

57407-8

57407-8

80020-1

NO. 57407-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

Leaa'Esola Unga,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES NOE, JUDGE
THE HONORABLE PHILIP HUBBARD, JUDGE

BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

YARDEN WEIDENFELD
Deputy Prosecuting Attorney
Attorney for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 AUG -2 PM 4:40

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
<u>Procedural Facts</u>	1
<u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	4
1. THE TRIAL COURT CORRECTLY ADMITTED UNGA'S CONFESSION BECAUSE UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE STATEMENT WAS MADE VOLUNTARILY	4
2. UNGA'S CONVICTION FOR VEHICLE PROWLING IN THE SECOND DEGREE DOES NOT MERGE WITH HIS CONVICTION FOR TAKING MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE.	14
D. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES:

<u>State v. Broadaway,</u> 133 Wash. 2d 118, 942 P. 2d 363 (1997)	1, 6, 9, 11
<u>State v. Burkins,</u> 94 Wash. App. 677, 973 P.2d 15 (1999)	4-5, 9-10
<u>State v. Davis,</u> 73 Wash. 2d 271, 438 P.2d 185 (1968)	12-13
<u>State v. Gilchrist,</u> 91 Wash. 2d 603, 590 P.2d 809 (1979)	12
<u>State v. Johnson,</u>	15
92 Wash. 2d 671, 600 P.2d 1249 (1979), <u>cert. dismissed,</u> 446 U.S. 948, 100 S. Ct. 2179 (1980), <u>overruled on other grounds,</u> <u>State v. Sweet,</u> 138 Wash. 2d 466, 980 P.2d 1223 (1999)	
<u>State v. Lass,</u> 55 Wash. App. 300, 777 P.2d 539 (1989)	15-17
<u>State v. Reed,</u> 75 Wash. App. 742, 879 P.2d 1000 (1994)	13-14
<u>State v. Riley,</u> 19 Wash. App. 289, 576 P.2d 1311 (1978)	5
<u>State v. Setzer,</u> 20 Wash. App. 46, 579 P.2d 957 (1978), <u>overruled in</u> <u>State v. Broadaway,</u> 133 Wash. 2d 118, 942 P.2d 363 (1997)	6-9

State v. Sweet,
138 Wash. 2d 466, 980 P.2d 1223 (1999) 15-16

State v. Vladovic,
99 Wash. 2d 413, 662 P.2d 853 (1983) 14-16

FEDERAL CASES:

Arizona v. Fulminante,
499 U.S. 279, 111 S. Ct. 1246 (1991)..... 11

Bram v. United States,
168 U.S. 532, 18 S. Ct. 183 (1897)..... 9, 11

United States v. Brimberry,
744 F.2d 580 (7th Cir. 1984) 11-12

U.S. v. Cahill,
920 F.2d 421 (7th Cir. 1990) 12

United States v. Gonzalez,
736 F.2d 981 (4th Cir.1984) 11

OTHER JURISDICTIONS:

State v. Aguilar,
133 Or. App. 304, 891 P.2d 668 (1995) 10-11

A. ISSUES PRESENTED

1. Under the "totality of the circumstances" test of State v. Broadaway, 133 Wash. 2d 118, 132, 942 P. 2d 363 (1997) for the voluntariness of a confession, did the trial court correctly admit defendant Leaa'Esola Unga's confession to being in the passenger seat of a car that he knew was stolen but not remembering who was driving, and to writing words on the dash board with a marker, considering that the confession was made during a 30 minute interview and after (A) Unga was advised of his Constitutional rights, including the special warning for juveniles, (B) Unga signed his rights and a statement acknowledging he understood his rights and voluntarily waived them, and (C) the interviewing detective told Unga he would not be charged with the graffiti to the dashboard?

2. Should Unga's conviction for Vehicle Prowling in the Second Degree be reversed on the basis that it merges with his conviction for Taking Motor Vehicle without Permission in the Second Degree?

B. STATEMENT OF THE CASE

PROCEDURAL FACTS

On July 14, 2005, Unga was charged by Information with one count of Taking Motor Vehicle without Permission in the

Second Degree. CP 1. This was supported by a Certification for Determination of Probable Cause. CP 2-3. On August 18, 2005, an amended information was filed changing the date of the alleged offense to a period between February 7, 2005 and February 9, 2005. CP 4.

On October 11, 2005, Unga filed a trial brief that included a motion to suppress his confession on the grounds that it was "involuntary and therefore inadmissible," CP 13. The State filed a response to this motion on October 12, 2005. CP 54-57. The motion was denied by the court after hearing evidence and argument as part of a fact-finding hearing on October 17, 2005.

On October 12, 2005, the State filed a Second Amended Information adding a count of Vehicle Prowling in the Second Degree. CP 20-21. Fact-finding was held on October 17, 2005. After hearing evidence and argument, the Court found Unga guilty of both Taking Motor Vehicle without Permission in the Second Degree and Vehicle Prowling in the Second Degree. CP 22. These verdicts are both being appealed.

SUBSTANTIVE FACTS

A Honda Civic belonging to Jean Layer was taken without her permission from behind Madrona Elementary School in King

County Washington on February 7, 2005. RP 10-18. The car was recovered on February 9, 2005 near Foster High School, also in King County, Washington. RP 18-25. Upon recovery, the car had ignition damage and the words, "Fuck Officer Gillette 4rm c-loc, bear, bam bam, don't trip" written on the dashboard. RP 16-17, 23-34, CP 48.

Unga was arrested several months later (May 26, 2005) on an unrelated warrant and was interviewed by King County Sheriff Detective Ryan Mikulcik regarding Ms. Layer's car. RP 25-28. Before interviewing Unga, Detective Mikulcik advised him of his Constitutional rights, including the special section for juveniles, and Unga signed an acknowledgment that he understood his rights and voluntarily waived them. RP 28-30.

During the interview with Detective Mikulcik, Unga was asked to write the name of Deputy Gillette and "4rm" on a piece of paper, and once Unga did so, Detective Mikulcik believed there were similarities between what Unga had written and the writing on the dashboard. RP 86-87.

Also during the interview, Unga was asked what "4rm" means, and he replied that this is how he writes the word "from". RP 41, CP 49.

Unga at first denied having written on the car's dashboard, but after Detective Mikulcik told Unga he would not be charged with the graffiti to the dashboard, Unga admitted to having been in the car knowing it was stolen, not remembering who was driving, and using a marker to write on the dashboard the words cited above. RP 36-40, 53-58, 88, CP 48-49.

The trial court found Unga's confession accurate and also inferred from it that the car was being driven when Unga was in it, RP 117-119, CP 49.

C. ARGUMENT

1. THE TRIAL COURT CORRECTLY ADMITTED UNGA'S CONFESSION BECAUSE UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE STATEMENT WAS MADE VOLUNTARILY.

"For a statement to be admissible, the State must establish that the defendant was fully advised of his *Miranda* rights, and knowingly and intelligently waived them." State v. Burkins, 94 Wash. App. 677, 694, 973 P.2d 15, 26 (1999). There seems to be no dispute that that this requirement was fulfilled in Unga's case. RP 28-30, CP 48.

However, even if Miranda requirements are met, a court may still find that a confession is involuntary and therefore inadmissible

if it finds "based on the totality of the circumstances" that "the defendant's will was overborne," Burkins, 94 Wash. App. at 694. "Some of the factors considered in the totality test include the defendant's physical condition, age, mental abilities, physical experience, and police conduct." Id.

Unga does not argue that his physical condition, age, mental abilities, or physical experience should lead to suppression. He testified that he was 16 years old (about to be 17), RP 50-51, had finished through the ninth grade, and was studying for his GED. RP 56. He was 16 years old at the time of the disputed confession. There was no evidence presented that Unga was lacking in the physical or mental capacities typical for someone his age.

Unga's suppression argument centers around alleged improper police conduct, specifically an allegation that his confession "was the direct result of an officer's promise of immunity," Appellant's Brief at 13. However

[a] promise of leniency standing alone, does not . . . automatically invalidate a confession; rather, the totality of the circumstances must be closely examined to determine its impact.

State v. Riley, 19 Wash. App. 289, 297-298, 576 P.2d 1311, 1316 (1978).

In other words, as recognized by Unga, Appellant's Brief at 10-11, Washington courts do not recognize a per se rule excluding confessions that occur after a promise of leniency. While the "court must *consider* any promises or misrepresentations made by the interrogating officers" and "must determine whether there is a causal relationship between the promise and the confession," the "inquiry is whether, under the totality of the circumstances, the confession was coerced" and "whether the Defendant's will was overborne." Broadaway, 133 Wash. 2d at 132 (emphasis added).

Unga's case is distinguishable from the case cited in his brief, State v. Setzer, 20 Wash. App. 46, 579 P.2d 957 (1978), overruled in Broadaway, 133 Wash. 2d at 132. In Setzer, the Court of Appeals was "not convinced that the promise of leniency *standing alone* invalidated the confession" but viewed the promise "in light of all the surrounding circumstances," 20 Wash. App. at 50 (emphasis added). The Court went on to note that "[f]or *two days* the defendant exercised his right to remain silent, then he suddenly confessed after Detective Stoner recited the prosecutor's offer of immunity [to a prior case]." Id. (emphasis added). The defendant's confession was found to be a direct result of that immunity offer and an (incorrect) assurance "that two prior *Washington* felonies were

necessary before he could be classified a habitual criminal." Id. (emphasis added). Thus, the Court of Appeals held that the defendant's confession should have been suppressed, even for impeachment purposes, Id. at 50-52.

Unlike Setzer, Unga was arrested not for the case at issue but "for an outstanding warrant," RP 27. He was not silent for two days. His *entire interview* with Detective Mikulcik lasted for approximately 30 minutes. RP 37, 52-53. Unga also did not specifically "express[] a desire to remain silent" as did Setzer, Setzer, 20 Wash. App. at 47.

Secondly, Detective Mikulcik did not give Unga false legal advice. Contrary to what Setzer was told by his interviewing detective, he was indeed "held to be a habitual criminal" based on "proof of four *out-of-state* felony convictions," Id. at 48 (emphasis added). Unga was not so misled.

Finally, the causal connection between Detective Mikulcik's statement that he would not "charge" Unga with the graffiti, CP 45, RP 38-40 and Unga's confession is not as strong as in Setzer, in which the Court of Appeals described the causal connection as follows:

Inferentially, defendant was told that unless he was convicted of both the Churchill and Countryman burglaries he could not be declared a habitual criminal, absent the requisite number of prior felony convictions. Furthermore, defendant's initial reluctance to discuss the Countryman burglary was prompted by his desire not to be charged as a habitual criminal; and his initiation of the discussion concerning this potential status highlights his awareness of the nature and significance of the recidivist statute. The spontaneity of the confession and the defendant's awareness of the statute's ramifications, added to the offer of immunity, distinguishes this confession from a "purge of conscience." [citation omitted].

20 Wash. App. at 50.

Here, however, the contention that Unga's confession to being in a stolen car knowing it was stolen but not remembering who was the driver, was caused by Detective Mikulcik's statement that he would not be charged with the graffiti to the dashboard, is more dubious. While Unga did testify that he thought Detective Mikulcik "was dropping all the charges," RP 56, he gave no indication that Detective Mikulcik said this, only that Unga "thought when he meant graffiti, it meant the whole car, the whole charge of the car," RP 56. When asked if it had "come up at all that he [Detective Mikulcik] was investigating the stolen car," Unga testified that "he [Detective Mikulcik] just asked me about this car, and then he just asked me about some other graffitis and (inaudible) I don't

know." RP 57. When asked if Detective Mikulcik had told him the car was stolen, Unga testified that he did not remember. RP 57.

Admittedly, there is a stronger causal connection between Detective Mikulcik's promise and Unga's confession *to having written the graffiti* (the basis of the Vehicle Prowling conviction, CP 50). However, the other distinctions from Setzer described above still apply.

Also, it should not be lost in this discussion that the Court of Appeals in Setzer made its decision to suppress the defendant's confession based on a rule that a confession may not be "obtained by any direct or implied promises, however slight," 20 Wash. App. at 49 (quoting Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183 (1897)). As conceded by Unga, Appellant's Brief at 10-11, this standard for voluntariness of a confession was overruled by the Washington Supreme Court in Broadaway, 133 Wash.2d at 132. Thus, the use of Setzer to argue that Unga's confession was involuntary is inherently suspect.

Unga argued in his brief to the trial court that "through a manipulative and cunning promise," he was "tricked into giving his statement." CP 16. However, as the State argued in its reply brief, CP 56, Washington courts are clear that "[d]eception alone does

not make a statement inadmissible as a matter of law," Burkins, 94 Wash. App. at 695.

Courts have held confessions to be voluntary when police falsely told a suspect that his polygraph examination showed gross deceptive patterns, when police told a suspect that a co-suspect named him as the triggerman, and when police concealed the fact that the victim had died.

Id. at 695-696. The trial court cited Burkins in concluding as a matter of law that "Detective Mikulcik's conduct was not so overbearing as to overcome the respondent's will to resist." CP 46.

In response, Unga argues that "there is an inherent difference between a police officer exaggerating the strength of the state's evidence and a police officer making a false offer of immunity to a suspect," Appellant's Brief at 16. He then goes on to cite Oregon, Fourth Circuit, and Seventh Circuit (but no Washington or Ninth Circuit) law to the effect that confessions resulting from such a "false offer" are "involuntary as a matter of law," Id. at 16-17. While the State denies that Detective Mikulcik made a "false offer" of immunity, it is first important to note that all of the cases cited by Unga are inapposite.

First of all, the Court of Appeals of Oregon, which held "that a confession induced by an express or implied promise of immunity

is involuntary and inadmissible, *as a matter of law*," State v. Aguilar, 133 Or. App. 304, 307, 891 P.2d 668 (1995) (emphasis in original) *explicitly* relied upon "the Oregon Constitution, Article I, section 12," Id. (emphasis added). Its holding is thus not really relevant in Washington.

Secondly, Unga cites United States v. Gonzalez, 736 F.2d 981 (4th Cir.1984), to the effect that "if the defendant's testimony was induced by the government's promise of immunity, it is involuntary and must be suppressed," Appellant's Brief at 17. However, in making this statement of law, Gonzalez, 736 F.2d at 982, the Fourth Circuit was to some extent relying on Bram, which, as Unga concedes, Appellant's Brief at 10-11, "under current precedent does not state the standard for determining the voluntariness of a confession," Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246 (1991) (quoted in Broadaway, 133 Wash. 2d at 132).

Finally, Unga cites a Seventh Circuit case, United States v. Brimberry, 744 F.2d 580 (7th Cir. 1984), Appellant's Brief at 17. However, this case is completely irrelevant since it involves a formal plea agreement with the government, Brimberry, 744 F.2d at

582, not a statement of a police officer in the field. The Seventh

Circuit later described its holding in Brimberry as follows:

a defendant who received a *specific, written* promise of immunity could not be prosecuted for offenses discovered as a direct or indirect result of the defendant's testimony.

U.S. v. Cahill, 920 F.2d 421, 426 (7th Cir. 1990) (emphasis added).

Needless to say, no such promise was conveyed to Unga.

In any case, Detective Mikulcik did not make any "false offer of immunity," Appellant's Brief at 16, at least not one recognizable under Washington law. Most relevant is State v. Davis, wherein the Supreme Court of Washington cites the original Miranda holding to the effect that "cajolery" invalidates a confession, 73 Wash. 2d 271, 282, 438 P.2d 185 (1968). (cited with approval in State v. Gilchrist, 91 Wash. 2d 603, 607, 590 P.2d 809 (1979)). The Court then goes on to define "cajolery" as

a *deliberate* attempt at persuading or deceiving the accused, with false promises, inducements or information, into relinquishing his rights and responding to questions posed by law enforcement officers.

Davis, 73 Wash.2d at 282 (emphasis added).

Detective Mikulcik, however, made no such deliberate deception. Unga himself agreed under oath both that Detective

Mikulcik "said that he would not charge [him] with the graffiti" and that Detective Mikulcik in fact did not charge him with the graffiti. RP 56. Detective Mikulcik stated in his testimony under oath that his real aim was to "find out who was making death threats against Officer Gillette," RP 45-46, not "to get the [appellant] to confess to motor vehicle theft," which "kind of came after the fact." RP 46. Thus, he was certainly not engaging in any deliberate deception, i.e. the illegal "cajolery" as defined in Davis.

Once Unga's confession was freely made, Detective Mikulcik referred the case to the prosecutor as a *Motor Vehicle Theft case*, CP 2 (i.e. not Malicious Mischief or Vehicle Prowling). The prosecutor, after initially charging Unga with Taking Motor Vehicle without Permission in the Second Degree, CP 1, 4, later made an independent decision to add on Vehicle Prowling charges based on the graffiti. CP 20-21. This was within prosecutorial discretion. "[P]romise[s] by police to 'drop charges' . . . without the involvement of the county prosecutor, . . . cannot be enforced as a contract." State v. Reed, 75 Wash. App. 742, 745, 879 P.2d 1000 (1994).

The police have no authority to make prosecutorial decisions. The county prosecutor is charged with prosecution of all criminal actions in which the state is a party. [citation omitted]. The decision whether to file criminal charges is within the prosecutor's discretion.

[citations omitted]. The prosecutor may make enforceable agreements to reduce or dismiss charges, [citation omitted], but because the police did not first obtain the approval or consent of the prosecutor, they had no authority to enter into an enforceable agreement not to prosecute Reed.

Id.

In sum, it is the State's position that Unga's overall confession, under the totality of circumstances, was voluntary. There is thus no basis for a reversal of Unga's conviction for Taking Motor Vehicle without Permission in the Second Degree. While Unga does have a stronger argument with regard to his confession to the graffiti, the State's position is that, under the totality of the circumstances, even that part of the confession was voluntary. There is thus no basis for a reversal of Unga's conviction for Vehicle Prowling in the Second Degree.

2. UNGA'S CONVICTION FOR VEHICLE PROWLING IN THE SECOND DEGREE DOES NOT MERGE WITH HIS CONVICTION FOR TAKING MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE.

"Merger" is a very narrow doctrine that is applicable to a very limited number of scenarios. It is

a rule of statutory construction which *only* applies where the Legislature has *clearly* indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that

the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (e.g., assault or kidnapping).

State v. Vladovic, 99 Wash. 2d 413, 420-421, 662 P.2d 853 (1983) (emphasis added). See also State v. Sweet, 138 Wash. 2d 466, 478, 980 P.2d 1223 (1999) (quoting Vladovic, 99 Wash. 2d at 420-421) (Merger "will 'only appl [y] where the Legislature has clearly indicated' it intended the offenses to merge."). Since Taking Motor Vehicle without Permission in the Second Degree is not in any way elevated by proof of another crime, including Vehicle Prowling in the Second Degree, merger does not apply to this scenario.

In State v. Lass, the Court of Appeals (Division 3) cites the following merger rule:

[W]hen an offense is proven which elevates another crime to a higher degree, "an additional conviction cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element."

55 Wash. App. 300, 308, 777 P.2d 539 (1989) (quoting State v. Johnson, 92 Wash. 2d 671, 680, 600 P.2d 1249 (1979)). Division 3 then goes on to hold that Vehicle Prowling in the Second Degree and Taking Motor Vehicle without Permission in the Second Degree

merge because "no additional steps were necessary to complete both charges," Lass, 55 Wash. App. at 308.

The State believes that Lass was wrongly decided. The standard for merger is not whether the same facts prove both crimes, but whether one crime elevates the other to a higher degree. Vehicle Prowling in the Second Degree does *not* elevate Taking Motor Vehicle without Permission in the Second Degree to a higher degree, and thus merger does *not* apply. Certainly there has been no clear legislative intent of merger, as required by Vladovic, 99 Wash. 2d at 420-421 and Sweet, 138 Wash. 2d at 478.

However, even if the merger rule of Lass is correct, it does not apply to Unga's case. In Lass, the defendant was stopped by a Utah patrolman driving a stolen car. He was charged with and found guilty of Taking Motor Vehicle without Permission, Vehicle Prowling in the Second Degree, and Theft in the Second Degree. Division 3 held that the Vehicle Prowling and Taking Motor Vehicle convictions merged because "[s]econd degree vehicle prowling requires a showing of unlawfully entering or remaining in a motor vehicle with intent to commit a crime therein" and the defendant "had to unlawfully enter the truck in order to take it without

permission." Lass, 55 Wash. App. at 308. Thus, "no additional steps were necessary to complete both charges," Id. In other words, the underlying crime which the defendant had intent to commit for the Vehicle Prowling was the Taking Motor Vehicle crime.

In contrast, Unga's convictions were based on different facts. His conviction for Taking Motor Vehicle without Permission in the Second Degree was based on voluntarily riding in a car he know was stolen, CP 49, while his conviction for Vehicle Prowling in the Second Degree was based on unlawfully entering the car with intent to write graffiti on its dashboard, CP 50. These are entirely different factual bases; and thus, even if Lass were correctly decided, it does not apply to Unga's case.

D. CONCLUSION

Unga's confession was voluntary under the totality of the circumstances test used by Washington courts. The confession was admissible and Unga's convictions for Taking Motor Vehicle without Permission in the Second Degree and Vehicle Prowling in the Second Degree should be affirmed on that basis. Furthermore, the merger doctrine does not apply to Vehicle Prowling in the

Second Degree and Taking Motor Vehicle without Permission in the
Second Degree.

DATED this 2nd day of August, 2006.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

By: 
YARDEN WEIDENFELD, WSBA #35445
Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. LEAA'ESOLA UNGA, Cause No. 57407-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

8/2/06

Date August 2, 2006

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 AUG -2 PM 4:40