No. ***42964-1***-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALFRED JOSEPH SANCHEZ,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 09-1-00591-9

FIRST AMENDED SUPPLEMENTAL BRIEF OF RESPONDENT
(Appeal Number)

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A. ARGUMENT

1. THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellant argues the trial court's findings of fact are not properly supported by the evidence. An appellate court reviews findings of fact entered by a trial court in support of its ruling on a motion to suppress evidence under the substantial evidence standard. *State v. Mendez,* 137 Wn.2d 208, 970 P.2d 722 (1999). Substantial evidence is such evidence sufficient to persuade a fair-minded rational person of the truth of the finding. *Id.* In the present case, all of the trial court's findings are supported by sufficient evidence to meet this standard.

In fact, most of the trial court's findings of fact were undisputed in the evidence. For instance, it was undisputed that the interview in question took place at JBLM and was arranged by military personnel at the request of Olympia Police detectives. RP 10-11, 48-49, 84-85. It is not disputed that the defendant was one of several soldiers interviewed, he was in uniform at the time, and he was not physically restrained, nor was he under arrest. RP 88. The undisputed evidence clearly supports the court's first three findings of fact.

In addition, it was undisputed that the interview consisted of two parts, once that was not taped, and a second with a tape recorder. The detectives testified, and the defendant agreed on cross examination he was advised of his *Miranda* warnings prior to each part of the interview and each time he acknowledged he understood his rights and waived them. RP 17-20, 52-53, 88-90. When the interview was concluded, he was not arrested and left. RP 34, 53. This undisputed evidence clearly supported the last four (5-8) findings of fact entered by the court.

As a side note, appellant alleges the State agreed not to use the substance of the "first interview" (the untapped portion) as evidence in the case in chief "because of the detective's poor memory." That is inaccurate. The court did express concern about the detective's lack of memory about the untapped portion of the interview. The State's position was that only the taped portion of the interview would be offered. The court was satisfied with that clarification. RP 95. Nonetheless, finding of fact #5, referring to the initial pre-tape portion of the interview, is relevant to the court's analysis of the voluntariness of the entire interview because the court finds that the defendant was read his *Miranda* rights prior to any questioning and waived those rights, a fact that was undisputed. Nothing about

the substance of the first interview was the subject of any finding of fact because it was not relevant or necessary for the court's analysis of voluntariness.

The only finding of fact arguably in dispute was finding of fact #4 which reads as follows:

> 4. Prior to the interview, the defendant was ordered by a superior to go into the interview room and to 'cooperate.' The defendant complied and went into the interview room.

It is important to note that the evidence of the conversation referenced in finding #4 was introduced through the defendant's testimony and an affidavit (admitted over the State's objection, (RP 76)) from his superior. While the defendant was subject to cross examination, his superior was not. Therefore, the state did not have opportunity to test that evidence, and the court was entitled to give whatever weight it felt was appropriate under the circumstances. Be that as it may, the court acknowledged the evidence on this issue and found that there was an order to "cooperate" given. Therefore, finding #4 appears to be supported by the evidence.

Appellant further argues that some findings of fact are not supported by substantial evidence because they "omit critical facts."

This argument is illogical. If certain findings are supported by the evidence, the absence of additional findings, for whatever reason, does not change the evidence supporting the findings that were made. In the present case, the court was unwilling to go further in its findings, either determining that further findings were not necessary for its decision, or that further findings would not be supported by substantial evidence, or both. Appellant cites no authority supporting an argument that the decision not to make certain findings undermines the evidence supporting the findings that were made.

Finally, Appellant assigns error to the court's decision to not adopt proposed findings from defense. The findings and conclusions proposed by defense, however, would have the court reversing itself and suppressing the statements that were already admitted into evidence. The purposes of findings it to document the decisions made by the court. The proposed findings from defense did not describe the actual findings or conclusions by the court.

The State submits that in fact no additional findings were necessary for the court to make its decision. The ultimate issue in this hearing was whether the giving of an order to cooperate by a

superior officer was so coercive as to render a subsequent reading and waiver of *Miranda* rights useless and, therefore, make the giving of a statement involuntary. The relevant facts to resolve that issue are contained in the court's findings. It's discretion in refusing the make further findings on factual issues that need not be resolved should not be disturbed on appeal.

2. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE PROPER ADVISEMENT OF MIRANDA RIGHTS WAS SUFFICIENT TO OVERCOME ANY COERCIVE EFFECT OF THE PRIOR MILITARY ORDER.

a.While the defendant was on duty and ordered to be present for the interview, his freedom to leave was not restricted to a degree associated with formal arrest.

Because the requirements of *Miranda* were met in this case, it is debatable whether the court needed to decide if the defendant was or was not in custody for purposes of requiring *Miranda* warnings. However, whether the defendant was in fact in custody, as that term is defined by cases interpreting *Miranda*, could be a factor in the court's analysis about the voluntariness of the statements.

That being said, it is clear the court did not view the defendant as being in "custody" for purposes of *Miranda*. A person is in custody when their freedom is restricted to a degree that could be reasonably associated with formal arrest. *Berkemer v. McCarthy*,

468 U.S. 420, 104 S.Ct. 3138, 3151, 82 L.Ed. 2d 317 (1984). While he may have been ordered to be there for the interview, there was never any indication he was being arrested. Even the defendant admitted on cross examination he knew he was not under arrest. RP 88. There was nothing about this encounter that would lend itself to being associated with formal arrest.

> b. Any coercive effect of the order to cooperate given by Appellant's superior was neutralized by the subsequent advisement of *Miranda* rights on two occasions and the defendant's waiver of those rights.

In conclusion of law #4, the court concludes the advisement of rights given twice by detectives was sufficient to overcome any potential coercive effect of the order to cooperate. There is substantial evidence to support this conclusion.

Whether statements obtained from a criminal suspect during interrogation are voluntarily made is determined by considering the totality of the circumstances surrounding the interrogation. *State v. Young,* 158 Wn. App. 707, 243 P.3d 172 (2010). Circumstances that may bear on the voluntariness of those statements include any police coercion, the length of the interrogation, the location of the interrogation, whether the interrogation was continuous, the defendant's maturity, education, physical condition, and mental

health, and whether the police advised the defendant of the rights to remain silent and to have counsel present during interrogation. *Id.*

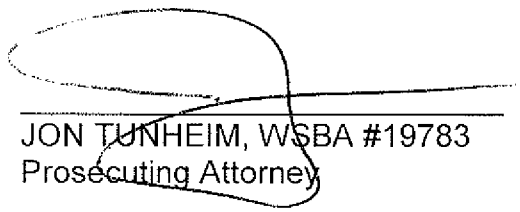
The environment and circumstances of this interview were not coercive. The interview was reasonable in duration and conducted in a familiar place (on base). The defendant admitted that he knew and understood his rights. He was not physically restrained in any way, his superior was not in the room during the interview, and at all times the detectives were, by his own testimony, courteous and respectful. The defendant never expressed concern before or during the interviews about being ordered to cooperate, and never asked any questions about whether this order would in fact override his constitutional right to remain silent.

As noted in Respondent's Brief, the United States Supreme Court has consistently held that coercive police activity is a necessary predicate to a finding that a confession is not voluntary and, thus, inadmissible under the due process clause of the Fourteenth Amendment. *Colorado v. Connolly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Absent police conduct causally related to the confession, there is no basis for concluding

that any state actor has deprived a criminal defendant of due process. *Id.*

Under the circumstances of this case, the trial court did not err in concluding that any possible coercive effect from an order given by a military superior to this defendant was overcome when he was read his rights and provided clear opportunity to assert or waive those rights. Under these circumstances, the defendant's decision to waive his rights and give a statement (professing his innocence) was clearly voluntary and the courts conclusion to such is supported by substantial evidence. *See United States v. Shafer*, 384 F. Supp. 491 (E.D. Oh. 1974).

RESPECFULLY SUBMITTED THIS 5th DAY OF JUNE, 2014.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the cover page of Respondent's First Amended Supplemental Brief (corrected appeal number) on the date below as follows:

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TO: DAVID C. PONZOHA, CLERK
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of June, 2014, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

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