

NO. 34094-5

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

FILED
Mar 27, 2017
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Appellant,

v.

ROGELIO NUÑEZ,

Respondent.

REPLY BRIEF OF APPELLANT

Respectfully submitted:
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I. IDENTITY OF APPELLANT

The State of Washington, represented by the Franklin County Prosecutor, is the Appellant herein.

II. ARGUMENT IN REPLY

The Brief of Respondent (BOR) responded to the State's three arguments by restructuring into five arguments. This Appellant's Reply mirrors the BOR's organization so as to clearly address each counterargument.

A. THE STATE HAS NOT WAIVED ANY CHALLENGE.

The Defendant claims that the State waived any challenge to a finding that the confession was custodial in nature by failing to assert this at the original CrR 3.5 hearing. But no such custodial finding was made or even addressed in that hearing. The State cannot waive that which was not addressed.

The Defendant made this argument in response to the motion for reconsideration, and the lower court addressed it. CP 69, II. 10-15; RP 7, 13. By entering an oral finding that the interview was custodial, the superior court rejected the defense waiver argument. RP 15.

As the State has maintained, a motion to suppress for violation of *Miranda* must be briefed as a CrR 3.6 suppression motion at which the Defendant bears the burden of proof. Brief of Appellant (BOA) at 11; CP 8; RP 9-10. At the CrR 3.5 voluntariness hearing, the defense never discussed whether the interview was custodial or noncustodial. Nor did the defense schedule a CrR 3.6 hearing or file a CrR 3.6 brief to make such argument. Therefore, the State's failure to address that which was not challenged is neither remarkable nor meaningful.

At the CrR 3.5 hearing, the judge made no inquiries or findings on the issue. CP 55-57, 62-64. When the court ruled, suppressing the statements in an erroneous analysis, only then was the matter at issue. The State had no notice of any CrR 3.6 motion to suppress which was intended to be argued at the CrR 3.5 hearing.

The State did not delay in bringing this error to the Court's attention. The State made a motion to reconsider raising this error at the very next hearing. CP 7; RP 5. Reconsideration is a proper remedy for irregularity where a suppression motion was made for the first time in oral argument without notice or requisite briefing so as to prevent the submission of material evidence and catch the opponent by surprise, and where the court made an error in law. CR 59(a)(1),

(2), (3), (8), (9).

Indeed, the first time the defense discussed the custody was in response to the State's motion for reconsideration. CP 68-69. And then, the defense did not argue that the interview was custodial, but only that he **assumed** the reason the prosecutor elicited evidence regarding the giving of *Miranda* warnings was because the prosecutor felt the interview had been custodial.

The defense assumption was a mistake. If the defendant does not stipulate to the admissibility of the statements, the state is obliged to note a hearing to provide the court with the facts relevant to determine voluntariness.

... a voluntariness hearing is not required "absent some contemporaneous challenge to the use of the confession." *State v. Rice, supra* 24 Wash.App. at 566, 603 P.2d 835, quoting from *Wainwright v. Sykes*, 433 U.S. 72, 86, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977). *Cf. State v. Nogueira*, 32 Wash.App. 954, 650 P.2d 1145 (1982) (defendant objected at trial to admission of his statements without CrR 3.5 hearing being held).

State v. Fanger, 34 Wn. App. 635, 638, 663 P.2d 120 (1983). The advisement of the right to remain silent is such a fact relevant to voluntariness under a totality of the circumstances standard. RP 7-8.

The holding of a hearing does not equate to the state's concession

on any point.

In this case, the Defendant did not stipulate to the admissibility of his statement. The State scheduled a hearing at which the prosecutor elicited testimony relevant to voluntariness and lack of coercion. The Defendant Nuñez chose the time and location of his statement and drove himself to the sheriff's office. CP 20-21, 38. He was advised he was not under arrest, and no circumstance suggested otherwise. CP 21, 30-31, 38, 46-47. The prosecutor asked: "were any weapons drawn" and "was he in handcuffs." CP 21. The officer answered in the negative. And the prosecutor elicited that the Defendant Nuñez was advised of and understood his rights. It was under these circumstances that he made his statement. This was a presentation appropriate for a decision on voluntariness.

The Defendant suggests the State's elicitation of the advisement was an admission that the interview was custodial. Because the fact of advisement was relevant to the plain purpose of the hearing, i.e. voluntariness, no concession can be found or inferred from this record. Because the prosecutor specifically elicited facts demonstrating the noncustodial nature of the interview, the Defendant's interpretation is not credible.

In support of his claim that the scheduling of a CrR 3.5 hearing is an implicit acknowledgement of the custodial nature of statements, the Defendant relies on *State v. Viney*, 52 Wn. App. 507, 761 P.2d 75 (1988), *State v. DeCuir*, 19 Wn. App. 130, 574 P.2d 397 (1978); *State v. Falk*, 17 Wn. App. 905, 909, 567 P.2d 235 (1977); and *State v. Fanger*, 34 Wn. App. 635, 663 P.2d 120 (1983). BOR at 6-7, 13. These are all abbreviated opinions, which offer little to no illumination of the Defendant's point. There is no analysis of the passing language such that any generalization to be drawn from the holding is less than obvious.

In *State v. Viney*, the defendant stipulated that his statements "may be admitted at trial without a pretrial hearing." *State v. Viney*, 52 Wn. App. at 508-09. When at trial the defendant objected on relevancy grounds to the admission of *parts* of his statement, the superior court ruled that the stipulation foreclosed any challenge. *State v. Viney*, 52 Wn. App. at 509. He appealed from his conviction, arguing that he had only waived his right to contest the *voluntariness* of his statement. *Id.* The court of appeals agreed. It is in this context that the opinion states the CrR 3.5 hearing addressed voluntariness only, not evidentiary questions such as relevance. The case does not

support the Defendant's argument.

In *State v. Falk*, 17 Wn. App. 905, 906, 567 P.2d 235 (1977), the defendant was impeached with his statements to police after he testified. On appeal, he did not challenge the voluntariness of his statements, but he complained that there had been no CrR 3.5 hearing. *State v. Falk*, 17 Wn. App. at 907-08. There had been no hearing because the prosecutor did not learn about this statement until mid-trial. *State v. Falk*, 17 Wn. App. at 908.

The Defendant Nuñez suggests that the holding in this case is that CrR 3.5 hearings are only held for custodial statements. That is not what the opinion says. The court held that the mere failure to hold a hearing "does not render an otherwise admissible statement inadmissible." *Id.* See *State v. Williams*, 34 Wn. App. 662, 673-74, 663 P.2d 1368 (1983), *reversed on other grounds*, 102 Wn. 2d 733, 689 P.2d1065 (1984) (a trial court's failure to hold a CrR 3.5 hearing is not reversible error if the custodial statements were made voluntarily and after proper advisement). The statement was admissible because it was voluntary and not obtained in violation of *Miranda* where he was not in custody. *State v. Falk*, 17 Wn. App. at 908-09.

In *State v. DeCuir*, even the facts underlying the brief discussion on the relevant issue are unclear. Although there had been a CrR 3.5 hearing, DeCuir alleged otherwise. The facts describe that, post-*Miranda* and after arrest, the defendant made an oral confession to police and then made a written confession to the prosecutor. *State v. DeCuir*, 19 Wn. App. at 132. At the CrR 3.5 hearing, the court addressed the voluntariness of both statements, admitting one and suppressing the other. *State v. DeCuir*, 19 Wn. App. at 132-33. Yet on appeal, the court addressed the defendant's claim that "a state's witness should not have been allowed to testify regarding inculpatory statements made to him by DeCuir without first having the statements presented at a CrR 3.5 hearing." *State v. DeCuir*, 19 Wn. App. at 134. It appears that the challenge must be in reference to a third noncustodial statement to yet another party. And because the opinion cites to cases regarding confessions to non-investigators, this likely refers to a confession made to a civilian. *State v. DeCuir*, 19 Wn. App. at 134, (citing *State v. McFarland*, 15 Wn. App. 220, 548 P.2d 569 (1976), (statements to civilians do not require CrR 3.5 hearings) and *State v. Harris*, 14 Wn. App. 414, 542 P.2d 122 (1975), (serviceman's conversation with superior officer did not require CrR

3.5 hearing)).

And in *State v. Fanger*, 34 Wn. App. 635, 636-37, 663 P.2d 120 (1983) (cited in § 3 of the BOR), the opinion explains that “[t]he purpose of a pretrial confession hearing under CrR 3.5 is to allow the court, prior to trial, to rule on the admissibility of *sensitive* evidence,” not statements which are agreed to be custodial.

No law or fact supports the Defendant’s claim of waiver.

B. THE PARTY SEEKING TO SUPPRESS EVIDENCE BY ALLEGING A VIOLATION OF LAW BEARS THE BURDEN OF PROOF.

The Defendant gave no notice and filed no brief or written motion seeking suppression. CrR 3.6 (requiring notice and written briefing). However, the Defendant’s responsive argument at the CrR 3.5 voluntariness hearing was a motion to suppress. The Defendant argues that he does not bear the burden of proof in a motion to suppress.

The Defendant’s entire argument relies upon a challenge to a case that is not once cited in the Appellant’s Brief: *United State v. Bassignani*, 560 F.3d 989 (9th Cir. 2009). The Defendant fails to address the authority actually cited in the Appellants’ Brief.

“The burden of production and persuasion rests on the person seeking to suppress evidence.” *United States v. Smith*, 783 F.2d 648, 650 (6th Cir.1986); *United States v. Arboleda*, 633 F.2d 985, 989 (2d Cir.1980). Accordingly, a criminal defendant seeking to suppress statements under *Miranda* “has the burden of proving that he was under arrest or in custody.” *United States v. Davis*, 792 F.2d 1299, 1309 (5th Cir.1986) (citing *United States v. Charles*, 738 F.2d 686, 692 (5th Cir.1984); *United States v. De La Fuente*, 548 F.2d 528, 533 (5th Cir.), cert. denied, 431 U.S. 942, 97 S.Ct. 2640, 53 L.Ed.2d 249 and 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312 (1977)).

BOA at 11. Instead the Defendant cites to two cases which are not on point and do not offer any insight. BOR at 10.

In *People v. Davis*, 66 Cal. 2d 175, 177, 424 P.2d 682, 57 Cal. Rptr. 130 (1967), the opinion begins by stating that *Miranda* had no retroactive application to this case. Accordingly, *Davis* cannot and does not speak to the burden of proof in challenges to *Miranda*.

The Defendant also cites to *United States v. Matlock*, 415 U.S. 164, 178-79, 94 S. Ct. 988, 997, 39 L. Ed. 2d 242 (1974). BOR at 10. Because the pinpoint cite refers to the dissenting opinion with no discussion of the burden of proof on custodial findings, the Defendant probably intended to cite *Matlock*, 415 U.S. at 177, n. 14. At this cite, the majority opinion decides that the burden of proof is a mere preponderance. But even here there is no discussion of *Miranda* or

the burden of proof on custodial findings. The footnote references the pre-*Miranda* case of *Lego v. Twomey*, 404 U.S. 477, 484, 92 S. Ct. 619, 624, 30 L. Ed. 2d 618 (1972), which in turn “fairly assume[s]” that the State bears the burden of proof in determining voluntariness of a confession by a preponderance. The case offers no support for the Defendant’s argument.

The Defendant has provided no authority in support of his claim that the challenging party would not bear the burden of proof.

But regardless of the burden of proof, the court’s belated finding that the interview was custodial for the sole reason of its location is contrary to law. BOA at 18 (citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1982)) (mere location of an interview at the station house will not support a finding that the interrogation was custodial in nature). The Defendant offers no argument that the record supports a finding that the interview was custodial under any standard.

C. THE COURT ABUSED ITS DISCRETION IN REFUSING TO HEAR TESTIMONY IN A PRETRIAL HEARING ON A MATERIAL ISSUE.

The Defendant’s discussion of this issue continues to be colored by his assertion that “the entire purpose” of a CrR 3.5 hearing

is only to review statements which the State has stipulated to be custodial. BOR at 13. This false premise has been addressed above. And the cases the Defendant cites in support of his understanding do not bear him out.

When a challenge is raised for the first time in argument, it is an abuse of discretion to fail to permit the State to provide the facts responsive to the claim.

Although the Defendant claims that State “cites no authority” for the proposition that a failure of notice violates due process (BOR at 12), this authority was provided. BOA at 13 (citing CrR 3.6, *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979), and *Snyder v. Massachusetts*, 291 U.S. 97, 137, 54 S. Ct. 330, 340, 78 L. Ed. 674 (1934)).

As the Defendant notes, the State’s awareness of “what it had to establish to successfully oppose” a suppression motion is critical to a determination of deciding whether it is appropriate to reopen the evidentiary portion of a hearing. BOR at 11. Contrary to the Defendant’s assertion (BOR at 12), the State did not have notice that the Defendant was seeking to suppress the confession as obtained in violation of *Miranda* and for the reason that advisement was

inadequate. The first time this was raised was in the Defendant's argument *after* the witnesses had stepped down.

The trial court cannot rely on the finality principle to prevent the development of the ***necessary*** record ***in a pretrial hearing*** for an issue ***raised for the first time in argument***. In a case with the Defendant's same name, it was held that, with a reasonable explanation, the government may reopen ***even after the close of its case at trial***. *United States v. Nuñez*, 432 F.3d 573, 579 (4th Cir. 2005). In deciding such a motion, the court shall consider the timeliness of the motion, the character of the testimony, and whether granting the motion imbues the evidence with distorted importance, prejudices the opposing party's case, or preclude the adversary from having an adequate opportunity to meet the additional evidence offered.

This lower court made no such assessment. Its cursory refusal to hear even a single sentence more of testimony is untenable.

D. THE COURT ERRED IN SUPPRESSING THE VOLUNTARY, PROPERLY ADVISED, NONCUSTODIAL CONFESSION.

The Defendant argues that, ***if*** this Court disregards Detective Nuñez's affidavit, then the remaining record shows an inadequate

Miranda advisement. BOR at 14.

First, the record does not support a finding of a mis-advisement. The testimony was that a portion of the advisement was stricken **because** it related only to juveniles. The testimony was supported by the exhibit, which shows a line drawn through the juvenile advisement only.

Second, the Court must not disregard the affidavit which clarifies the testimony. There is simply no reason to fail to observe what the true and material facts of the case are. There was no contest of witnesses. The only witness to speak on the issue clarified his testimony which defense counsel had misinterpreted. The clarification was offered at the first opportunity after the State first received notice of the unbriefed challenge.

Third, the failure of *Miranda* advisements is only cause for suppression if the statement was custodial. The record does not support a finding that the statement was custodial. Therefore, there is no lawful basis to suppress the voluntary statement.

Fourth, the Defendant has not argued below or in this appeal that the statement was coerced. The record demonstrates it was voluntary.

E. THE VOLUNTARINESS DETERMINATION SHOULD HAVE BEEN DECIDED AT THE VOLUNTARINESS HEARING.

The Defendant argues that the question of voluntariness should be reserved until such time as he decides whether to testify. BOR at 17. The argument presumes that the confession should be suppressed in the State's case in chief. Because this is the very issue on appeal, no such presumption can be made.

The State noted a voluntariness hearing. The court held a voluntariness hearing. But there are no findings as to voluntariness. Because the facts were before the court, there could be no utility in putting off the decision to a later time. A pretrial decision assists the parties in preparing for trial and in reaching a settlement and prevents disruptions in trial.

This Court can resolve this question on the record before it.

The Court may also consider whether it is appropriate to remand to a different judge to maintain the appearance of fairness. Here the superior court judge presumed without evidence or inquiry the State's concession in a voluntariness hearing of a factor relevant only in a suppression motion. The judge refused to allow the State to

make a record on a challenge raised for the first time in argument and without briefing before ruling on an incomplete record. The judge failed to read the State's Motion for Reconsideration in advance of the hearing. And the judge summarily decided the custodial question despite the legal standards available in the briefing (CP 8-10). This Court should consider whether a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing or whether the judge's impartiality might reasonably be questioned under an objective test that assumes a reasonable person to know and understand all relevant facts. *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674 (1995); *Sherman v. State*, 128 Wn.2d 164, 205–06, 905 P.2d 355 (1995).

III. CONCLUSION

The State respectfully requests this Court reverse the suppression ruling and admit the Defendant's confession at trial.

DATED: March 24, 2017.

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A copy of this Appellant's Reply was sent via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 24, 2017, Pasco, WA


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Comments:

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