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NO. 63742-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

YUSSUF ABDULLE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Barbra Mack, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT SHOULD HAVE SUPPRESSED STATEMENTS OBTAINED AFTER ABDULLE INVOKED HIS RIGHT TO COUNSEL

1. The Rule of Law Governing Suppression Hearings is Well Established: Where Independent Evidence Exists, the State Must Either Present it or Explain its Absence on the Record.

Under state and federal law, the prosecution bears the burden of showing an alleged waiver of the right to remain silent was made voluntarily, knowingly, and intelligently. North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966); State v. D.R., 84 Wn. App. 832, 930 P.2d 350, rev. denied, 132 Wn.2d 1015 (1997). Where the prosecution had control over potentially corroborating evidence regarding the alleged waiver and failed to present it at trial, courts have found the State did not meet its burden. State v. Erho, 77 Wn.2d 553, 557-58, 463 P.2d 779 (1970); State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968).

The State claims the rules for Miranda hearings set out in Erho and Davis, do not apply here. Brief of Respondent (BOR) at 18-19 (citing State v. Haack, 88 Wn. App. 423, 958 P.2d 1001 (1997), rev. denied, 134

Wn.2d 1016 (1998)). However, Haack is factually distinguishable, whereas Davis and Erho apply.

In Haack, the State did not present corroborating evidence during the pretrial suppression hearing because none existed. A single officer was present during Haack's alleged waiver and subsequent interrogation. Haack appealed the court's finding of admissibility, claiming the lack of additional officers or witnesses at his interrogation violated the corroboration rule in Erho. The court affirmed Haack's conviction, explaining the State is only required to present corroborating testimony at a suppression hearing when such testimony actually exists. Haack, 88 Wn. App. at 431-33. The rule in Haack does not change the law in Erho or Davis, it merely clarifies that the police are not required to have multiple officers to interrogate a defendant, nor do they have to obtain a defendant's written acknowledgment of waiver. Haack, 88 Wn. App. at 433-35.

This case is distinct from Haack because, like Erho and Davis, more than one officer was present during Abdulle's alleged waiver and alleged voluntary statements. Like Erho and Davis, Abdulle appealed the pretrial finding of admissibility made where one or more of the officers did not testify at the pretrial hearing. The rule requires the prosecution to present all the existing evidence at the pretrial hearing, or else explain its

absence on the record. Haack, 88 Wn. App. 433-34. Again, as in Davis and Erho, the State in this case failed to comply.

In its brief, the State also refers to the proper burden of proof in Miranda cases. BOR at 10. Whether the burden is proof beyond a reasonable doubt or a preponderance of the evidence is of no consequence. These facts raise the same type of "swearing contest" at issue in Davis and Erho. There is no evidence the State lacked an opportunity to produce Newell. Because the State, without explanation, failed to produce Newell's testimony, or independent corroborating evidence of the alleged waiver, the State failed to meet its heavy burden under Miranda. Therefore, the prosecution failed to meet its burden under either standard.

2. The State Failed to Meet its Heavy Burden to Prove a Knowing, Voluntary, and Intelligent Waiver

The State claims Abdulle voluntarily waived his unequivocal and undisputed demand for an attorney by reinitiating conversation with police. 1RP 16, 50; BOR at 13-14. The State cites Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983) in support of this contention. BOR at 12. The State's reliance on Bradshaw is misplaced.

Bradshaw was interrogated about a body found in his wrecked pickup truck, and later arrested for providing alcohol to the decedent, a minor. After being given his Miranda rights, Bradshaw denied his

involvement and asked for an attorney. While being transferred to jail, Bradshaw asked a police officer, "Well, what is going to happen to me now?" The officer told Bradshaw he did not have to talk and Bradshaw said he understood. Bradshaw was told where he was being taken and what he would be charged with. Bradshaw took a polygraph at the officer's urging, and when told the results showed deceptiveness, admitted he had passed out at the wheel of the truck. Bradshaw's motion to suppress his statements admitting his involvement was denied, and he was found guilty of first-degree manslaughter, driving while under the influence, and driving while his license was revoked. Bradshaw, 462 U.S. at 1039.

The Court found Bradshaw broke his silence when he initiated a conversation with police by asking, "Well, what is going to happen to me now?" Bradshaw, 462 U.S. at 1045. The Bradshaw court made clear its holding was limited to its facts. Bradshaw, 462 U.S. at 1046 ("On these facts we believe there was not a violation of Edwards." [1]). Additionally, the Court noted that determining whether conversation has been "initiated" should be decided on a case-by-case basis. Bradshaw, 462 U.S. at 1045 ("While we doubt that it would be desirable to build a

[1] Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue.")

Bradshaw is also factually distinguishable from the present case. Nothing in Bradshaw suggests Bradshaw disputed he asked police "Well, what is going to happen to me now?" In contrast, while the State alleges Abdulle voluntarily reinitiated conversation by asking Hoover what they were doing or where they were going, Abdulle denied he ever asked Hoover any questions. 1RP 50-51, 60-62.

The State also suggests Abdulle's request for water and a cigarettes constituted a waiver. BOR at 14. Abdulle did not agree to talk to Hoover in exchange for a cigarette and glass of water. 1RP 51-52. Abdulle said he only asked Hoover to return the cigarettes Hoover had taken from him. 1RP 51-52, 63-64. Moreover, as the Bradshaw Court noted:

> There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.

Bradshaw, 462 U.S. at 1045.

3. The Issue May be Raised on Appeal

The general rule is that issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (citing Sate v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996)). By its own terms, however, the rule is discretionary rather than absolute. See RAP 2.5(a) (an "appellate court may refuse to review any claim of error which was not raised in the trial court"); Ford, 137 Wn.2d at 477 (citing Obert v. Environmental Research & Dev. Corp., 112 Wn.2d 323, 333, 771 P.2d 340 (1989); Bennet v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990)). "Thus, the rule never operates as an absolute bar to review." Ford, 137 Wn.2d at 477.

Furthermore, a manifest constitutional error may be raised for the first time on appeal. RAP 2.5(a)(3); Ford, 137 Wn.2d at 477. In determining a manifest error, courts consider four factors: 1) whether the alleged error is a constitutional issue, 2) whether the error is manifest, that is, whether it had practical and identifiable consequences, 3) the merits of the constitutional issue, and 4) whether the error was harmless. State v. Barr, 123 Wn. App. 373, 98 P. 3d 518 (2004), rev. denied, 154 Wn.2d 1009 (2005) (citing State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Abdulle's argument concerns a constitutional issue. An accused has a constitutional right to a "fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." State v. Joseph, 10 Wn. App. 827, 830, 520 P.2d 635 (1974), rev. denied, 84 Wn.2d 1006 (1974) (citing Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 1780, 12 L. Ed. 2d 908 (1964)). At such hearing, the State has the burden of proving a waiver of the Fifth Amendment right to remain silent. Butler, 441 U.S. at 373; Miranda, 384 U.S. at 436; D.R., 84 Wn. App. at 832; See also Lynn, 67 Wn. App. at 342 ("admissions and confessions involve the Fifth and Sixth Amendments").

On its merits, the constitutional issue requires reversal. By attempting to establish a voluntary waiver based on a "swearing contest" between Abdulle and Hoover despite access to Newell's testimony, the State failed to meet its heavy burden under Miranda. Erho, 77 Wn.2d at 558; Davis, 73 Wn.2d 271.

The State failed to explain why it did not call Newell, the only other witness to the interrogation and alleged waiver, nor did it explain his absence. The State contends because there are no findings as to Newell's involvement, this case does not involve independent evidence to support an application of the missing witness rule. BOR at 19-20. The Brief of

Respondent cites no authority in support of its proposition that findings are required.

Furthermore, the record demonstrates Newell was a witness to Abdulle's interrogation and alleged waiver. The car Abdulle was in was a regular, unmarked sedan. 1RP 10-11. Hoover said it was not equipped with a "silent partner" nor any type of screening: Hoover did not say there was any barrier between the front and back seats. 1RP 10-11. Indeed, Abdulle said Hoover and Newell began talking to one another inside the car, but Abdulle was unable to focus on what was said because he was nervous and afraid he would be arrested and lose his job. 1RP 48, 59. Hoover said Newell drove toward the Bellevue Police Department to book, fingerprint and photograph Abdulle. 1RP 11. While Hoover alleged Newell went to get Abdulle water and a cigarette at the Bellevue Police Department, Abdulle said Hoover gave him back a cigarette he had taken. 1RP 51-52.

Because the trial court relied exclusively on Hoover's alleged credibility in finding Abdulle's alleged statements voluntary – despite the State's failure to meet its burden under Miranda – Abdulle was deprived of his constitutional right to a fair and reliable determination of his alleged voluntary statements. 1RP 67, 74-75.

This error was also "manifest" and prejudicial. Constitutional error is presumed prejudicial. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001) (citing State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372. (1997); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980)). The State bears the burden of proving error harmless beyond a reasonable doubt. Spotted Elk, 109 Wn. App. at 261. In this context, the State must show the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Spotted Elk, 109 Wn. App. at 261.

As discussed in Abdulle's opening brief, where the prosecution emphasized Abdulle's statements on numerous occasions and the remainder of its case allowed rational jurors to have a reasonable doubt as to identity and other people's access and opportunity to take the checks from the PSS office, the error is prejudicial. This Court should reverse. Spotted Elk, 109 Wn. App. at 261; Miller, 131 Wn.2d at 90.

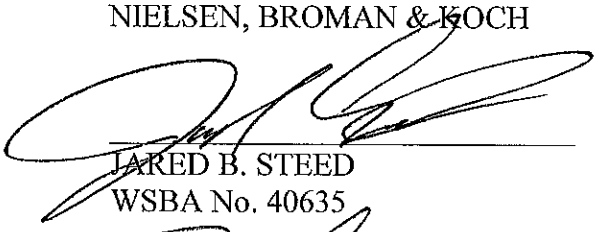
B. CONCLUSION

For the reasons discussed above and in the opening brief, Abdulle's convictions should be reversed and the case remanded for a new trial. Additionally, resentencing is required because the court failed to exercise its discretion when it imposed a non-mandatory DNA collection fee based on the mistaken view the fee was "mandatory."

DATED this 20th day of January, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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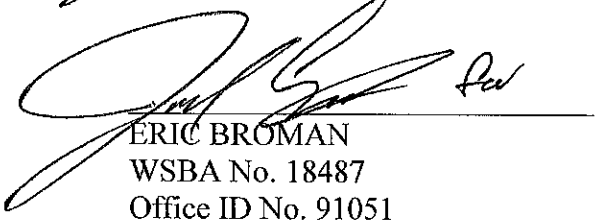

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63742-8-I
	)	
YUSSUF ABDULLE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF JANUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JANUARY, 2010.

x Patrick Mayovsky