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Court of Appeals
Division II
State of Washington
11/12/2020 11:44 AM

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SUPREME COURT
STATE OF WASHINGTON
11/12/2020
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SUPREME COURT NO. 99222-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LISA HURDE,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 52879-7-II
Clallam County No. 18-1-00304-0

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, LISA HURDE, by and through her attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Hurde seeks review of the October 13, 2020, unpublished decision of Division Two of the Court of Appeals affirming her conviction.

C. ISSUE PRESENTED FOR REVIEW

While incarcerated, Hurde was asked by correctional officers whether she had any controlled substances in her possession. In response to this questioning she handed over a container of methamphetamine and made statements explaining the circumstances of her possession. Where Hurde was not provided *Miranda* warnings, should her statements have been excluded from evidence at trial?

D. STATEMENT OF THE CASE

Lisa Hurde was being held in Clallam County Jail when corrections staff decided to search her for controlled substances. RP 71. Sergeant Bryant, Deputy Clark, and Deputy Wessel waited in the hallway outside the shower room while Deputy Brooks went to retrieve Hurde from her cell. RP 41, 43, 71-72. Brooks told Hurde that she was being taken for an attorney visit, so the other inmates would not know corrections deputies were looking for drugs. RP 72.

As he was walking Hurde down the hall toward the other officers, Brooks began interrogating her. RP 72. He first asked her if she had anything she shouldn't have. RP 42, 73. Hurde asked if he meant a pen or pencil, because she had been told she would be meeting with her attorney. RP 42, 46-47, 116. Brooks then asked specifically if she had any controlled substances, and Hurde said she did not. RP 42, 73, 116.

When Brooks and Hurde were in front of the shower room, Bryant joined in the interrogation. He told Hurde that if she had any controlled substances it would be better to turn them over, because she was going to be strip searched. RP 73. Hurde sighed, rubbed her face, and said she had something on her. RP 73. Clark then pulled Hurde into the shower room. RP 74. Hurde responded by immediately handing over a small container of methamphetamine and telling Clark she wasn't using the methamphetamine. According to Clark, Hurde said she had given some to the girls in the tank, but she hoped to get clean while in jail. RP 93-94, 102.

At no point during the entire encounter with corrections officers was Hurde provided *Miranda* warnings or otherwise advised of her right to remain silent. RP 44, 72.

Hurde was charged with possession with intent to deliver methamphetamine and possession of a controlled substance by a prisoner.

CP 37; RCW 69.50.401(1); RCW 9.94.041(2). She pled guilty to possession by prisoner, stipulated to admission of test results to establish the controlled substance element, and waived her right to a jury trial. RP 11-12; CP 25-36. The court conducted a CrR 3.5 hearing concurrent with the bench trial. RP 37-38.

Following trial, the court found that Hurde's statements to Clark were spontaneous, since Clark had not asked Hurde any questions. RP 153. It concluded her statements regarding providing methamphetamine to other inmates were voluntary and admissible, and they established Hurde's intent to deliver. RP 153, 156. The Court of Appeals agreed and affirmed Hurde's conviction on appeal.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS'S CONCLUSION THAT HURDE'S STATEMENTS WERE PROPERLY ADMITTED CONFLICTS WITH PRIOR DECISIONS OF THE COURT OF APPEALS AND PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be compelled in any criminal case to be a witness against himself." This provision intends "to prohibit the compelling of self-incriminating testimony from a party or witness." *State v. Russell*, 125 Wn.2d 24, 59, 882 P.2d 747 (1994) (citing *State v. Moore*, 79 Wn.2d 51, 56, 483 P.2d 630 (1971)), *cert. denied*, 514 U.S. 1129 (1995). *Miranda*

warnings protect a defendant from making incriminating statements to police while in the coercive environment of police custody. *See State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987)).

Police must advise suspects of their *Miranda* rights before questioning them in a custodial setting. *See Heritage*, 152 Wn.2d at 214 (citing *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988)); *see also Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Absent *Miranda* warnings, a suspect's statements during a custodial interrogation are presumed involuntary. *Heritage*, 152 Wn.2d at 214 (citing *Sargent*, 111 Wn.2d at 647-48). “Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*.” *State v. Lozano*, 76 Wn. App. 116, 119, 882 P.2d 1191 (1994).

In *Lozano*, the defendant was taken into custody by her community corrections officer. The officer did not provide *Miranda* warnings before asking if she had anything on her person, telling her she would be searched before she was placed in jail. She responded by reaching in her pocket, pulling out a container of heroin, and placing it on his desk. *Lozano*, 76 Wn. App. at 117-18. Because the defendant’s act of pulling the

heroin from her pocket was compelled by the CCO's request and preceded *Miranda* warnings, it was properly suppressed. *Id.* at 119; *see also State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988) (act of handing over contraband is confession of knowledge regarding that contraband).

A contemporaneous verbal statement acknowledging guilt must also be suppressed when obtained without *Miranda* warnings. *State v. Spotted Elk*, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). In *Spotted Elk*, a police officer arrested the defendant on outstanding warrants. Before cuffing and searching her, and without providing *Miranda* warnings, he asked if she had anything on her person he needed to be concerned about. In response, she removed a plastic container from her shirt pocket and told the officer it was heroin belonging to a friend. *Spotted Elk*, 109 Wn. App. at 256. On appeal, the Court held that the defendant's testimonial act of handing the officer the heroin in response to his question should have been suppressed. *Id.* at 260-61. Moreover, her verbal statement, which amounted to a contemporaneous acknowledgment of guilt in response to the officer's question, should have been suppressed as well. Proceeding without giving *Miranda* warnings violated the defendant's constitutional right against self-incrimination. *Id.* at 261.

In this case, as in *Lozano* and *Spotted Elk*, Hurde was subjected to custodial interrogation without being provided *Miranda* warnings, in

response to which she handed over controlled substances in her possession. It is undisputed that Brooks did not provide *Miranda* warnings before he asked Hurde whether she had any controlled substances on her person. RP 44. Bryant did not provide *Miranda* warnings when he joined in the interrogation, telling Hurde she was going to be searched and it would be better if she voluntarily turned over any contraband. RP 72-73. In response, Hurde acknowledged she had something, and she was taken behind a door where she handed over a container of methamphetamine. RP 73-74.

As in *Spotted Elk*, Hurde also made a contemporaneous verbal acknowledgment of guilt in response to the interrogation. Within seconds of being questioned about possession of controlled substances, Hurde handed a container of methamphetamine to one of the interrogating officers and started explaining the circumstances of her possession. RP 43, 93-94.

In its opinion, the Court of Appeals characterizes Hurde's statements as "spontaneous, unprompted, and not in response to any questions from law enforcement." Opinion, at 5. It notes that the search was lawful, none of the officers asked Hurde whether she was distributing controlled substances, and the officer who conducted the strip search asked no questions. *Id.*

But it was undisputed that officer Clark, to whom the statements were made, was part of the interrogation, standing with the other officers who asked Hurde if she had controlled substances and told her she should turn over any controlled substances in her possession. RP 41-43, 73-74, 117. That contact was still ongoing, and Hurde was responding to that interrogation, when she handed the methamphetamine to Clark and made statements about it. There can be no doubt Hurde's statements were elicited by the coercive environment of the custodial interrogation. Because Hurde was not provided *Miranda* warnings, admission of her statements violated her constitutional right against self-incrimination. *See Spotted Elk*, 109 Wn. App. at 261.

The Court of Appeals's conclusion that *Miranda* warnings were not required for admission of statements elicited by custodial interrogation conflicts with the decisions in *Lozano* and *Spotted Elk* and presents a significant constitutional question for this Court to address. RAP 13.4(b)(2), (3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Hurde's conviction.

DATED this 12th day of November, 2020.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

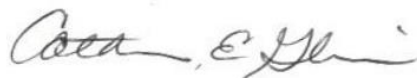
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in
State v. Lisa Hurde, Court of Appeals Cause No. 52879-7-II, as follows:

Lisa Hurde/DOC#828521
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
November 12, 2020

October 13, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LISA JEAN HURDE,

Appellant.

No. 52879-7-II

UNPUBLISHED OPINION

MELNICK, J. — Lisa Jean Hurde appeals her conviction for possession of a controlled substance, methamphetamine, with intent to deliver.¹ She argues that the trial court erred in admitting her statements. We affirm Hurde’s conviction.

FACTS²

Hurde was an inmate at the Clallam County Corrections Facility. Corrections deputies decided to search Hurde for controlled substances. Deputy Steve Brooks retrieved Hurde from her cell and asked her if she had anything that she was not supposed to have. Hurde responded, “like a pencil.” Report of Proceedings (RP) at 42. Brooks clarified he was thinking of drugs. Hurde denied having any drugs on her person.

¹ Hurde also pled guilty to possession of a controlled substance by a prisoner; however, that conviction is not contested in this appeal.

² The following facts rely in part on the trial court’s CrR 3.5 findings of fact, which, with the exception of finding of fact 8, are unchallenged and therefore verities on appeal. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Brooks then informed Hurde he was taking her to be strip searched by Deputy Melissa Clark. Sergeant Darrell Bryant, who was with Brooks and Clark, told Hurde that “it would be better for her if she gave it to us” and that she was going to be strip searched. RP at 73. Hurde said she had already been strip searched. Bryant told her they were going to do it again. At that point Hurde said she had “something on her.” RP at 73.

Hurde and Clark then went into a private area to conduct the search. Clark told Hurde she had been asked to do an unclothed body search. Clark instructed Hurde to “remove her garments and . . . hand them to [her] as she took them off.” RP at 93. Clark advised she would then search each piece of clothing and set it aside. After informing Hurde of the procedures to be employed, Hurde removed a small blue container from her bra and handed it to Clark. While taking this action, Hurde stated that, “she didn’t know what to do with it when she brought it in. That she wasn’t using. Um, that she had given it to the girls in the tank, that they were the ones using it.” RP at 94. Clark then continued the unclothed search of Hurde.

The State charged Hurde with possession of methamphetamine with intent to deliver and possession of a controlled substance by a prisoner. Hurde pled guilty to the latter charge and waived her right to a jury trial on the former charge.

The court held a confession hearing pursuant to CrR 3.5. Hurde argued her statements were not made knowingly, intelligently, and voluntarily.

The court held the confession hearing concurrent with Hurde’s bench trial. Hurde testified that Clark did not ask her any questions. Hurde “just started telling her . . . what happened.” RP at 119. Relevant to this appeal, the court entered written findings and found that, “[t]he statements Hurde made to Deputy Clark were spontaneous, unprompted and not in response to any questions

from law enforcement.” Clerk’s Papers (CP) at 48 (Finding of Fact (FF) 8).³ At no point did Clark, Brooks, or Bryant read Hurde her *Miranda*⁴ rights. No officer used force, threats, or intimidation to obtain these statements from Hurde.⁵

The court then concluded that the statements “were made spontaneously and . . . not in response to any questions or coercive tactics on the part of Deputy Clark” and that the statements “were made knowingly, intelligently and voluntarily, and were not the product of coercion, threats, or promises.” CP at 48-49 (Conclusion of Law 1-2)

The court found Hurde guilty. Hurde appeals.

ANALYSIS

Hurde contends the trial court should have suppressed her statements to Clark regarding giving methamphetamine to other inmates because the statements were a product of custodial interrogation made before she was read *Miranda* warnings.⁶ We disagree.

I. STANDARD OF REVIEW

We review challenged findings of fact to determine whether they are supported by substantial evidence. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Unchallenged findings are verities on appeal, and challenged findings supported by substantial evidence are binding. *O’Neill*, 148 Wn.2d at 571. We review the trial court’s conclusions of law following a

³ In its bench trial findings of fact and conclusions of law, the court only relied on Hurde’s statements to Clark to find guilt.

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

⁵ In its bench trial findings of fact and conclusions of law, in addition to Hurde’s verbal statements to Clark, the court relied on Hurde’s testimonial act of pulling the blue container from her bra and handing it to Clark. *See State v. Wethered*, 110 Wn.2d 466, 470-71, 755 P.2d 797 (1988).

⁶ Hurde does not assign error to any issues regarding statements she made to officers other than Clark.

suppression hearing de novo. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). We affirm conclusions of law that are supported by the findings of fact. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

II. LEGAL PRINCIPLES

“*Miranda* warnings must be given when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State.” *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). When these conditions are present, but *Miranda* warnings are not given, we presume that the suspect’s self-incriminating statements are involuntary and that the statements must be suppressed. *Heritage*, 152 Wn.2d at 214.

Miranda does not apply to statements that are made outside the context of a custodial interrogation. *State v. Sadler*, 147 Wn. App. 97, 131, 193 P.3d 1108 (2008). A custodial interrogation includes express questioning and any actions or words on the part of the police that are reasonably likely to elicit an incriminating response from the suspect. *State v. Wilson*, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). A suspect’s voluntary, spontaneous, and unsolicited statements are not the product of a custodial interrogation. *State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985).

An inmate’s constitutional rights are limited due to the need to protect institutional goals and policies. *State v. Rainford*, 86 Wn. App. 431, 436, 936 P.2d 1210 (1997). These limitations include strip searches of inmates if there is a reasonable suspicion that it is necessary to discover weapons or drugs concealed on the inmate. *State v. Barron*, 170 Wn. App. 742, 752, 285 P.3d 231 (2012).

III. ADMISSION OF STATEMENTS

Here, Hurde challenges finding of fact 8, where the court found, “The statements Hurde made to Deputy Clark were spontaneous, unprompted and not in response to any questions from law enforcement.” CP at 48. Hurde also challenges the court’s conclusions of law 1 and 2 that the statements “were made spontaneously and . . . not in response to any questions or coercive tactics on the part of Deputy Clark” and that the statements “were made knowingly, intelligently and voluntarily, and were not the product of coercion, threats, or promises.” CP at 48-49.

The record shows while walking to a search area to conduct a lawful search Brooks asked Hurde if she had any controlled substances, and Hurde said she did not. When it was explained that she was going to be searched, Hurde admitted she had “something on her.” RP at 73. Neither Brooks nor any other officer ever questioned Hurde about whether she was distributing controlled substances.

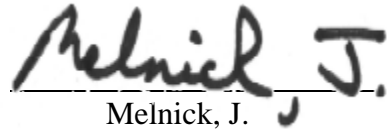
Hurde and Clark then went into a private area to conduct the search. Clark informed Hurde of the procedures she would use to perform the unclothed body search. Before the search began, Hurde handed Clark a small container containing methamphetamine and blurted out that she did not use methamphetamine, but instead she “had given it to the girls in the tank.” RP at 94. Clark did not ask Hurde any questions. Additionally, Clark did not use any force, threats, or intimidation to obtain these statements from Hurde.

Substantial evidence supports the court’s finding that Hurde’s statements to Clark regarding distributing methamphetamine “were spontaneous, unprompted and not in response to any questions from law enforcement.” CP at 48 (FF 8). A suspect’s voluntary, spontaneous, and unsolicited statements are not the product of a custodial interrogation. *Ortiz*, 104 Wn.2d at 484. Thus, *Miranda* warnings were not required.

The findings of fact support the trial court's conclusion that Hurde's statements were spontaneous and made knowingly, intelligently, and voluntarily. Thus, the trial court did not err in admitting Hurde's statements.

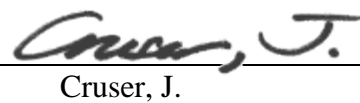
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Melnick, J.

We concur:


Worswick, P.J.


Cruser, J.

GLINSKI LAW FIRM PLLC

November 12, 2020 - 11:44 AM

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