No. 44433-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Gonzales,

Appellant.

Kitsap County Superior Court Cause No. 12-1-00705-3

The Honorable Judge Steven Dixon

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

ARGUMENT

I. THE CONVICTION VIOLATED MR. GONZALES'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Mr. Gonzales's statement to Detective Martin was involuntary and should have been suppressed.

A statement is involuntary under the due process standard if the accused's "will was overborne" under the totality of the circumstances. *Dickerson v. United States,* 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). The court admitted Mr. Gonzales's statement, which he made while in the critical care unit, under extreme pain, with several tubes sticking out of his chest, and while on pain medication. RP 6-7, 13; CP 11.

The state argues that Mr. Gonzales's statement was voluntary because he was not intoxicated to the "level of mania" at which he "could not comprehend what he was saying and doing." Brief of Respondent, pp. 12-13 (citing *State v. Cuzzetto*, 76 Wn.2d 378, 386-87, 457 P.2d 204 (1969)). Respondent misstates the voluntariness standard. The issue in *Cuzzetto* was the voluntariness of the accused's waiver of his *Miranda* rights during custodial interrogation. *Cuzzetto*, 76 Wn.2d at 382-83, 386. In fact, the trial court in that case excluded a pre-*Miranda* statement. *Id.*

Here, on the other hand, Mr. Gonzales was not read his *Miranda* warnings. RP 9. The issue is not the voluntariness of a waiver but whether his statement was voluntary under the due process analysis. *Dickerson,* 530 U.S. at 434. The state bears the burden of establishing voluntariness. *United States v. Lall*, 607 F.3d 1277, 1285 (11th Cir. 2010).

A statement is not voluntary for due process purposes unless it is the product of free will. *Dickerson*, 530 U.S. at 434. Extreme intoxication, for example, can produce a statement that is inadmissible because it is not "the product of a rational intellect and a free will." *Gladden v. Unsworth*, 396 F.2d 373, 380-381 (1968) (citing *Townsend v. Sain*, 372 U.S. 293, 307, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715 (1992)).

The state argues that Mr. Gonzales's statement was voluntary because he opened his eyes, engaged in conversation with the officer, appeared to understand what was happening, and responded appropriately to the officer's questions. Brief of Respondent, pp. 12-13. The *Townsend* court, however, rejected the idea that voluntariness can be established by a mere showing that the accused was "coherent" at the time of the statement. *Townsend*, 372 U.S. at 320, n. 11.

The state did not establish the voluntariness of Mr. Gonzales's statements. His conviction must be reversed, the statements suppressed, and the case remanded for a new trial. *Townsend,* 372 U.S. 293.

B. Mr. Gonzales's statements should have been suppressed as the product of custodial interrogation without benefit of *Miranda*.

A person is "in custody" for *Miranda* purposes if a reasonable person would not have felt free to terminate the interrogation and leave. *J.D.B. v. N. Carolina*, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011). Detective Murphy questioned Mr. Gonzales while he was in the critical care unit of the hospital with a broken pelvis, hooked up to machines with tubes, with his neck in a medical collar, unable to move, and in extreme pain. RP 6-13; CP 11. Murphy had to wake Mr. Gonzales up in order to question him. RP 6-7. Murphy did not *Mirandize* Mr. Gonzales. RP 9.

Respondent argues that Mr. Gonzales was not in custody during the interrogation. Brief of Respondent, pp. 9-11 (relying on *State v Butler*, 165 Wn. App. 820, 269 P.3d 315 (2012)). But the interrogation in *Butler* happened after a valid *Miranda* waiver. *Butler*, 165 Wn. App. at 319. Because decision in *Butler* did not rest on whether the accused was in custody, the statements upon which the state relies are arguably *dicta*.

Additionally, Mr. Butler's nurse had pre-determined that he was well enough to speak with the officers. *Id.* at 825. The officers did not

consult any medical professional before interrogating Mr. Gonzales. RP 9.

Respondent also relies on *State v. Kelter*, 71 Wn.2d 52, 54, 426 P.2d 500 (1967). That case, however, did not apply the *Miranda* rule because the accused had been tried before *Miranda* was decided. *Id.* at 53-54. The state's reliance on *Kelter* is misplaced.

Finally, the state argues that Mr. Gonzales was not in custody at the time of his interrogation because he was not handcuffed, no officer was stationed outside of his hospital room, and no threats or promises were made. Brief of Respondent, p. 11. Whether a person confined to a hospital room is in custody, however, does not turn on those physical indicia of incapacitation. Rather, the inquiry looks to whether the he was "at liberty to terminate the interrogation and 'cause the officers to leave.'" *United States v. Infante*, 701 F.3d 386, 396 (1st Cir. 2012) *cert. denied,* 133 S.Ct. 2841 (U.S. 2013) (quoting *United States v. New,* 491 F.3d 369, 373 (8th Cir.2007)).

Detective Martin did not tell Mr. Gonzales he was free to terminate questioning, or that he was not under arrest. RP 4-11; CP 11. The prosecution failed to establish the size of the room, whether Martin closed the door, or where Martin sat in relation to the door and to Mr. Gonzales. RP 4-11. The court found that Mr. Gonzales was confined to a hospital

bed and appeared to be in pain. CP 11. A reasonable person would not have felt free to terminate the interrogation and expel the detective from the hospital room.

Because Mr. Gonzales was subjected to custodial interrogation without benefit of *Miranda,* his statements should have been suppressed. *State v. Hickman*, 157 Wn. App. 767, 776, 238 P.3d 1240 (2010). His conviction must be vacated and the case remanded for a new trial. *Id.*

II. THE SEARCH OF MR. GONZALES'S VIOLIN CASE VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ART. I, § 7.

A. The state did not provide sufficient facts to establish a valid inventory search.

To justify a search under the inventory exception to the warrant requirement, the prosecution must prove that the officers conducted the search pursuant to "standardized" procedures that do not afford "excessive discretion." *Florida v. Wells*, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990); *see also State v. Dugas*, 109 Wn. App. 592, 597-598, 36 P.3d 577 (2001). The state did not present any evidence that the inventory search of Mr. Gonzales's car was conducted pursuant to a standardized

procedure. RP 20-40. The court did not enter a finding of fact that the officers followed such a procedure. *See generally* CP 13-16.[1]

Respondent argues that the lack of a policy specifically governing closed or sealed containers does not violate *Wells*. Brief of Respondent, pp. 24-29 (relying, *inter alia*, on *State v. Mireles*, 73 Wn. App. 605, 612, 871 P.2d 162 (1994)). The state misapprehends Mr. Gonzales's argument. Like in *Wells*, the search of Mr. Gonzales's car violated the Fourth Amendment because the officers did not follow *any* standardized procedure.

In *Mireles*, on the other hand, the person who conducted the search testified to written standardized inventory procedures used by all DSHS employees. *Mireles*, 73 Wn. App. at 612. The *Mireles* court held only that the absence of a specific policy regarding closed luggage containers was not fatal. *Id.*

Here, on the other hand, the officer's testimony that he simply searches for "anything that might have value" does not establish "standardized criteria" or "established routine." RP 26; *Wells,* 495 U.S. at 3. Such a practice does not "regulate;" nor is it "designed to produce an

[1] In the absence of a factual finding on the subject, the prosecution is deemed to have failed to meet its burden of proof. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001).

inventory," both of which are required under *Wells*. 495 U.S. at 4. The practice under which Mr. Gonzales's car was searched affords officers unbounded discretion during an inventory search. *Wells*, 495 U.S. at 4. Such a policy violates the Fourth Amendment. *Id.* at 4-5.

The warrantless search of Mr. Gonzales's violin case violated the Fourth Amendment. *Wells*, 495 U.S. at 4-5. The evidence must be suppressed, the conviction reversed, and the case remanded for a new trial. *Dugas*, 109 Wn. App. at 599.

B. Even if the search of the car was a valid inventory search, it did not justify opening Mr. Gonzales's violin case.

An officer may not open a piece of luggage or a locked trunk pursuant to an inventory search unless the owner consents. *State v. Houser*, 95 Wn.2d 143, 158, 622 P.2d 1218 (1980); *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998); *Dugas*, 109 Wn. App. 592. Absent exigent circumstances, an inventory search "only justifies noting such an item as a sealed unit." *Houser*, 95 Wn.2d at 158. During an inventory search, officers found and opened a closed violin case in Mr. Gonzales's car. CP 14; RP 26-27, 38-39.

Respondent argues that this court should not follow the holdings in *Houser* and *Dugas* because of cases decided by the United States and Colorado Supreme Courts since *Houser*. Brief of Respondent, pp. 17-24.

The state's argument centers on the U.S. Supreme Court's holding that the Fourth Amendment does not prohibit opening closed containers found during an inventory search. Brief of Respondent, pp. 19-21 (citing *Colorado v. Bertrine*, 479 U.S. 367, 375, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987)).

The Washington Supreme Court has noted since *Bertrine*, however, that "*Houser* is an article I, section 7 case," not a Fourth Amendment case. *White*, 135 Wn.2d at 767-68.[2] The *White* court reaffirmed *Houser* and restated that the Washington Constitution places more restrictions on the scope of a vehicle inventory search than does the Fourth Amendment. *Id.* at 768-69, 772. Respondent overlooks *White*, which is fatal to the state's argument. The Supreme Court's decision in *Houser* controls this case.

The inventory exception to the warrant requirement permitted the officer only to protect Mr. Gonzales's property by securing the closed violin case and "noting it as a sealed unit." *Houser*, 95 Wn.2d at 158. The warrantless search of Mr. Gonzales's violin case cannot be justified by the

[2] Also fatal to the state's argument, the *Houser* court was explicit in its reliance on on *Arkansas v. Sanders* only as persuasive – rather than binding – authority. *Houser*, 95 Wn.2d at 157 ("...the ruling in *Sanders* is not determinative of the issue presently before us").

inventory search exception. *White*, 135 Wn.2d at 771-72. The evidence must be suppressed and the conviction reversed. *Id.*

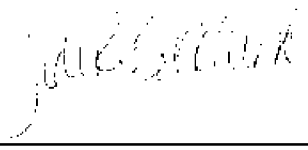
CONCLUSION

Mr. Gonzales's statement – made while he was in the critical care unit of the hospital, in considerable pain, on pain medication, and attached to multiple tubes for treatment purposes – was involuntary. Because he was not objectively free to terminate questioning, he was also in custody for *Miranda* purposes, and should have been administered *Miranda* warnings. Mr. Gonzales's statement to Detective Martin must be suppressed.

Officer Jensen conducted a warrantless search of Mr. Gonzales's violin case without the benefit of clear guidelines limiting such searches. An inventory search under a policy that permits boundless officer discretion violates the Fourth Amendment. Even if the search of Mr. Gonzales's car was lawful, it did not justify the warrantless search of his violin case, which could have been noted as a sealed unit. The evidence found in Mr. Gonzales's violin case must be suppressed, his conviction reversed, and his case remanded for a new trial.

Respectfully submitted on December 5, 2013,

BACKLUND AND MISTRY



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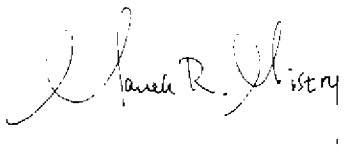

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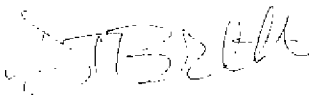

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I certify that on today's date:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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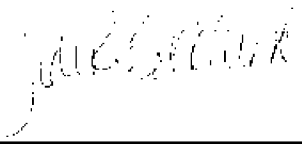
Signed at Olympia, Washington on December 5, 2013.



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