

34208-5-III
COURT OF APPEALS
DIVISION III

FILED
MAR 01, 2017
Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL SAVINO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENT OF ERROR..... 1

II. ISSUE PRESENTED..... 1

III. STATEMENT OF THE CASE 1

 Procedural facts..... 1

 Substantive facts. 5

IV. ARGUMENT 5

 A. MR. SAVINO’S STATEMENTS TO THE DEPUTY
 AFTER ARREST WERE SPONTANEOUS, AND NOT
 THE PRODUCT OF ANY COERCION, PROMISES OR
 MISREPRESENTATIONS BY THE DEPUTY. IN
 ADDITION, THE RECORD IS VOID OF ANY
 ATTEMPT BY THE DEPUTY TO SHOW THE
 DEFENDANT THE METHAMPHETAMINE IN AN
 ATTEMPT TO COAX HIM TO CONFESS..... 5

 Standard of review. 6

 B. IF THE COURT FINDS THAT MR. SAVINO’S
 STATEMENTS TO THE DEPUTY WERE NOT
 ADMISSIBLE, THE INTRODUCTION OF THE
 STATEMENTS AT TRIAL WAS HARMLESS. 11

V. CONCLUSION..... 12

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>In re Pers. Restraint of Cross</i> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	6, 7
<i>State v. Broadway</i> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	6
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002)	6
<i>State v. Eaton</i> , 143 Wn. App. 155, 177 P.3d 157 (2008).....	12
<i>State v. Eserjose</i> , 171 Wn.2d 907, 259 P.3d 172 (2011)	6
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020 (1986).....	11, 12
<i>State v. Heritage</i> , 152 Wn.2d 210, 95 P.3d 345 (2004).....	7
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	6
<i>State v. Miner</i> , 22 Wn. App. 480, 591 P.2d 812, <i>review denied</i> , 92 Wn.2d 1011 (1979).....	9
<i>State v. Moreno</i> , 21 Wn. App. 430, 585 P.2d 481 (1978).....	10
<i>State v. Ortiz</i> , 104 Wn.2d 479, 706 P.2d 1069 (1985).....	9
<i>State v. Peerson</i> , 62 Wn. App. 755, 816 P.2d 43 (1991), <i>review denied</i> , 118 Wn.2d 1012 (1992).....	8
<i>State v. Reuben</i> , 62 Wn. App. 620, 814 P.2d 1177 (1991), <i>review denied</i> , 118 Wn.2d 1006 (1991).....	11
<i>State v. Roberts</i> , 14 Wn. App. 727, 544 P.2d 754 (1976).....	9
<i>State v. Sargent</i> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	7
<i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994)	12
<i>State v. Thetford</i> , 109 Wn.2d 392, 745 P.2d 496 (1987)	6

<i>State v. Toliver</i> , 6 Wn. App. 531, 494 P.2d 514 (1972).....	9
<i>State v. Warner</i> , 125 Wn.2d 876, 889 P.2d 479 (1995).....	7
<i>State v. Wethered</i> , 110 Wn.2d 466, 755 P.2d 797 (1988).....	10
<i>State v. Wilson</i> , 144 Wn. App. 166, 181 P.3d 887 (2008).....	7

FEDERAL CASES

<i>Henery v. Dees</i> , 658 F.2d 406 (5 th Cir. 1981).....	10
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	7, 8
<i>Rhode Island v. Innis</i> , 446 U.S. 291, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980).....	7, 8
<i>Roberts v. United States</i> , 445 U.S. 552, 100 S. Ct. 1358, 63 L.Ed.2d 622 (1980).....	7
<i>United States v. Garcia</i> , 496 F. App'x 749 (9 th Cir. 2012).....	8
<i>United States v. Sherwood</i> , 98 F.3d 402 (9 th Cir. 1996).....	8

OTHER CASES

<i>People v. Savory</i> , 105 Ill. App. 3d 1023, 435 N.E.2d 226 (1982).....	10
<i>State v. Uganiza</i> , 68 Haw. 28, 702 P.2d 1352 (1985).....	10

STATUTES

RCW 69.50.4013	12
----------------------	----

I. APPELLANT’S ASSIGNMENT OF ERROR

The court erred in finding Mr. Savino’s post-arrest statements admissible at trial in the absence of timely *Miranda* warnings.

II. ISSUE PRESENTED

Is there any evidence to support Mr. Savino’s contention that a deputy showed him methamphetamine found in his pocket after a search incident to arrest which caused his spontaneous, albeit self-serving, statements to the deputy?

III. STATEMENT OF THE CASE

The appellant/defendant, Daniel Savino, was charged by information in the Spokane County Superior Court with one count of possession of a controlled substance – methamphetamine. CP 1. The matter proceeded to a jury trial before the Honorable John Cooney and the defendant was found guilty as charged. CP 22.

Procedural facts.

On February 22, 2016, the trial court conducted a CrR 3.5 hearing to determine the admissibility of the statements made by Mr. Savino to Deputy Daren Schaum after Mr. Savino’s arrest.

On April 20, 2015, Deputy Schaum, an 18 year veteran of the Spokane County Sheriff’s Office, responded to a call at a residence in the Spokane Valley. RP 8-10. The call was reported as a possible malicious

mischief – domestic violence.¹ RP 10. As Deputy Schaum and Deputy Jay Bailey approached the home, Mr. Savino exited the dwelling. RP 11. Mr. Savino was calm and cooperative when greeting the deputies. RP 11. After speaking with the defendant’s mother, Wendy Savino, Deputy Schaum developed probable cause to arrest Mr. Savino for third degree malicious mischief – domestic violence, which requires a mandatory arrest. RP 11.

Deputy Schaum recontacted Mr. Savino and explained the mandatory arrest for a domestic violence charge, and Mr. Savino was placed under arrest and handcuffed. RP 12. He was searched incident to arrest. RP 12. The deputy found a clear plastic cigarette wrapper, and another wrapper inside of the first, which contained a crystalline substance.² RP 13. The deputy immediately recognized the substance to be methamphetamine based upon his training and experience. RP 13. Thereafter, Mr. Savino made several remarks:

[DEPUTY PROSECUTOR]: And having secured this item, did Mr. Savino have any reaction?

[DEPUTY SCHAUM]: He told me that it wasn’t his pants.

¹ The complainant, Wendy Savino, had reported that Mr. Savino damaged a garage door and window. RP 11.

² The substance field tested positive for methamphetamine. RP 14.

[DEPUTY PROSECUTOR]: Did [Mr. Savino] follow up with any other statements?

[DEPUTY SCHAUM]: [J]ust that he said it wasn't his, and that if he would have known that it was there, he would have gotten rid of it before we showed up on scene.

[DEPUTY PROSECUTOR]: All right. Now, when he made that statement to you, was that in response to a question had you asked him?

[DEPUTY SCHAUM]: No.

[DEPUTY PROSECUTOR]: Was it in response to [a] question by any law enforcement?

[DEPUTY SCHAUM]: No.

[DEPUTY PROSECUTOR]: Did it appear to be a spontaneous statement?

[DEPUTY SCHAUM]: Yes.

[DEPUTY PROSECUTOR]: Had you read Mr. Savino his *Miranda* warnings at that point?

[DEPUTY SCHAUM]: No.

[DEPUTY PROSECUTOR]: Now, you told us already at the time he made the statements he was not free to go. Did you ask him any guilt-seeking questions that led to his statement about those not being his pants?

[DEPUTY SCHAUM]: No.

RP 13-14.

There were no other witnesses or evidence presented at the hearing.

Thereafter, the trial court entered written findings of fact and conclusions

of law. CP 31-33. The trial court, in relevant part, made the following undisputed facts:

1.3 Upon removing the methamphetamine from Mr. Savino's pocket, Deputy Schaum testified that Mr. Savino made a statement that "These are not my pants" and "If I had known that was in there, I would have removed it before you guys got here."

1.4 The statements made by Mr. Savino were not in response to questioning by law enforcement.

CP 31.

2.3 Mr. Savino was handcuffed at the time he made the statements, and he was not free to leave.

2.4 Mr. Savino's statements were not made in response to questioning from law enforcement.

2.5 Law enforcement did not threaten Mr. Savino to get him to make statements and did not promise him anything in exchange for his statements.

CP 32.

Thereafter, the trial court, in pertinent part, made the following conclusions of law.

3.1 Because Mr. Savino was placed in handcuffs by law enforcement, and was not free to leave, he was in custody at the time he made statements.

3.2 The statements made by Mr. Savino were not in response to questioning, and therefore [] were not the product of interrogation.

3.3 Mr. Savino voluntarily made the statements.

CP 32.³

Substantive facts.

At the time of trial, Deputy Schaum testified to the same facts as set forth above. RP 19-35. Forensic chemist Jayne Wilhelm tested the substance taken from Mr. Savino, followed laboratory procedures, and determined the substance was methamphetamine. RP 48-55. Mr. Savino did not testify at the hearing or at trial.

IV. ARGUMENT

A. MR. SAVINO'S STATEMENTS TO THE DEPUTY AFTER ARREST WERE SPONTANEOUS, AND NOT THE PRODUCT OF ANY COERCION, PROMISES OR MISREPRESENTATIONS BY THE DEPUTY. IN ADDITION, THE RECORD IS VOID OF ANY ATTEMPT BY THE DEPUTY TO SHOW THE DEFENDANT THE METHAMPHETAMINE IN AN ATTEMPT TO COAX HIM TO CONFESS.

Under his first argument, Mr. Savino argues the trial court erred in finding Mr. Savino's statement admissible at the time of trial absent the giving of *Miranda* warnings. Appellant's Br. at 3. More specifically, Mr. Savino's statement should have been suppressed because he was not advised of his *Miranda* warnings prior to his spontaneous statement to the deputy.

³ The defense attorney offered no opposition to admission of the statements. RP 17.

Standard of review.

An appellate court reviews a trial court's findings of fact following a CrR 3.5 hearing for substantial evidence and review de novo whether the findings support the conclusions of law. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997); *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Unchallenged findings of fact are verities on appeal. *Broadaway*, 133 Wn.2d at 131.

In determining if police engaged in "interrogation" for *Miranda* purposes, "[the appellate court] defer[s] to the trial court's findings of fact but review[s] its legal conclusions from those findings de novo." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 681, 327 P.3d 660 (2014). Mr. Savino does not assign error to the trial court's CrR 3.5 findings, so they are verities. *State v. Lorenz*, 152 Wn.2d 22, 30, 93 P.3d 133 (2004). Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the stated premise. *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987).

In *State v. Eserjose*, 171 Wn.2d 907, 913, 259 P.3d 172 (2011), the Supreme Court remarked about the purpose for suppressing evidence under article I, section 7 of the Washington Constitution:

[Suppression of evidence] is intended to protect individual privacy against unreasonable governmental intrusion, to deter police from acting unlawfully, and to preserve the

dignity of the judiciary by refusing to consider evidence that has been obtained through illegal means.

Under the Fifth Amendment of the United States Constitution, *Miranda* warnings must be given when a suspect encounters (1) custodial (2) interrogation (3) by an agent of the State. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). When these conditions exist and the police officer fails to advise the defendant of his *Miranda* rights, an appellate court presumes that a suspect's statements during custodial interrogation are involuntary and the statements must be excluded. *State v. Warner*, 125 Wn.2d 876, 888, 889 P.2d 479 (1995). *Miranda* procedural protections are implicated only when a suspect is subjected to "custodial interrogation." *Roberts v. United States*, 445 U.S. 552, 560-61, 100 S. Ct. 1358, 63 L.Ed.2d 622 (1980); *see also Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988).

"[I]nterrogation" can be express questioning or any words or actions reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 292, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980); *In re Cross*, 180 Wn.2d at 685. Only questions or actions reasonably likely to elicit an incriminating response from the defendant can be characterized as equivalent to interrogation. *State v. Wilson*, 144 Wn. App. 166, 184,

181 P.3d 887 (2008); *State v. Peerson*, 62 Wn. App. 755, 773, 816 P.2d 43 (1991), *review denied*, 118 Wn.2d 1012 (1992). “[C]ustodial interrogation” means “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444 (emphasis added). Further, absent police interrogation, there is no infringement on the right to counsel. *State v. Peerson*, 62 Wn. App. at 774.

Nevertheless, “[v]olunteered statements of any kind are not barred by the Fifth Amendment.” *Innis*, 446 U.S. at 300;⁴ *see also United States v. Garcia*, 496 F. App’x 749, 750 (9th Cir. 2012) (defendant’s spontaneous and volunteered *post-arrest* statements were admissible because he did not remain silent after being arrested); *United States v. Sherwood*, 98 F.3d 402,

⁴ In *Innis*, two officers arrested a robbery suspect and put him in the back seat of the patrol car. As they drove to the police station, the officers engaged in a conversation within Innis’ hearing about the missing weapon, which the officers stated was being searched for in an area near a school for handicapped children. One officer expressed to the other his concern that a child could be hurt by the missing firearm. Innis “interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located.” 446 U.S. at 295. The Supreme Court held that the officers’ conversation did not amount to “interrogation” because the officers had no reason to know that their “conversation was reasonably likely to elicit an incriminating response from [the defendant].” *Id.* at 302.

409 (9th Cir. 1996) (spontaneous or volunteered confessions of a suspect *in custody* are admissible despite the absence of a prior *Miranda* warning).

Similarly, in *State v. Ortiz*, 104 Wn.2d 479, 706 P.2d 1069 (1985), our high court held that a defendant's lowered mental intellect does not automatically render a confession inadmissible in a criminal proceeding but, rather, is one factor to be considered with all others bearing on voluntariness. In *Ortiz*, the defendant had been arrested and placed in a police car, and stated, "I didn't want to screw the old lady, she wanted to screw me." *Id.* at 484. Ortiz was a suspect in an earlier rape and murder of a 77-year-old woman, but he had been neither apprehended nor previously questioned about the crime. His outburst was not in response to questioning by police; indeed, "[i]t is undisputed that petitioner's statement [was] ... made spontaneously, [was] not solicited, and [was] not the product of custodial interrogation." *Id.* at 484; *see also State v. Miner*, 22 Wn. App. 480, 591 P.2d 812, *review denied*, 92 Wn.2d 1011 (1979) (spontaneous, voluntary, and unsolicited statements not coerced under *Miranda*); *State v. Roberts*, 14 Wn. App. 727, 731, 544 P.2d 754 (1976) (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. Toliver*, 6 Wn. App. 531, 534, 494 P.2d 514 (1972) (if a suspect's

statements are spontaneous, unsolicited and not the product of custodial interrogation, they are not coerced within the concept of *Miranda*.⁵

Here, there is no evidence or support in the record for the defendant's claim that the deputy attempted to solicit information from him when he removed the methamphetamine from his pocket. Mr. Savino's claim that the deputy showed him the methamphetamine for a reaction is pure speculation and not supported by the record. *See* Appellant's Br. at 5.

Although Mr. Savino was taken into custody, this act alone is not sufficient to show the deputy's conduct was calculated to elicit a response

⁵ A defendant's offer of evidence can be testimonial in nature. *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988) (where a police officer's questioning or requests induce a suspect to hand over incriminating evidence, such nonverbal act may be testimonial in nature); *State v. Moreno*, 21 Wn. App. 430, 433, 585 P.2d 481 (1978) (where the defendant produced cocaine from his pocket during interrogation by police officers, the production of the cocaine was testimonial in nature for purposes of Fifth Amendment privilege against self-incrimination).

The cases relied on by Mr. Savino are legally and factually inapposite to his claim and the facts of this case. In *Henery v. Dees*, 658 F.2d 406 (5th Cir. 1981), the defendant agreed to waive his rights during a polygraph examination. The confession was found involuntary because the polygraph told the defendant that he failed the test and questioned him after the polygraph examination without counsel); *State v. Uganiza*, 68 Haw. 28, 29, 702 P.2d 1352 (1985) (a police officer should have known his actions were likely to elicit an incriminating response when he went to the defendant's cell and showed the defendant several incriminating statements of witnesses and the defendant subsequently confessed); *People v. Savory*, 105 Ill. App. 3d 1023, 435 N.E.2d 226 (1982) (confronting the defendant with the discrepancies in his story was the functional equivalent of express questioning under *Innis*).

from the defendant. Nor does the record show that his statements were involuntary or the product of coercion or manipulation as suggested, but unsupported, by Mr. Savino. Appellant's Br. at 5. The record supports the trial court's factual findings and legal conclusions that the statements were voluntary, and not a product of a custodial interrogation to which *Miranda* applies. This Court should deny Mr. Savino's claim.

B. IF THE COURT FINDS THAT MR. SAVINO'S STATEMENTS TO THE DEPUTY WERE NOT ADMISSIBLE, THE INTRODUCTION OF THE STATEMENTS AT TRIAL WAS HARMLESS.

Statements admitted in violation of *Miranda* are subject to harmless error analysis. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991), *review denied*, 118 Wn.2d 1006 (1991). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). 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. *Id.* at 425. Under the "overwhelming untainted evidence" test, the court looks only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.* at 426. Under this test, a conviction will be reversed where there is any reasonable chance

that the use of inadmissible evidence was necessary to reach a guilty verdict. *Id.* at 426.

Unlawful possession of methamphetamine has no mens rea requirement. *See* RCW 69.50.4013(1); *State v. Eaton*, 143 Wn. App. 155, 160, 177 P.3d 157 (2008). The State simply bears the burden of proving that the substance in question is a controlled substance and that the defendant had possession of it. *Id.* at 160. Possession can be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession means that the goods were in the personal custody of the defendant. *Id.* at 798.

Here, Mr. Savino's statement to the deputy, if anything, was an attempt to exculpate himself from the discovery of the methamphetamine. He said he did not know there was methamphetamine in his pocket, and, if he had known it was inside his pocket, he would have disposed of it prior to law enforcement's arrival. It is fair to say that the jury convicted Mr. Savino independently from his statement because he had actual possession of it when searched by the deputy. The error, if any, was harmless beyond a reasonable doubt.

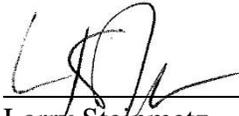
V. CONCLUSION

Nothing in the record suggests that the deputy communicated to Mr. Savino, directly or indirectly, intentionally or accidentally, or made

assurances, promises, or threats to cause him to make the several statements to the deputy. The defendant cannot imply, let alone directly show *any* police conduct which would require suppression of the evidence. The CrR 3.5 findings support the conclusion that Mr. Savino's unsolicited statement to the deputy was voluntary.

Respectfully submitted this 1 day of March, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL R. SAVINO,

Appellant.

NO. 34208-5-III

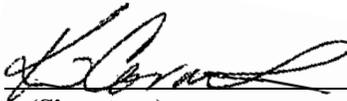
CERTIFICATE OF
SERVICE

I certify under penalty of perjury under the laws of the State of Washington,
that on March 1, 2017, I e-mailed a copy of the Brief of Responent in this matter,
pursuant to the parties' agreement, to:

Janet Gemberling
jan@gemberlaw.com; admin@gemberlaw.com

3/1/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

March 01, 2017 - 4:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34208-5
Appellate Court Case Title: State of Washington v. Daniel R Savino

The following documents have been uploaded:

- 342085_20170301160647D3405882_4009_Briefs.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Savino Daniel 342085 Resp Br LDS.pdf

A copy of the uploaded files will be sent to:

- jan@gemberlaw.com
- admin@gemberlaw.com

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Larry D. Steinmetz - Email: lsteinmetz@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20170301160647D3405882