granted a motion to suppress.

Ms. Maxwell can also establish prejudice by showing that defense counsel's errors deprived her of a fair trial. *See Hicks*, 163 Wn.2d at 477 (quoting *Strickland*, 466 U.S at 687). While Ms. McCants and Detective Wilson testified Ms. Maxwell did not turn in a weekly check-in sheet after September 2, 2015, both Ms. Maxwell and Mr. Barnes testified to the contrary. (RP 16-17, 31-32, 37-37, 40-41, 46). In addition, the State emphasized Ms. Maxwell's statements to Ms. McCants in its rebuttal closing argument. (RP 51). The trial court's findings indicate Ms. Maxwell's statements to Ms. McCants persuaded the trial court into believing the testimony of Ms. McCants and Detective Wilson, over the testimony of Ms. Maxwell and Mr. Barnes. (CP 30). The State's emphasis upon, and the trial court's reliance upon, Ms. Maxwell's statements given without the benefit of *Miranda* warnings, demonstrate that defense counsel's errors in waiving a CrR 3.5 hearing and in not moving to suppress the statements deprived Ms. Maxwell of a fair trial.

Defense counsel had no tactical reason for waiving a CrR 3.5 hearing and failing to move to suppress Ms. Maxwell's statements to Ms. McCants. *See Grier*, 171 Wn.2d at 33. There was a valid basis to seek

suppression, the lack of *Miranda* warnings, and the statements were incriminating and detrimental to Ms. Maxwell.

Ms. Maxwell has met the two-prong test for ineffective assistance of counsel. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). Defense counsel's waiver of a CrR 3.5 hearing and failure to move to suppress the statements Ms. Maxwell made to Ms. McCants constituted deficient performance and Ms. Maxwell was prejudiced by this failure. Ms. Maxwell's conviction should be reversed.

**F. CONCLUSION**

Ms. Maxwell was denied her right to effective assistance of counsel, when defense counsel waived a CrR 3.5 hearing and failed to move to suppress the statements Ms. Maxwell made to Ms. McCants. Her conviction should be reversed.

Respectfully submitted this 26th day of April, 2016.

  
Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols  
Kristina M. Nichols, WSBA #35918  
Attorney for Appellant

COURT OF APPEALS  
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STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 34073-2-III  
vs. )  
JOILENE TANYA MAXWELL )  
Defendant/Appellant )  
PROOF OF SERVICE )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 26, 2016, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Joilene Tanya Maxwell, DOC #791276  
Washington Corrections Center for Women  
9601 Bujacich Rd. NW  
Gig Harbor, WA 98332-8300

Having obtained prior permission from the Benton County Prosecutor's Office, I also served the Respondent State of Washington by e-mail at prosecuting@co.benton.wa.us using Division III's e-service feature.

Dated this 26th day of April, 2016.



Jill S. Reuter, Of Counsel,  
WSBA #38374  
Nichols Law Firm, PLLC  
PO Box 19203  
Spokane, WA 99219  
Phone: (509) 731-3279  
Wa.Appeals@gmail.com