

No. 82491-6

SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

V.

JAMES ESERJOSE

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STATE OF WASHINGTON  
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BRIEF OF APPELLANT

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**ORIGINAL**

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## A. Assignments of Error

### Assignments of Error

1. The trial court erred by not suppressing the statements of Mr. Eserjose made at the police station soon after his illegal arrest.

2. Excising Mr. Eserjose's statements to law enforcement from the stipulated facts, the evidence is insufficient to sustain a conviction.

### Issues Pertaining to Assignments of Error

1. The trial court found that Mr. Eserjose's warrantless arrest in his home at 1:30 in the morning without consent was illegal. Should the trial court have suppressed Mr. Eserjose's statements to law enforcement made soon thereafter at the police station?

2. Assuming that Mr. Eserjose's statements to law enforcement should have been suppressed, is the remaining evidence sufficient to sustain a conviction?

## B. Statement of Facts

James Eserjose was arrested inside his home without a warrant on August 30, 2008 at 1:30 in the morning. He was then taken to the police station and interrogated. Based upon his admissions, as well as other information, he was charged by Information with one count of second degree burglary. CP, 1. The major issue in the case was the lawfulness of

his arrest and subsequent interrogation. Mr. Eserjose filed a motion to suppress his statements on October 8, 2008. CP, 6. Both sides briefed the issue comprehensively and the issue was heard by the trial court on November 10, 2008. RP, 1. The trial court concluded that the arrest was illegal, but that Mr. Eserjose's admissions were otherwise admissible. The court denied the motion and findings of fact and conclusions of law were entered. CP, 87.

Mr. Eserjose proceeded to trial by way of stipulated facts. CP, 33. The trial court found him guilty and sentenced him within the standard range. CP, 62. Mr. Eserjose filed a notice of direct review to the Washington Supreme Court on the suppression issue.

On or about August 29, 2008, a latte stand in Kitsap County was burglarized. RP, 5. A window was smashed and money was taken from the freezer. RP, 5-6.

Approximately 24 hours later, an informant named James Cordell contacted the Sheriff's Office with information. RP, 6. He was interviewed by Deputy Heather Wright that night. RP, 7. Based upon the information provided by Mr. Cordell, Deputy Wright developed probable cause that James Eserjose and Joseph Paragone had committed the

burglary. RP, 8.<sup>1</sup> Deputy Wright also learned that Mr. Eserjose and Mr. Paragone were living together at the home of Mr. Eserjose's parents in the Illahee area of Kitsap County. RP, 8.

Based upon this information, Deputy Wright contacted her supervisor, Sergeant Clithero. RP, 15. It was decided that the deputies would go to the home of Mr. Eserjose's parents and try to make contact with Mr. Eserjose and Mr. Paragone. RP, 15. The officers had neither an arrest warrant nor a search warrant. RP, 54. A total of four officers went to the home: Sergeant Clithero and Deputies Sapp, Swayze, and Baker. RP, 32. The time was 1:30 in the morning. RP, 53. All the officers were in uniform and carrying firearms. RP, 53-54.

Deputy Swayze knocked on the door. RP, 68. Mr. Eserjose answered the door. RP, 33. The officers said they were looking for "Joe." RP, 33. Mr. Eserjose said he was upstairs sleeping. RP, 33. Mr. Eserjose turned to go upstairs, leaving the front door open. RP, 34, 57. The door was open about 18 inches. RP, 88.

Mr. Eserjose's father, Wade Frauen, then approached the door. He asked what was going on. The officers told him they needed to talk to Joe

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<sup>1</sup> At the trial level, Mr. Eserjose contested whether the information provided by Mr. Cordell amounted to probable cause. The trial court concluded that it did. CP, 90. On appeal, Mr. Eserjose does not contest that conclusion.

and also to James. RP, 34. Mr. Frauen said, "Well, that was James you were just talking to." RP, 34. At that time, Mr. Fraun said, "I don't want to let the heat outside, so why don't you come in here and I'll shut the door." RP, 57, 78, 88. Sergeant Clithero and Deputies Swayze and Sapp entered the house. RP, 35. The door was shut behind them. RP, 88. Mr. Eserjose never consented to the entry into the house. RP, 63. Mr. Frauen asked what was going on and the deputies refused to tell him. RP, 89.

Immediately inside the doorway is a small elevated entryway or landing. RP, 58, 79, Exhibit 2. The four men stood together quietly waiting for the two young men to come downstairs for several minutes. RP, 35. The three officers remained entirely on the elevated landing while Mr. Frauen stepped just off the landing. RP, 79. They did not proceed immediately upstairs because the entryway was a "reasonable place to stand." RP, 58.

The house is a two story house with the living room and kitchen areas on the main floor and the bedrooms on the second floor. RP, 97. Deputy Sapp testified that it did not seem "appropriate or necessary" to go upstairs immediately. RP, 59.

The officers started getting concerned because it appeared the young men were taking longer than necessary. RP, 35. There was a brief conversation between the officers about whether they should proceed

further into the house. RP, 80. Deputies Swayze and Sapp walked upstairs. RP, 36. Mr. Frauen remained downstairs. RP, 64. At the top of the stairs, the deputies walked down a short hallway. RP, 36. Mr. Eserjose was standing at the doorway just inside the bedroom. RP, 94, 98. According to Mr. Eserjose, Deputy Sapp beckoned for him to approach and told him to "Come over here." RP, 100. Mr. Eserjose and Mr. Paragone walked towards the officers from the bedroom door. RP, 36, 61. At that time, the young men were arrested and handcuffed. RP, 37. They were taken to separate patrol cars. RP, 37. Deputy Sapp read Mr. Eserjose his Miranda rights through the open door of the patrol vehicle. RP, 43. Mr. Eserjose stated that he understood his rights. RP, 39. Deputy Sapp did not ask Mr. Eserjose if he was willing to speak with him, although that question is included on the standard Kitsap County Sheriff's Miranda card. RP, 44.

The two young men were transported to the Silverdale branch of the Sheriff's Office. RP, 16. En route to the station, Mr. Eserjose asked several times why he was being arrested, but Deputy Sapp declined to answer the question. RP, 40. At the station, Mr. Eserjose was placed in the BAC room. RP, 40. Deputy Sapp asked him if he recalled his rights. RP 41. Mr. Eserjose answered affirmatively. RP, 41. Deputy Sapp asked what he knew about the burglary. RP, 41. Mr. Eserjose said he did not

know what he was talking about. RP, 41. Deputy Sapp then moved him to a nearby holding cell. RP, 45. Mr. Eserjose was alone in the holding cell for about 30 to 40 minutes. RP, 46.

Mr. Paragone was then interviewed by Deputies Wright and Sapp. RP, 16, 41. Mr. Paragone confessed to being involved with the burglary. RP, 25. He also implicated Mr. Eserjose. RP, 46.

After the interview with Mr. Paragone, Mr. Eserjose was interviewed. RP, 16. He was interviewed in a large conference room. RP, 47. At the beginning of the interview, he was provided his Miranda warnings, both orally and in writing. RP, 17, 41, Exhibit 7. The form has two spots for a suspect to sign. Mr. Eserjose signed that he understood his rights. RP, 48. Mr. Eserjose did not sign, however, the portion of the form that reads, "I understand my constitutional rights. I have decided not to exercise these rights at this time. Any statements made by me are made freely, voluntarily, and without threats or promises of any kind." RP, 48.

In response to questions, Mr. Eserjose again denied any involvement in the burglary. RP, 23, 49. At that time, the officers advised Mr. Eserjose that honesty would go a long way to benefit him later. RP, 26. Deputy Sapp told him that he had already interviewed Mr. Paragone. RP, 50. Although Deputy Sapp could not specifically recall, it is possible he told him that Mr. Paragone had implicated Mr. Eserjose in the burglary.

RP, 50. The officers said they already knew he had been involved in the burglary and it was important for him to be honest about it. RP, 26. Deputy Sapp reminded Mr. Eserjose that he had no criminal history and implied that he was not looking at a long sentence for this crime, particularly if he was honest about his involvement. RP, 50, 52-53. At that time, Mr. Eserjose admitted his involvement in the burglary. RP, 53.

In its findings of fact and conclusions of law, the trial court concluded the arrest was illegal pursuant to Payton v. New York, infra. The Court concluded that although the deputies did have consent to enter the home, “they did not have consent to go upstairs in the home to the upper hallway, and that the upper hallway would be consider[ed] a private area, not normally open to guests. This is not an area an occupant would assume a risk that a co-occupant would give consent to another to enter.” CP, 90.

Having concluded that the arrest was illegal, the Court next considered the appropriate remedy. Citing New York v. Harris, infra, the trial court concluded that Mr. Eserjose’s statements at the police station were attenuated from the illegal arrest such that suppression was not legally required. The trial court refused to consider whether article 1, section 7 requires a different result. CP, 90-91. The trial court denied the motion to suppress the statements.

### C. Argument

As a preliminary matter, the trial court concluded that the warrantless arrest of Mr. Eserjose in his home was illegal because the officers did not have consent to enter that portion of his home. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). These conclusions are well supported by the record and the trial court's findings should be treated as verities on appeal. State v. Cheatam, 112 Wn. App. 778, 51 P.3d 138 (2002). That Deputy Sapp initially believed it was not "appropriate" to leave the elevated entryway and go upstairs is further evidence that the trial court's conclusion that the arrest violated Payton.

Assuming the arrest was illegal, the issue is whether the trial court correctly concluded that the statements of Mr. Eserjose at the police station were nevertheless admissible. The issue whether an illegal arrest of a person in his home requires the suppression of statements made soon thereafter at the police station is an issue of first impression in Washington. See State v. Riley, 121 Wn.2d 22; 846 P.2d 1365 (1993) (declining to address the issue because it was raised for the first time on appeal); State v. Greve, 67 Wn. App. 166; 834 P.2d 656 (1992) (same).

The United States Supreme Court addressed this issue in New York v. Harris, 495 U.S. 14, 110, S.Ct. 1640, 109 L.Ed.2d 13 (1990).

Harris represents one of a series of cases decided under the Fourth Amendment where the Court has held that the exclusionary rule is not applicable. The rule in Harris is that when police, acting on probable cause but without a warrant, make an illegal arrest pursuant to Payton v. New York, and the police subsequently obtain a statement at the police station, then the statement should not be suppressed as the fruit of the illegal arrest. The Court said, “We decline to apply the exclusionary rule in this context. . .” Harris at 17.

In Washington, illegal searches are governed by Article 1, section 7 of the state constitution, which has been consistently held to be more protective of privacy rights than the Fourth Amendment. This is particularly true when police invade a person’s home. State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). Normally, the remedy for an illegal entry into a home is suppression of any evidence obtained pursuant to the illegal entry. State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998). When courts are called upon to decide whether Article 1, section 7 is more protective than the Fourth Amendment, courts should apply the Gunwall test. State v. Gunwall, 106 Wn.2d 54, 66, 720 P.2d 808 (1986).

Gunwall sets out six factors that should be considered by the court: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters

of particular state or local concern. Because of the textual language of Article I, section 7, the differences between it and the Fourth Amendment, the constitutional history, and the structural differences between state and federal law, it has been repeatedly and consistently found to be more protective of the rights of Washington citizens. More recent case law indicates additional argument on elements (1), (2), (3), (5), and (6) is no longer necessary because the enhanced protections afforded by Article I, section 7 are well-established. State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

The fourth Gunwall factor, pre-existing state law, will always need to be analyzed on a case-by-case basis. In analyzing the preexisting state law, there is a compelling argument that this Court should reject the analysis of Harris. In the first major case decided by the Washington Supreme Court after the Payton decision, State v. Counts, 99 Wn.2d 54, 659 P.2d 1087 (1983), this Court consolidated three cases. In two of the three cases, the defendants argued that their confessions were improperly admitted after they were illegally arrested. The Court spent the majority of its analysis determining whether Payton should apply. In all three cases, the Court concluded that it did. Having concluded that the defendants were illegally arrested, the Court held that all evidence

obtained after the illegal arrests, including the confessions, must be suppressed.

In addition to the case law specific to Payton situations, we have the benefit of other case law involving exceptions to the Exclusionary Rule. At every opportunity where this Court has been asked to erode the Exclusionary Rule, this Court has declined. For instance, when the Court was asked to apply the inevitable discovery rule, this Court declined saying,

We conclude that the inevitable discovery rule cannot be applied in these circumstances, because it would undermine our holding that a lawful custodial arrest must be effected before a valid search incident to that arrest can occur. If we apply the inevitable discovery rule, there is no incentive for the State to comply with article I, section 7's requirement that the arrest precede the search.

State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003).

Similarly, this Court has consistently declined to apply the good faith exception to the exclusionary rule. See United State v. Leon, 468 U.S. 897; 104 S. Ct. 3405; 82 L. Ed. 2d 677 (1984) (evidence obtained by officer, acting in good faith, who conducts a search with an invalid warrant need not be suppressed). This Court explained its reasoning for rejecting the good faith rule in State v. Rife, 133 Wn.2d 140 943 P.2d 266 (1997). This Court said that Washington has never viewed the

exclusionary rule as merely protecting against police misconduct. Instead, the purpose of the exclusionary rule is threefold:

First, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.

Rife, quoting State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990).

While the good faith rule may make sense when the goal is the prevention of police misconduct, it does not make sense when the goal is the protection of the privacy interests of Washington citizens.

In sum, there are three exceptions to the Exclusionary Rule that have been adopted by the United States Supreme Court: the inevitable discovery rule, the good faith rule, and the rule of Harris. This Court has directly addressed two of those exceptions and explicitly declined to apply them in Washington, citing Washington's heightened privacy interests. Given that these privacy interests are particularly acute in a person's home, this Court should decline to follow Harris as well. Not only is Harris inconsistent with this Court's case law (see State v. Counts), but it is inconsistent with this Court's interest in protecting privacy in a person's home. The Exclusionary Rule should apply to post-arrest statements when the arrest was done in violation of Payton.

Looking at the specific facts of Mr. Eserjose's situation illustrates why this Court should reject the analysis of Harris. Four uniformed and armed police officers arrived at Mr. Eserjose's house at 1:30 in the morning. Although Mr. Frauen invited them to wait for him on the landing, he never gave them permission to leave the landing or go upstairs to the bedroom portion of the house. After a short wait, and exceeding the scope of Mr. Frauen's consent, the deputies entered a portion of the house that was not "appropriate" to enter. They went upstairs and arrested Mr. Eserjose who was standing at the doorway of his bedroom. Both Mr. Frauen (while standing on the landing) and Mr. Eserjose (in the back of the patrol car) repeatedly asked why he was being arrested, but the officers refused to say. Although Mr. Eserjose was twice read his Miranda rights, once in the patrol car and once at the station, he was never asked whether he was voluntarily waiving his rights. In fact, on the written Miranda form provided to him at the station, Mr. Eserjose declined to sign the Miranda waiver. Exhibit 7. At the police station he was moved into three separate rooms: the BAC room where he denied any involvement in the burglary, the holding cell for 30 to 40 minutes while he waited for the officers to return, and finally in a large conference room. In the conference room, he again denied any involvement. The deputies confronted him with Mr. Paragone's statements implicating him and told

that they already knew he was involved in the burglary. He was told that his honesty was important and that, given his lack of criminal history, he was looking at a minimal sentence if he was honest. It was at that time Mr. Eserjose made incriminating admissions.

It is not unusual for police to utilize a variety of interrogation techniques to procure a confession from a suspect similar to the techniques used with Mr. Eserjose. See State v. Unga, 165 Wn.2d 95, 196 P.3d 645 (2008). And, but for the illegal arrest, there is little doubt that this Court would sustain the interrogation techniques used in this case. But the issue is whether Mr. Eserjose's statements are sufficiently attenuated from the illegal arrest to allow their admission at trial. When the police illegally arrest a person in his home, separate him from his friends and family without explanation, make no effort to obtain a voluntary waiver of Miranda rights, shuttle him from room to room when he does not immediately confess, and then subject him to coercive interrogation techniques, it cannot be said that the subsequent statements are attenuated from the illegal arrest. Mr. Eserjose's post-arrest statements should be suppressed.

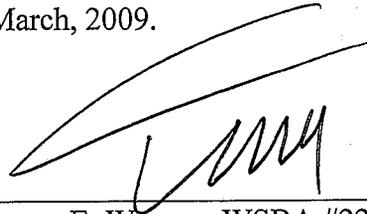
The final question is the appropriate remedy. Normally, the remedy after reversal of a CrR 3.5 hearing would be remand for a new trial. But in this case, Mr. Eserjose was tried on stipulated facts. The

stipulated facts do not contain Mr. Paragone's statements to law enforcement. After excising Mr. Eserjose's statements to law enforcement, there is not sufficient evidence to convict him. This Court should reverse and dismiss the case.

D. Conclusion

This case should be reversed and dismissed.

DATED this 10<sup>th</sup> day of March, 2009.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

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Attorney for Defendant