

03149-7

03149-7

NO. 63149-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

ASFAWESAN DRES,

Appellant.

REC'D  
AUG 19 2010  
King County Prosecutor  
Appellate Unit

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JENNIFER L. STANLEY

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

The Honorable Chris Washington, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress drug evidence discovered as a result of an unlawful interrogation. CP 118-20.<sup>1</sup>

2. The trial court erred concluding suppression of physical evidence is not an appropriate remedy for a Fifth Amendment violation. CP 119-20; 4RP<sup>2</sup> 17-19.

3. The trial court erred in implicitly finding that appellant's post-arrest confession obtained in violation of appellant's Fifth Amendment rights was not coerced. See CP 119-20 (trial court notes "The Fifth Amendment does not require the suppression of physical evidence derived from an un-Mirandized confession unless the statement was actually coerced.").

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<sup>1</sup> A copy of the court's "Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Physical, Oral or Identification Evidence" is attached as an appendix.

<sup>2</sup> There are currently nine volumes of verbatim report of proceedings referenced as follows: 1RP - 1/9/08; 2RP - 9/17/08 (a.m.); 3RP - 9/17/08 (CrR 3.5/3.6 hearing); 4RP - 12/9/08; 5RP 12/10/08; 6RP - 12/11/08 (trial); 7RP - 12/12/08; 8RP - 1/23/09; and 9RP 2/25/09 (sentencing). A supplemental statement of arraignments was filed August 5, 2010, requesting a tenth volume that will contain the closing arguments of counsel from December 11, 2008. In the event additional appellate issues arise from this transcript, Dres will seek to raise those issues by filing a motion to file a supplemental brief and associated supplemental brief.

Issue Pertaining to Assignments of Error

Police violated appellant's Fifth Amendment rights by interrogating him after his arrest and while he was in either a drug-induced or fall-induced stupor, without first advising him of his right to remain silent. As a result of the unlawful interrogation, police recovered small pieces of crack cocaine from the sidewalk that were used to convict appellant of possession of cocaine with intent to deliver. Where but for the violation of appellant's Fifth Amendment rights the drugs used to convict him would not have been recovered,<sup>3</sup> and where appellant's statement that led to discovery of the drugs was given while in a state of stupor, should the trial court have granted the defense motion to suppress the drugs?

B. STATEMENT OF THE CASE

In the early morning hours of August 21, 2007, Seattle Police officers Daina Boggs, Mark Hazard and Jason Diamond were patrolling the Pike Place Market area of downtown Seattle in an unmarked black SUV. 6RP 16-18, 30. All three were dressed in plain clothes, but wore badges and vests signifying they were police officers. 6RP 17, 43, 85.

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<sup>3</sup> The State may claim, as the trial court initially found, that discovery of the drugs was probably inevitable. See 3RP 45 (trial court initial ruling implied it might find police would have found the drugs even absent the unlawful interrogation of appellant). Following a mistrial, however, the court reheard the suppression motion, and no such implied finding exists in the court's subsequent oral or written ruling. See CP 118-20;

When they stopped to look at a group of people standing on the sidewalk, all but one person in the group left. 6RP 19, 44. Boggs, who was seated in the right-side back passenger seat of the SUV, rolled her window down six to eight inches and asked the remaining person, Aaron Brown, "if he had weed." 6RP 17-18, 20, 31, 45. When Brown told her she was in the wrong place for weed, Boggs then arranged instead to buy \$40 worth of "crack cocaine." 6RP 21-22. Brown directed Boggs to meet him at another location to complete the transaction. 6RP 23, 46.

When the SUV pulled up to the location designated by Brown, there were several people standing there, including Brown and Appellant Asfawesan Dres. 6RP 24. Boggs claimed she saw Dres place what she thought was crack cocaine in Brown's palm, but then removed it after looking at her. 6RP 24-27. Boggs told Hazard and Diamond what she had seen, and she and Hazard got out of the SUV intending to arrest Brown and Dres for "drug traffic loitering." 6RP 27, 38-39, 90. Brown and Dres, however, both ran away in different directions. 6RP 27, 48.

Boggs chased and caught Brown. 6RP 27-28. Brown was not aware of any drugs or cash being found on Brown. 6RP 28.

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4RP 17-19. Moreover, no evidence was presented at the CrR 3.6 hearing to support such a finding. Therefore, such a claim should be rejected.

Hazard chased Dres down a steep hill on Pine Street towards the Pike Place Market and eventually caught and arrested him after a security guard tripped Dres as he ran by. 6RP 27, 90-91. According to Hazard, when Dres was tripped "he hit hard and rolled multiple times. I think it stunned him pretty good[.]" 6RP 91. Hazard arrested and handcuffed Dres and walked him up the hill to an arriving patrol car. 6RP 91. Hazard admitted he never saw Dres try to slough anything, nor did he ever see anything fall from Dres's person. 6RP 99.

According to the testimony of Officer Raul Vaca at a pretrial CrR 3.5/3.6 hearing, he and his partner arrived at the scene where Hazard had Dres in custody. 3RP 8-9. Vaca said that when he arrived Dres was sweating, salivating at the mouth and "going in and out of consciousness." 3RP 9. Based on his training and experience, Vaca believed Dres's symptoms suggested he had ingested narcotics. 3RP 9-10.

Vaca asked Dres "if he had ingested any narcotics or dropped any narcotics." 3RP 11. According to Vaca, Dres "kind of mumbled, 'back there.' And [Dres] pointed in a direction that [Vaca] didn't write in [his] statement." 3RP 11. Vaca claimed he did not make any promises or threats to induce Dres's response, and in his opinion, Dres responded "freely and voluntarily" to his question. 3RP 11. Vaca admitted however,

that he never advised Dres of his rights before questioning him, nor did he have a basis to believe Officer Hazard had done so. 3RP 14.

Vaca passed on what he had learned from Dres to Hazard, who then went to the area where Dres pointed to and recovered suspected narcotics. 3RP 14-15; see also 6RP 50-51, 55, 63-65, 93 (Diamond and Hazard later returned to the area where Dres had tripped and fallen, and collected "small pieces" crack cocaine that "was strewn all throughout the sidewalk."). The State charged Dres with one count of possession of cocaine with intent to deliver based on the cocaine found on the sidewalk by Hazard and Diamond. CP 1-4; RCW 69.50.401(1),(2)(a).

Pretrial, Dres filed a motion to suppress, claiming that because he was not advised of his rights before Vaca questioned him, both his responses and the evidence recovered as a result of his response must be excluded from trial. CP 6-14. In its written response, the State did not contest that Dres was never advised of his rights before Vaca questioned him. See Supp CP \_\_ (sub no. 65, State's Response to Defendant's Motion to Suppress Evidence, 7/29/08). Instead, the State claimed the interrogations was allowed under "the public safety exception to Miranda<sup>[4]</sup>" and therefore both Dres's statements and the drugs found as a

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<sup>4</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

result were both admissible. Id. at 3-4. Alternatively, the State argued that even if there was a Miranda violation, the drugs should still be admitted at trial because suppression of physical evidence is not an available remedy for such a violation. Id. at 5.

A hearing on Dres's motion to suppress was held September 17, 2008. 3RP. After hearing testimony from Officer Vaca, and argument from counsel for the State and Dres, the court concluded that asking Dres if he had dropped any narcotics before advising him of his rights constituted a Fifth Amendment violation and therefore Dres's response to that inquiry was inadmissible at trial. 3RP 44. The court held, however, that the drugs found as a result of Dres's inadmissible response were admissible at trial because the officer would have found the drugs anyway.<sup>5</sup> 3RP 44-45.

Dres's first trial ended in a mistrial when the jury could not reach a unanimous verdict. 4RP 2. Prior to retrial, Dres made clear he would not stipulate to the trial court's prior rulings for purposes of the retrial. CP 66-74; 4RP 3-4. The State agreed that rulings from the prior trial were not

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<sup>5</sup> Error has not been assigned this ruling because, as previously noted, the suppression motion was reheard following a mistrial, and as such this ruling was superseded. It is worth noting, however, that there was no evidence presented at any hearing to support a finding that police would have found the drugs absent Dres's response to Vaca's post-

binding on retrial, and the court allowed the parties to reargue Dres's motion to suppress. 4RP 4-5.

As before, Dres argued that Vaca's violation of his Fifth Amendment rights warranted suppression of both his response to Vaca's interrogation and the drugs found as a result of that response. 4RP 7-12. The State argued that despite the Fifth Amendment violation, the drugs should be admitted because suppression of physical evidence for such a violation is not an option for the court. 4RP 12-15. The State did not, however, argue inevitable discovery as an alternative basis for admission. The court found, as it had before, that Dres's response to Vaca's interrogation was not admissible, but the drugs were. 4RP 17-18. The court subsequently filed written findings and conclusion in support of its rulings. CP 118-20 (Appendix); Supp CP \_\_ (sub no. 137, Written Findings of Fact and Conclusions of Law on CrR 3.5....., 3/2/09).

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arrest interrogation. For example, no one testified that it is routine for police to retrace the area covered during a pursuit to search for potential evidence.

C. ARGUMENT

THE DRUGS USED TO PROSECUTE DRES SHOULD HAVE BEEN SUPPRESSED BECAUSE THEY WERE FOUND IN DIRECT VIOLATION OF DRES'S FIFTH AMENDMENT RIGHTS.

The Fifth Amendment to the United States Constitution states, in part, that no person "shall . . . be compelled in any criminal case to be a witness against himself." Const. art. 1, § 9, states, "No person shall be compelled in any criminal case to give evidence against himself." The provisions are interpreted the same. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); State v. Warness, 77 Wn. App. 636, 639 n.2, 893 P.2d 665 (1995). The right against self-incrimination exists to put the entire load of producing incriminating evidence on the State "by its own independent labors." Easter, 130 Wn.2d at 241 (citations omitted).

Any form of custodial interrogation is inherently and presumptively coercive. State v. Lavaris, 99 Wn.2d 851, 857, 664 P.2d 1234 (1983), affd., 106 Wn.2d 340, 721 P.2d 515 (1986). Thus, police are required to issue warnings before engaging in custodial interrogation in order to protect a person's constitutional right to be free from self-incrimination while in the coercive environment of police custody. Miranda v. Arizona, 384 U.S. 436, 478, 16 L.Ed.2d 694, 86 S. Ct. 1602

(1966);<sup>6</sup> State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). The requirement that police issue the Miranda warnings is a constitutional rule. Dickerson v. United States, 530 U.S. 428, 439, 441, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000). The failure to provide proper warnings or to obtain a waiver of those rights is sufficient to exclude any statements obtained. Missouri v. Seibert, 542 U.S. 600, 608, 124 S. Ct. 2601, 159 L.Ed.2d 643 (2004). Thus, any confession obtained in the absence of proper Miranda warnings is effectively coerced. Lavaris, 99 Wn.2d at 856.

Here, the trial court correctly found that by interrogating Dres after he had been arrested, but before anyone had advised him of his Miranda rights, Officer Vaca violated Miranda and therefore Dres's statements had to be suppressed. Supp CP \_\_ (sub no. 137, supra). That finding has not been challenged and is therefore a verity on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (unchallenged findings of fact are verities on appeal).

The trial court ruled, however, that although Dres's statements to Vaca were not admissible at trial, the drugs found as a result of those statements were. CP 118-20. This was error because under the totality of the circumstances, Dres's statement to Vaca was not voluntary, but instead

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<sup>6</sup> Those admonishments are: (1) the right to remain silent; (2) that anything said can be used against the person; (3) the right to an attorney during questioning; and (4) that if the

coerced in direct violation of the Fifth Amendment. Under such circumstances, not only is the statement suppressed, but so to must any evidence recovered as a result of the statement. See State v. Wethered, 110 Wn.2d 466, 474, 755 P.2d 797 (1988), and State v. Putman, 65 Wn. App. 606, 612, 829 P.2d 787 (1992), review denied, 122 Wn.2d 1015 (1993) (where there is coercion or a direct Fifth Amendment violation, evidence derived from a non-Mirandized testimonial act must be suppressed).

In Wethered, the petitioner turned over hashish in response to the request of the arresting officer. The officer had not advised the petitioner of his Miranda rights. 110 Wn.2d at 468-69. The issue was whether the hashish was suppressible as a fruit of an un-Mirandized testimonial act. Id. In ruling against the petitioner, the Court followed the reasoning in Oregon v. Elstad, 470 U.S. 298, 314, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985): that Miranda provides greater protection than the Fifth Amendment; thus, "absent deliberately coercive or improper tactics in obtaining the initial confession," the fruits of the un-Mirandized statement are admissible. Wethered, 110 Wn.2d at 473.

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person cannot afford an attorney, one will be appointed. Miranda, 384 U.S. at 478.

Coercion may be physical or psychological. A confession is coerced if based on the totality of the circumstances the defendant's will was overborne. State v. Burkins, 94 Wn.App. 677, 694, 973 P.2d 15 (citing State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997)), review denied, 138 Wn.2d 1014 (1999). The factors to consider in determining whether a confession was coerced include: (1) the condition of the defendant; (2) the defendant's mental abilities; and (3) the conduct of the police. Broadaway, 133 Wn.2d at 132; see, Missouri v. Seibert, 542 U.S. 600, at 604-605, 612 (confession made *after* proper Miranda warnings inadmissible because of police conduct where police deliberately questioned defendant for 30 to 40 minutes before giving Miranda warnings).

Here, Officer Vaca testified at the suppression hearing that when he arrived on the scene Dres was sweating, salivating at the mouth and "going in and out of consciousness." 3RP 9; see also 6RP 91 (Officer Hazard testified that when Dres was tripped "he hit hard and rolled multiple times. I think it stunned him pretty good[.]"). Based on his training and experience, Vaca believed Dres had ingested narcotics. 3RP 9-10. Despite Dres's being in an apparent drug- or violent-fall-induced stupor, Vaca asked him "if he had . . . dropped any narcotics," to which

Dres "kind of mumbled, 'back there'" and pointed. 3RP 11. Given Vaca's admitted awareness of Dres's condition, this Court should find that Dres's response to Vaca's interrogation was not voluntary, but rather a response unfairly coerced out of him in direct violation of the Fifth Amendment by an officer that knew his ability to reason and make rational decisions was severely compromised and easily overborne.

D. CONCLUSION

Because the drugs used to prosecute Dres were recovered in direct violations of his Fifth Amendment rights, this Court should conclude it was reversible error not to exclude them from Dres's trial. Wethered, 110 Wn.2d at 474.

DATED this 19<sup>th</sup> day of August, 2010

Respectfully submitted,

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ASFAWESAN DRES,

Defendant,

No. 07-1-06482-2 SEA

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.6  
MOTION TO SUPPRESS PHYSICAL,  
ORAL OR IDENTIFICATION  
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on December 9, 2008 before the Honorable Judge Chris Washington. After considering the evidence stipulated to by the parties and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. On August 21, 2007 at approximately 12:30 a.m., Seattle Police Sergeant Mark Hazard, Officer Daina Boggs, and Officer Jason Diamond were patrolling the Pike Place Market area of downtown Seattle.
- b. The officers were in an unmarked Chevy Tahoe and were in plain clothes with police vests over their clothing and their badges clearly displayed.
- c. After observing a suspected narcotics transaction between the Defendant and an individual later identified as Aaron Brown, Officer Boggs and Sergeant Hazard got out of the passenger side of the Tahoe and attempted to contact the two men.
- d. Both men fled, with Officer Boggs chasing Brown and Sergeant Hazard chasing the Defendant.
- e. Sergeant Hazard caught up to the Defendant after a Pike Place security guard tripped the Defendant.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

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- 1 f. Sergeant Hazard took the Defendant into custody and walked him up the hill to a  
transport vehicle.
- 2 g. Officer Raul Vaca arrived as Sergeant Hazard was walking the Defendant up the  
hill.
- 3 h. Officer Vaca noticed the Defendant was sweating profusely, drooling, and  
foaming at the mouth.
- 4 i. Concerned that the Defendant had swallowed narcotics, Officer Vaca asked the  
Defendant if he swallowed any drugs or if he had tossed any drugs onto the  
5 ground while he had been running.
- 6 j. Prior to asking this question, neither Officer Vaca, nor any other officer had  
advised the Defendant of his Miranda warnings.
- 7 k. The Defendant acknowledged that he had tossed the drugs onto the ground while  
he had been running, motioning to where he had been tripped and had fallen.
- 8 l. Officer Vaca relayed this information to Sergeant Hazard.
- 9 m. Sergeant Hazard returned to where the Defendant had fallen and found a small  
piece of plastic surrounded by several pieces of suspected crack cocaine.

10 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE  
SOUGHT TO BE SUPPRESSED:

11 a. **Suppression of physical evidence is not a remedy under the Fifth**  
**Amendment.**

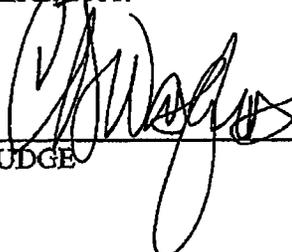
12 Although this court finds a Miranda violation requiring suppression of the Defendant's  
13 statements, suppression of the crack cocaine is not warranted. The Fifth Amendment does not  
14 require the suppression of physical evidence derived from an un-Mirandized confession unless  
15 the statement was actually coerced. State v. Wethered, 110 Wn.2d 466, 473-75, 755 P.2d 797  
16 (1988). In Wethered, the defendant was seen by an officer selling hashish out of his car. Id. at  
17 467. Other officers arrived, arrested the defendant, and told him pre-Miranda that he could  
18 either "do it the easy way or the hard way" (referring to production of the hashish). Id. at 467-  
19 68. After assurances from the officers that the car would not be impounded if he turned over the  
20 hashish, the Defendant retrieved the hashish from one of the vehicle occupants and handed it to  
21 the officers. Id. at 468. The court held that Wethered's statement and act of producing the  
22 hashish was a confession obtained in violation of Miranda and was not admissible. Id. at 471.  
23

1 The court went on to hold, however, that suppression of the hashish itself derived from the non-  
2 Mirandized testimonial act was not a remedy for the Fifth Amendment violation. Id. at 474-75.

3 Here, the Defendant stated and gestured back to the location where he was tripped. At  
4 that location, Sergeant Hazard found the piece of plastic with pieces of crack cocaine all around  
5 it. Under Wethered, suppression of the plastic and crack cocaine found by Sergeant Hazard is  
6 improper as suppression of physical evidence is not a remedy for a Miranda violation. This court  
7 thus finds the crack cocaine and plastic admissible.

8 In addition to the above written findings and conclusions, the court incorporates by  
9 reference its oral findings and conclusions. Defendant's motion to suppress is denied.

10 Signed this 2nd day of March 2009.  
~~December, 2008.~~

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14 JUDGE

15 Presented by:

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17 \_\_\_\_\_  
18 Deputy Prosecuting Attorney # 210627

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