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35567-5-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JEREMY ALVAREZ, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S SUPPLEMENTAL BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

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

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial, conviction, and sentence of the Appellant.

III. SUPPLEMENTAL ISSUE

Is this court bound by Washington Supreme Court precedent which holds that “the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment”?

IV. STATEMENT OF THE CASE

In the Brief of Appellant (BOA), the Defendant claimed a violation of the right against self-incrimination. BOA at 12. Initially,¹ the Defendant failed to acknowledge *Salinas v. Texas*, 570 U.S. 178,

¹ In a supplemental brief, the Defendant notes that this Court has recognized that *Salinas* has overruled *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996) and its progeny. Supplemental Brief of Appellant (SBOA) at 3 (citing *State v. Magana*, 197 Wn. App. 189, 194-95, 389 P.3d 654 (2016)).

133 S.Ct. 2174, 186 L.Ed.2d 376 (2013). The State brought the case to the Defendant's attention. Respondent's Brief (BOR) at 10-11.

The State noted that the cases cited by the Defendant, insofar as they conflict with United States Supreme Court precedent, are no longer good law. BOR at 11, 13-14. And the State noted that it is well-established law that article I, section 9 of the Washington constitution is co-extensive with, not broader than, the federal constitution. BOR at 9 (citing *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) and *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971)).

This Court's Commissioner has permitted the Defendant to file a supplemental brief raising a new claim that article I, section 9 of the Washington constitution is more protective than the federal constitution and offering a *Gunwall* analysis.

V. ARGUMENT

THIS COURT IS BOUND BY WASHINGTON SUPREME COURT PRECEDENT ON THIS QUESTION.

The Defendant argues the evidence of his demeanor violates the state constitution. Supplemental Brief of Appellant (SBOA) at 13.

That evidence was that the Defendant “had no expression whatsoever on his face” when, apparently have recently woken, he was informed that his father required him to vacate the house following accusations of molestation. RP 343, 345. He claims that article I, § 9 of the Washington constitution is more protective than the Fifth Amendment. SBOA at 15.

The Defendant is attempting to revisit decided questions. The Court of Appeals is required to follow Washington Supreme Court precedent. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Although the State noted that the Washington Supreme Court has already decided this issue in *State v. Earls* and *State v. Moore*, the Defendant does not address or acknowledge either case in his supplemental brief. (He does however repeat the arguments made in the dissenting opinions therein.)

Instead, he argues there can be no precedent on the question of the scopes of the constitutional provisions, because the answer will depend upon the factual context of every case. SBOA at 5-6. A little more than a month after the Defendant filed his supplemental brief, the Washington Supreme Court specifically disagreed with this argument. *State v. Mayfield*, -- Wn.2d --, 434 P.3d 58, 64-66 (Feb. 7,

2019). Because previous cases “have been somewhat unclear,” the *Mayfield* opinion clarified that a new *Gunwall* analysis is not required for new contexts. *Id.* See also *State v. Earls*, 116 Wn.2d at 392-93 (Utter, J., dissenting) (lone dissent’s attempt to distinguish the holding in *Moore* as not applicable to “different fact scenarios and concerning different issues” was not persuasive on the other eight justices). *Moore* and *Earls* have precedential authority.

In *State v. Moore*, the defendant asked the court to find that the state constitutional privilege against self-incrimination was more protective than that in the federal constitution. *State v. Moore*, 79 Wn.2d at 56. Specifically, the defendant Moore asked the court to find that giving a breath sample was like giving a statement. The court disagreed, holding that the Implied Consent Law (which conditions the granting of a driver’s license on the driver’s consent to submit to a breath test) does not compel an accused person to give evidence against himself.

The Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution. There is no compelling justification for its expansion. ***The protection of both constitutional provisions extends only to testimonial or communicative evidence.***

State v. Moore, 79 Wn.2d 51, 57, 483 P.2d 630, 634 (1971) (emphasis added). Although *Moore* predates *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the same analysis was made in reaching the earlier decision. *State v. Earls*, 116 Wn.2d at 376-77.

Here, the context is not different. The Defendant Alvarez argues that his demeanor should be protected under the state constitution. His demeanor is not testimonial or communicative evidence. Even the dissent in *Moore* would find no offense.

The testimonial and communicative aspects of the air once analyzed is undeniable in my opinion. Blood tests and breathalyzer tests are clearly distinguishable from physical examination tests for intoxication, such as the finger-to-nose test, because ***when such observations of a person's body or movements are made, no material substances are taken from his body. Nothing is taken from the person and the personal dignity is not infringed from an observation of the person or his movements.*** Our court has properly so held in several cases: *Mercer Island v. Walker*, 76 Wash.2d 607, 458 P.2d 274 (1969); *State v. Duckett*, 73 Wash.2d 692, 440 P.2d 485 (1968); *State v. West*, 70 Wash.2d 751, 424 P.2d 1014 (1967); *State v. Craig*, 67 Wash.2d 77, 406 P.2d 599 (1965)....

State v. Moore, 79 Wn.2d at 63–64 (Rosellini, J., dissenting) (emphasis added).

A decade after *Moore*, the validity of the Implied Consent Law was challenged again. *State v. Franco*, 96 Wn.2d 816, 639 P.2d 1320 (1982), *abrogated on other grounds by State v. Sandholm*, 184 Wn.2d 726, 364 P.3d 87 (2015). “This time a unanimous court concluded that *Moore* correctly interpreted article 1, section 9.” *State v. Earls*, 116 Wn.2d at 377 (observing that the two dissenting justices in *Franco* dissented on other grounds).

Certainly, this court is free to give a provision of our constitution an interpretation more protective of individual rights than the interpretation given a similar provision of the federal constitution and we have recently done so. *State v. Fain*, 94 Wash.2d 387, 617 P.2d 720 (1980); *Federated Publications, Inc. v. Kurtz*, 94 Wash.2d 51, 615 P.2d 440 (1980); *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 714, 585 P.2d 1153 (1978). However, in *State v. Moore*, 79 Wash.2d 51, 483 P.2d 630 (1971), this argument was presented and we chose not to interpret our constitutional provision differently. ***We decline to overrule Moore, which is stare decisis on this issue.***

State v. Franco, 96 Wn.2d at 829 (emphasis added).

In *State v. Earls*, the defendant challenged the admission of his confession made after the *Miranda* advisement and waiver. Prior to the confession, an attorney had called the police station to speak with the defendant to assess whether he would represent Earls, the attorney had been turned away. *State v. Earls*, 116 Wn.2d at 367-68.

The defendant Earls asked the court to “decide the validity of his waiver under our state constitution, rather than federal law,” arguing “article 1, section 9 should be interpreted as more protective than its federal counterpart.” *State v. Earls*, 116 Wn.2d at 374. The court declined, explaining:

... resort to the *Gunwall* analysis is unnecessary because this court has already held that the protection of article 1, section 9 is co-extensive with, not broader than, the protection of the Fifth Amendment. *State v. Moore*, 79 Wash.2d 51, 483 P.2d 630 (1971).

State v. Earls, 116 Wn.2d 364, 374–75, 805 P.2d 211, 216 (1991).

The dissent attempted to interpret *Moore* as having a narrower holding, limited to the Implied Consent Law.

While this court has traditionally interpreted article 1, section 9 to be coextensive with the Fifth Amendment, we did so under different fact scenarios and concerning different issues. The cases cited by the majority did not deal with the right to counsel issue presented here. *State v. Moore*, 79 Wash.2d 51, 483 P.2d 630 (1971), involved the constitutionality of the “implied consent law” relating to breath tests of drivers suspected of intoxication.

State v. Earls, 116 Wn.2d at 392-93 (Utter, J., dissenting). The argument was not persuasive on the eight other justices.

The Washington Supreme Court has held that this is a matter of stare decisis which it will not revisit. The opinions, *supra*, include

the same lengthy discussions that the Defendant would like to revisit. Those are not new arguments. The question has been litigated thoroughly and resolved. *Moore* is controlling.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: March 22, 2019.

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A copy of this supplemental brief was sent via U.S. Mail or 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 22, 2019, Pasco, WA



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