NO. 44052-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHERRY NIELSEN,

Appellant.

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

The Honorable Scott A. Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erroneously admitted statements appellant made during a custodial interrogation before she was advised of her constitutional rights.

2. The court violated appellant's Sixth Amendment right to a jury trial by imposing an exceptional sentence based on its own determination that a standard range sentence would be clearly too lenient.

Issues pertaining to assignments of error

1. Upon entering the home where appellant was staying, two police officers isolated her by ordering her friend to leave and refusing to let appellant leave the room to get dressed. They proceeded to question her for some time before advising her of her constitutional rights. Where appellant was in custody from the time the officers entered the house, should her statements to the police officers have been suppressed?

2. The trial court imposed an exceptional sentence after determining that appellant's unscored misdemeanor history resulted in a presumptive sentence which was clearly too lenient. Where the jury did not make the factual determination regarding this aggravating factor, must appellant's exceptional sentence be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

On July 15, 2012, the Clark County Prosecuting Attorney charged appellant Sherry Nielsen with one count of forgery and one count of making a false or misleading statement to a public servant. CP 1-2; RCW 9A.60.020(1)(a) and/or (1)(b); RCW 9A.76.175. On the first day of trial the State filed an amended information, changing the date of the false statement charge and alleging that Nielsen's prior unscored misdemeanor or foreign criminal history results in a standard range that is clearly too lenient, that her multiple current offenses and high offender score results in current offenses going unpunished, and that the failure to consider her prior criminal history, omitted from offender score calculation, results in a presumptive sentence that is clearly too lenient. CP 50-51; RCW 9.94A.535(2)(b), (c), (d).

The case proceeded to jury trial before the Honorable Scott Collier, and the jury returned guilty verdicts. CP 102-03. Based on its finding that Nielsen's presumptive sentence was clearly too lenient in light of Nielsen's unscored misdemeanor history, the court imposed an exceptional sentence of 14 months, six months above the standard range. CP 110, 136. Nielsen filed this appeal. CP 133.

2. Substantive Facts

Michael Miller and Sherry Nielsen moved from California to Washington together in 2005. 1RP[1] 118. They shared an apartment in Vancouver for over a year. Then, in May 2007, Miller bought a house, and Nielsen rented a room from him for $450 a month. 1RP 119. Nielsen moved out in July 2009. 1RP 120. In 2010 Miller stopped making his mortgage payments, and in June 2011 he moved back to California. 1RP 114, 130. He had the utilities shut off before he left. 1RP 128.

In June 2012, Miller received a water bill from the City of Vancouver, charging for recent usage. 1RP 128. When he contacted the water department, he was told that Nielsen had requested water service at his Vancouver house. 1RP 128. Miller informed the water department employee that Nielsen was not authorized to be at the house. 1RP 128.

On June 11, 2012, Vancouver Police Officer Ed Prentice was dispatched to Miller's house to investigate Miller's complaint that Nielsen was living there. 1RP 169. Prentice contacted Nielsen, who said that she used to live in the house with Miller, and she had moved back in about a week earlier. Nielsen said she was paying rent to the bank, rather than Miller, and that the bank agreed to her living there so the house would not be vacant. 1RP 171. Officer Prentice called Miller to report what Nielsen

[1] The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—9/17/12; 2RP—9/18/12; 3RP—10/4 and 9/12.

had said. Nielsen then showed him a rental agreement dated May 4, 2008, and a print out of a Facebook conversation with Miller in which they discussed her taking over the property. 1RP 172. Miller acknowledged that there could be some sort of written rental agreement from 2008. 1RP 175. Prentice told Miller that with the documentation Nielsen had, he was reluctant to take law enforcement action. 1RP 174.

About two weeks later, Nielsen brought documents to the water department in an attempt to establish an account in her name. 1RP 77. She provided the rental agreement from 2008, a rental agreement dated April 1, 2012, and excerpts from a Facebook conversation with Miller. 1RP 79, 88. The water department employee suspected the documents were not valid and told Nielsen her supervisor would have to review them. 1RP 90-91.

The water department supervisor called Miller and told him that Nielsen had presented a rental agreement dated April 1, 2012, that purported to have his signature. When Miller told her he had not signed the agreement, she advised him to contact the police. 1RP 129.

Miller spoke to Vancouver Police Officer James Watson and reported that his house was being occupied by a former tenant who was not authorized to be there. 1RP 138. Watson contacted the water

department and obtained copies of the documents Nielsen had presented. 1RP 94, 138-39.

Officers Watson and O'Meara went to the house to contact Nielsen. Nielsen's friend answered the door, and Watson asked to speak to Nielsen. When Nielsen came to the door, Watson explained that he was investigating a complaint from Miller that she was squatting at the house. 1RP 144-45. Watson asked if they could speak inside, and Nielsen acquiesced. 1RP 145.

When the officers entered the kitchen, Watson told Nielsen's friend she had to leave. 1RP 61, 66, 153. Nielsen was recovering from recent surgery, and she had a bandage on her arm and was wearing a nightgown. She asked to be allowed to get dressed, but Watson would not let her leave the room. 1RP 60-61, 151-52.

Nielsen told Watson that she had been living in the house continually since 2007, and she showed him a rental agreement dated 2008. 1RP 145. Because the agreement only referenced renting a room, Watson told Nielsen it was insufficient to prove she had permission to occupy the entire house. He asked to see a more recent agreement, and Nielsen showed him the Facebook stream she had presented to the water department. 1RP 146.

Watson then advised Nielsen of her Miranda rights. He told her that Miller was claiming he never signed any rental agreement with her and that what she had given the water department was a forgery. 1RP 147. She again showed him the 2008 agreement and said it was not a forgery. 1RP 148. Nielsen said she had permission to be in the house and Miller was lying. 1RP 149. Watson placed Nielsen under arrest. 1RP 150.

Nielsen was charged with one count of forgery based on the 2012 rental agreement and one count of making a false statement to a public servant based on her conversation with Prentice.

Miller testified at trial that he never had a written rental agreement with Nielsen. They had a verbal agreement that she could stay in the house as long as she paid him $450 a month, but Nielsen moved out permanently in July 2009, and they had no tenancy agreement after that. 1RP 120-21. Miller testified that he did not authorize Nielsen to be in the house in 2012, and he did not sign the rental agreement Nielsen presented to the water department. 1RP 123-24.

The water department supervisor testified that water to the house had been shut off at the request of the owner and started again at Nielsen's request. Even though Nielsen initiated the service, the account remained in Miller's name as the owner of record of the property. 2RP 194.

Defense counsel argued that the State failed to prove Nielsen was guilty of forgery, because she did not present the lease agreement with the intent to injure or defraud. Her intent was to put the utilities in her name so that Miller would not be billed for the water she used. 2RP 251-53, 257.

The jury returned guilty verdicts. At sentencing, the State presented certified copies of Nielsen's prior convictions, including four felonies and 28 misdemeanors. 3RP 15-16; CP 118-22. Defense counsel challenged the identification of Nielsen as the subject of these prior convictions, and the State presented certified copies of booking photos and fingerprint records. 3RP 10, 19-20. The court found Nielsen was the defendant identified in the prior convictions based on its review of the photographs. 3RP 19. The court imposed an exceptional sentence based on its finding that "the number and continuous pattern over a 20-year period, of prior unscored misdemeanor offenses results in a presumptive sentence that is clearly too lenient in light of the purpose of the Sentencing Reform Act, as expressed in RCW 9.94A.010." CP 136.

C. ARGUMENT

1. BECAUSE NIELSEN WAS NOT ADVISED OF HER CONSTITUTIONAL RIGHTS BEFORE BEING SUBJECTED TO CUSTODIAL INTERROGATION, HER STATEMENTS SHOULD HAVE BEEN SUPPRESSED.

Two police officers arrived at the house where Nielsen was staying and asked to come inside. Nielsen and her friend admitted them to the kitchen, and the officers then told the friend that she had to leave. Nielsen was recovering from surgery, and she was in her night clothes. Although she asked permission to get dressed, the officers would not allow it. The officers questioned her for about 15 minutes. They advised Nielsen of her rights at some point, but it is not clear when that occurred.

Trial counsel argued that Nielsen was in custody from the time the officers entered the house, because the officers clearly communicated that they were in charge of the encounter by ordering Nielsen's friend to leave and refusing to let Nielsen leave the room to get dressed. 1RP 68-70. While the court acknowledged that the police exerted control by telling Nielsen's friend to leave, it felt that the situation did not become custodial until Nielsen was formally arrested and handcuffed. The court ruled that because Nielsen was not in custody, all of her statements during the interrogation were admissible at trial. 1RP 72-73; CP 107.

An individual has the right to remain free from compelled self-incrimination while in police custody. U.S. Const. amends. V & XIV; Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). In Miranda, the Supreme Court recognized that custodial interrogation, by its very nature, "isolates and pressures the individual," "blurs the line between voluntary and involuntary statements," and thereby heightens the risk that an individual will be deprived of his privilege against compulsory self-incrimination. Dickerson v. United States, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000). Thus, before a suspect in custody may be interrogated by a state agent, he must be advised of his right to remain silent and his right to an attorney. Miranda, 384 U.S. at 479.

Miranda warnings protect a suspect's constitutional right not to make incriminating statements while in the coercive environment of police custody. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). A person is in custody if, under the totality of the circumstances, a reasonable person would "have felt he or she was not at liberty to terminate the interrogation and leave." United States v. Craighead, 539 F.3d 1073 (9th Cir, 2008).

The key aspect of the custodial setting is the isolation of the suspect in a room dominated by law enforcement officials conducting an

interrogation. "[T]he Supreme Court was explicit that the law enforcement technique of isolating the suspect from family and friends is one of the distinguishing features of a custodial interrogation." Craighead, 539 F.3d at 1087 (citing Miranda, 384 U.S. at 445-46). Indeed, it is "perhaps the crucial factor." Id. at 1086. The main reason the questioning of a motorist during a routine traffic stop does not constitute custodial interrogation is that "the typical traffic stop is public, at least to some degree." Berkemer v. McCarty, 468 U.S. 420, 438, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984); see also Heritage, 152 Wn.2d at 219 (suspect questioned in public park surrounded by friends was not in custody). But "[o]fficers diminish the public character of, and assert their dominion over, an interrogation site by removing a suspect from the presence of third persons who could lend moral support." United States v. Griffin, 922 F.2d 1343, 1352 (8th Cir. 1990).

In both Craighead and Griffin, the courts held that the defendants were in custody even though they were in their own homes, primarily because they were separated from their friends and family members. Craighead, 539 F.3d at 1087 (defendant questioned in storage room while search warrant was executed in home; custodial interrogation even though defendant was told he would not be arrested that day); Griffin, 922 F.2d at 1355 (interrogation was custodial where two FBI agents questioned

defendant in dining room while his parents waited upstairs, escorted him when he left room to get cigarettes, and told him he was to stay in view at all times).

Here, police took control of the setting when they entered the house. They ordered Nielsen's friend to leave, isolating her from anyone who could provide moral support, and they refused to let Nielsen leave the room to get dressed. Any reasonable person would conclude from these actions that the officers were in complete control of Nielsen, and indeed, Nielsen testified that that is what she felt. 1RP 60-61. Nielsen was in custody from the time the officers exerted control over the premises and isolated her. None of the statements she made prior to being advised of her Miranda warnings should have been admitted at trial.

Miranda is a constitutional requirement. As such, the State bears the burden of proving that the admission of statements obtained in violation of Miranda was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). In other words, the State must show that the admission did not contribute to the conviction. Id. at 296.

The State cannot meet this heavy burden here. To convict Nielsen of forgery, the State had to prove she presented the 2012 rental agreement to the water department with the intent to injure or defraud. RCW

9A.60.020(1); 2RP 236. The defense theory was that there was no intent to injure or defraud; Nielsen merely intended to establish an account in her own name so she could pay for her water usage. 2RP 251-53. Watson testified that when he told Nielsen he believed she was trespassing, she said she had been living at the house continually since 2007, and she showed him a rental agreement dated 2008. When he tried to ask about the 2012 agreement she had shown the water department, Nielsen kept talking about the agreement from 2008. 1RP 146-48. Evidence of Nielsen's inconsistent statements to Watson could have contributed to the jury's determination that she acted with intent to defraud. The court's error in admitting the statements was not harmless beyond a reasonable doubt, and Nielsen's forgery conviction must be reversed.

2. IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON THE COURT'S DETERMINATION THAT THE PRESUMPTIVE SENTENCE WAS CLEARLY TOO LENIENT VIOLATED NIELSEN'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL.

The court imposed an exceptional sentence based on RCW 9.94A.535(2)(b), which allows the sentencing court, rather than a jury, to impose an exceptional sentence based on the determination that "[t]he defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient

in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.525(2)(b); CP 136.

In Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Supreme Court held that that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely, 542 U.S. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The Washington Supreme Court has held that the conclusion that a sentence is "clearly too lenient" is a factual determination which cannot be made by the sentencing court following Blakely. State v. Alvarado, 164 Wn.2d 556, 568, 192 P.3d 345 (2008). In order to meet Sixth Amendment muster, this factual determination must be made by a jury. Alvarado, 164 Wn.2d at 564.

In this case, when the State amended the information on the first day of trial to allege aggravating factors, including the one ultimately relied on by the court, defense counsel argued that the aggravating factors needed to be decided by a jury, because they involved a factual determination other than the fact of a prior conviction. 1RP 11. The court incorrectly stated that there was no case holding that the aggravating factors required a jury determination. 1RP 12. Washington case law is

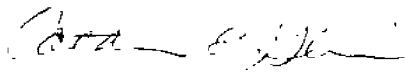
clear that the unscored misdemeanor aggravator cannot be imposed by the court without a factual determination by the jury that a standard range sentence would be "clearly too lenient." Alvarado, 164 Wn.2d at 567-68; State v. Saltz, 137 Wn.App. 576, 583-84, 154 P.3d 282 (2007). Because there was no such jury finding in this case, Nielsen's exceptional sentence must be vacated.

D. CONCLUSION

Nielsen's statements during the custodial interrogation should have been suppressed. The court's failure to do so was not harmless beyond a reasonable doubt, and Nielsen's forgery conviction must be reversed. In addition, the exceptional sentence must be vacated for violation of Nielsen's right to a jury determination.

DATED May 9, 2013.

Respectfully submitted,



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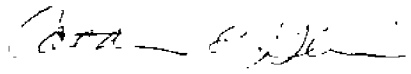

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