

NO. 68717-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

LIU WEI,

Appellant.

REC'D
NOV 06 2012
King County Prosecutor
Appellate Unit

Filed
COURT OF APPEALS
DIVISION ONE
NOV 06 2012

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

The Honorable Carol A. Schapira, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred when it failed to suppress appellant's custodial statements made in the absence of a lawyer and without adequate Miranda¹ warnings.

Issue Pertaining to Assignment of Error

Both the Washington and federal constitutions require a suspect who is arrested and facing interrogation by police be told that he has a right to have counsel present before and during the interrogation and, if he cannot afford an attorney, one will be provided for him. A Washington Court rule explains that if a suspect requests appointed counsel, he is to be given the telephone number of the public defender or the court official responsible for assigning a lawyer. When appellant was read his Miranda rights, however, the Chinese interpreter, who was also a Homeland Security agent, erroneously stated that if appellant needed an attorney "the agency" would provide one. Thus, appellant was presented with a false choice – proceed with a lawyer provided by the agency interrogating him or decline appointment of counsel. Additionally, the agent advised only that

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

appointed counsel would represent appellant “before questioning,” not during questioning. Were the Miranda advisements given to appellant inadequate and misleading such that the trial court erred when it did not suppress his statements?

B. STATEMENT OF THE CASE

1. Procedural History

On October 14, 2010, the King County prosecutor charged appellant Lui Wei with one count of second degree promoting prostitution, alleging he knowingly advanced and profited from the prostitution of another. CP 1-6. On March 12, 2012, the information was amended to change an erroneous date and to conform the charge to the statute by alleging Wei did knowingly advance or profit from the prostitution of another. CP 45. A trial was conducted, and the jury found appellant guilty as charged. CP 51. With no prior criminal history, Wei was sentenced under a first-time offender waiver for which his term of incarceration was satisfied by the 12 days Wei previously served in jail. CP 69-75. Wei appeals. CP 77-84.

2. Substantive Facts

On June 14, 2010, Seattle Police Department’s Vice Unit began an undercover operation of “Rainer Foot Massage,” which

was located at 4204 Rainer Ave South. 1RP 16. Wei was the registered owner of the business. 2RP 24.

From June 14 to September 15, 2010, three “undercover Johns” made five visits to the business. 1RP 31; 3RP 24, 137. Each time, the undercover Johns encountered either a 50-year-old woman who called herself “Nancy” (A.K.A. Gaicui Zhao) or a middle-aged woman who called herself “Shee Shee” (A.K.A. Ju Dong). 3RP 93-96, 118-34; 4RP 40-45. After taking these men to massage rooms set up in the back of the salon, the women usually explained that the body massage cost \$40 and would end with manual stimulation for a “tip” varying between \$40 and \$60. Id.

The undercover officers also observed used condoms in the bathroom. 3RP 132; 4RP 45. However, when two different officers attempted to bargain for sexual intercourse, they were flatly refused. 3RP 97; 4RP 46.

During their visits, officers encountered Wei minimally. Detective Trent Bergmann observed Wei giving a woman a foot massage in the front section of the salon. 1RP 31-32, 3RP 120. He never spoke with Wei. 1RP 32. Later, when undercover officer Dale Williams came to the business on June 18, 2010, he saw Wei sitting in the front of the business in a foot massage chair with a lap

top. 3RP 92. Wei asked if Williams wanted a full body massage. 3RP 92. When Williams answered affirmatively, "Nancy" stepped forward and led him to a back room. 3RP 93.

Officers also conducted several days of surveillance on the business. 3RP 24. They observed Wei leave the salon and go to the bank. 3RP 33, 149. They also observed both men and women enter the business. 3RP 34, 78, 86, 151-52, 156.

Officers also searched the web to locate advertisements for Rainier Foot Massage. 3RP 20. They discovered that Rainer Foot Massage posted ads on "Craig's List" and in the adult section of "Backpage." 3RP 20-21. Officers concluded the advertisement included terms that implicitly conveyed sex services. 3RP 40-42. Wei's credit card was used to fund the postings, but the advertisements were posted in English and Wei did not speak English.² 3RP 40-46, 111.

Community Police officers also entered the business on two occasions. 3RP 107-09. Wei greeted them at the front desk, but he had difficulty understanding the officers. 3RP 111. Officers

² Wei required the aid of interpreters throughout the legal proceedings.

checked the business license hanging on the wall and then left.
3RP 109, 111.

On October 11, 2010, the Vice Unit executed a search warrant and promptly arrested Zhao and Dong. 3RP 34. When Wei arrived at the business a few hours later, he was also arrested. 3RP 34. Wei had \$1,285 in his possession at that time. 4RP 70.

In the front desk of the business, officers found a ledger that seemed to have amounts of money corresponding with the pricing scheme for legitimate services. 4RP 100. Officers also found punch cards advertising one free massage after the purchase of ten. 4RP 100-01.

The business was connected to an upstairs residence where Wei, Dong, and Zhao lived. 1RP 185; 4RP 54-60. There, officers found large sums of cash stashed in various places (i.e. under a mattress, in a camera bag, in a lady's purse). 4RP 63-70). They also found Western Union receipts, many indicating they were sent by Zhao. 4RP 76-77, 94, 97-99. Officers also found a lease agreement, lap tops, bills, airline tickers, cell phones and cameras. 4RP 81-87. Officers were authorized to search the computers but never pursued a forensic examination. 4RP 108, 119. Additionally,

officers discovered Wei's tax records which were prepared by an accountant, but the accountant was never contacted. 4RP 101.

On October 11, 2010, a female undercover officer posed as an employee of the Rainer Foot Massage for the day. 4RP 133-35. She offered sex acts to various costumers and six men were arrested. 4RP 136, 146.

3. The 3.5 Hearing

After Wei was arrested, officers decided to interrogate him. 1RP 66. They employed Special Agent Yi-Lin Lee from the Department of Homeland Security (Homeland Security) as the Mandarin Chinese interpreter. 1RP 56-66. Agent Lee presented Wei with the Mandarin language Advisement of Rights form used by Homeland Security. 1RP 69. Agent Lee read Wei his rights directly from this form and left the form in front of Wei to read and sign. 1RP 69.

During the 3.5 hearing, Agent Lee translated the advisement form and read it into the record as follows:

Notice of Rights. Before questioning I have responsibility to inform you your rights. You have rights to remain silent. Any statement you make this agency can, in any court of law or other legal proceeding, use to form evidence against you. Before you make any statement or respond to any question you have the right to consult with your attorney. You

have the right to undergo questioning with the presence of your attorney. If you desire attorney but cannot afford to hire one the agency can appoint one to represent you before questioning you. If you decide to answer questions you will still have the right to stop answering any question or stop because you need to consult with an attorney.

1RP 70-71 (grammatical errors in original).³

Wei signed the form and proceeded to answer questions without the assistance of an attorney. 1RP 74. He admitted he was the manager and owner of Rainier Foot Massage. 3RP 166. He also discussed his credit card/banking account and informed officers that business was bad. 3RP 167-168.

Defense counsel sought to exclude these statements because Wei had not been given proper Miranda warnings. 2RP 45. It argued Lee's version did not comport with Washington's standard warnings and was confusing. 2RP 45.

³ For some reason, the State failed to turn this form over to the defense during discovery. 1RP 178. The defense objected to its admission, complaining that they did not have time to translate and review it, but the trial court admitted it after Lee translated it on the stand. 1RP 68-74.

The trial court disagreed, stating “in many ways this [advisement] was better.”⁴ 2RP 69.

C. ARGUMENT

BECAUSE THE MIRANDA WARNINGS WERE INADEQUATE AND MISLEADING, WEI'S STATEMENTS TO POLICE DURING HIS INTERROGATION SHOULD HAVE BEEN SUPPRESSED.

The Miranda advisements presented to Wei did not adequately inform him of his core Miranda rights. Give this, the State could not demonstrate that Wei knowingly and intelligently waived his right to counsel.⁵ Consequently, the trial court erred in admitting the statements Wei made during the interrogation.⁶

⁴ The trial court erred by failing to issue written CrR 3.5 findings and conclusions, but this failure constitutes harmless error “if the court's oral findings are sufficient to allow appellate review.” State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998). Appellant believes the oral findings and conclusions are sufficient given the standard of review in this case – which is set forth below.

⁵ The burden is upon state to show by a preponderance of the evidence an intelligent and knowing waiver of Miranda rights. State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012).

⁶ Because there is no dispute here regarding the actual words used by Lee when he informed Wei of his rights, and because it is only the legal sufficiency of the warning that is at issue, this case presents a question of law which is reviewed de novo. See, U.S. v. Wysinger, 683 F.3d 784, 798 (2007).

The right to counsel is constitutionally compelled by the Fifth Amendment and Sixth Amendment of the United States Constitution.⁷ State v. Templeton, 148 Wn.2d 193, 207, 59 P.3d 632 (2002). In Miranda, the United States Supreme Court fashioned procedural safeguards to ensure that a suspect's right against self-incrimination and right to counsel are protected even in the context of police interrogations. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Under Miranda, a suspect in custody must be warned prior to any questioning that: (1) he has the absolute right to remain silent; (2) anything that he says can be used against him; (3) he has the right to have counsel present before and during questioning; and (4) if he cannot afford counsel, one will be appointed to him. State v. Brown, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting Miranda, 384 U.S. 436, 86 S.Ct. 1602). Violation of any of the Miranda requirements results in exclusion of subsequent statements given by the suspect during the interrogation. Id.

⁷ Washington Constitution article I, sections 9 and 22 similarly guarantee the accused the right to assistance of counsel.

The warnings prescribed by Miranda are “invariable.” U.S. v. Wysinger, 683 F.3d 784, 798 (2007). Although the Supreme Court does not require the language of Miranda be read verbatim to defendants, California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 2809, 69 L.Ed.2d 696 (1981) (per curiam), warnings must reasonably “conve[y] to [a suspect] his rights as required by Miranda.” Duckworth v. Eagan, 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989).

Although Wei was advised of his Miranda rights before he was interrogated by police, the warnings did not convey to him he had the right to have appointed counsel present during questioning.

The right to counsel during questioning is a significant right that is independent of the right to counsel before questioning. Miranda, 384 U.S. at 471 (holding “an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation”). Thus, a suspect must be informed that he has the right to have counsel present during questioning; otherwise, the warnings are constitutionally deficient. State v. Creach, 77 Wn.2d 194, 200, 461 P.2d 329 (1969), overruled on other grounds, State

v. Russell, 125 Wn.2d 24, 882 P.2d 747, 63 (1994); United States v. Noti, 731 F.2d 610, 614-15 (9th Cir.1984).⁸

Wei was told:

Before you make any statement or respond to any question you have the right to consult with **your** attorney. You have the right to undergo questioning with the presence of **your** attorney. If you desire attorney but cannot afford to hire one the agency can appoint one to represent you **before** questioning you.

1RP 70-71 (emphasis added). On the one hand, Wei was explicitly informed he could have his own attorney present before and during questioning. On the other hand, Wei was only informed that appointed counsel could represent him before questioning. One could reasonably interpret this to mean that Wei had no right to have appointed counsel present during questioning. As such, Wei

⁸ See also, United States v. Tillman, 963 F.2d 137, 140-42 (6th Cir.1992) (suppressing statements made to police where suspect was told that he had the right to the presence of an attorney, but police “failed to convey to defendant that he had the right to an attorney both before, during and after questioning” and failed to warn that statements could be used against him); United States v. Anthon, 648 F.2d 669, 672-74 (10th Cir.1981) (finding Miranda warning insufficient where suspect was not advised that “right to counsel encompassed the right to have counsel present during any questioning”); Windsor v. United States, 389 F.2d 530, 533 (5th Cir.1968) (explaining “Merely telling him that he could speak with an attorney or anyone else before he said anything at all is not the same as informing him that he is entitled to the presence of an attorney during interrogation....”), but see, United States v. Lamia, 429 F.2d 373, 377 (2d Cir.) (concluding otherwise); United States v. Adams, 484 F.2d 357, 361–62 (7th Cir.1973) (same).

was not informed of a significant right. On this ground alone, the Miranda warnings were constitutionally defective. Creach, 77 Wn.2d at 200; Noti, 731 F.2d 610, 614–15 (9th Cir.1984).

Additionally, Agent Lee's Miranda warnings were defective because they presented Wei with the false choice of proceeding with counsel appointed by the very agency that was interrogating him, or proceeding without consulting with appointed attorney. The United States Supreme Court has stated: "Only by effective and express explanation to the indigent of [his right to appointed counsel] can there be assurance that he was truly in a position to exercise it." Miranda, 384 U.S. at 473. Even if Miranda warnings only "veer slightly" from the standard warnings, they will be deemed constitutionally deficient when such a variance presents to the suspect a false choice that does not place him in a position to freely exercise his right to counsel. Wysinger, 683 F.3d at 797-800.

The Seventh Circuit's decision in Wysinger is instructive. There, the interrogating agent advised the suspect: "You have a right to talk to a lawyer for advice before we ask any questions or have one – have an attorney with you during questioning." Id. at 797 (emphasis added). The Court concluded the use of the

disjunctive “or” constituted a “potentially serious misstatement” of the defendant’s rights. Id. It explained:

Taken literally, [the agent] told Wysinger that he could talk to an attorney before questioning **or** during questioning. In fact, Wysinger had a right to consult an attorney both before **and** during questioning.

Id. (emphasis in original).

The Court determined that the agent’s Miranda warning presented Wysinger with a “false choice” between talking to a lawyer before questioning or having a lawyer present during questioning. Id. at 799. It explained a suspect might forgo speaking with an attorney before questioning if he believes he has to choose between having a lawyer with him before questioning or during questioning. Id. at 800. Given the erroneous language’s potential to chill Wysinger’s exercise of his right to counsel prior to questioning, the Court concluded the government failed to meet its burden of showing proper Miranda warnings and Wysinger’s statements were suppressed. Id. at 803.

Although a different false choice was presented to Wei, it was no less misleading and was just as likely to chill Wei’s exercise of his right to counsel. Agent Lee advised Wei orally and in writing that any statement he made to “this agency” could be used to form

evidence against him. 1RP 70. Lee then went on to advise Wei orally and in writing that he had a right to an attorney and that if he could not afford one “the agency” would provide one. 1RP 71. The term “agency” was never defined, but one could reasonably understand it to mean either Homeland Security (for which Lee worked) or the Seattle Police Department (for which he was interpreting).

The Miranda warning given by Agent Lee was factually incorrect and dangerously misleading. Washington’s court rule CrR 3.1 clarifies that when a suspect requests appointed counsel he shall be given “the telephone number of the public defender or official responsible for assigning a lawyer.” CrR 3.1(c)(2). Notably, nothing in the rule remotely suggests the interrogating agency will provide counsel. Instead, the rule only sets forth that the interrogating agency will provide access to an attorney through the court or a public defender. Id.

The difference between obtaining an attorney through the public defender or the court and obtaining one through the very agency that is interrogating a suspect is significant. Understandably, a suspect may harbor distrust of the interrogating agency and, thus, choose not to exercise his right to appointed

counsel even though he would choose otherwise if he knew counsel would be appointed by the court or a public defender. This is especially so where the suspect has just been told “Any statement you make to this agency can... [be used] to form evidence against you.” 1RP 70 (emphasis added). Given this statement, a suspect could reasonably conclude that speaking to an agency-appointed attorney might subject him to more harm than good.⁹ For this reason, Agent Lee’s statement that appointed counsel would be provided through the agency likely had the very real effect of chilling Wei’s exercise of his right to counsel. As such, Wei’s statements should have been suppressed.

In response, the State may argue the error was harmless. This Court should reject any such argument. On the one hand, the case against Wei was not particularly strong. The State had to prove beyond a reasonable doubt Wei “knowingly” profited from or advanced the sex acts performed by Dong and Zhao. No officer saw Wei offer sex services to anyone or take any money from Dong or Zhao. Indeed, no officer even saw Wei in the back of the salon

⁹ Sophisticated parties who have dealt with lawyers before might understand the privileges and ethical requirements all attorneys would be bound by even if appointed by the agency; however, there is nothing in this record indicating Wei was so sophisticated, especially given the fact that he had no prior criminal history.

were the prostitution was occurring. Officers observed both men and women entering the salon, and they only saw Wei giving a foot massages to women. Although officers found a lot of cash on Wei and in the apartment, the State failed to trace that money to the sex acts that were being solicited and performed by Dong and Zhao. Indeed, the State failed to make any effort to analyze the computer or contact Wei's accountant to establish some kind of link between Wei and the money Dong and Zhao were collecting. Furthermore, there was no evidence of who posted the online ads despite the fact the officers seized all computers in the business and residence.

On the other hand, the State used the substance of Wei's statements as significant pieces in its attempt to circumstantially prove Wei "knowingly" promoted prostitution. Wei's statements established his ownership of the business, his use of the credit card or bank account, and his belief that business was bad. 3RP 166-168. In its closing argument, the State emphasized Wei's ownership of the business and his oversight of the banking, arguing the jury could infer knowledge from these facts. 5RP 15-16, 20-21. Additionally, when asking the jury to infer Wei's knowledge from the posted ads, the State emphasized the use of Wei's credit cards. 5RP 27. Finally, the State also used the fact that Wei's business

was bad to suggest that any profits he received via repeat customers had to come from the fact Nancy and Shee Shee were performing sex acts. 5RP 30. As such, Wei's statements were indeed woven into the fabric of the State's case.

In sum, the Miranda warnings provided Wei were constitutionally deficient because they did not inform Wei he had a right to have appointed counsel present during questioning and because they presented Wei with a false choice that likely chilled his exercise of his right to appointed counsel. Consequently, the trial court erred when it admitted Wei's custodial statements, and his conviction should be reversed.

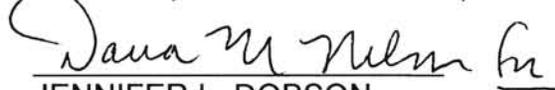
D. CONCLUSION

This Court should reverse appellant's conviction.

DATED this 6th day of November, 2012.

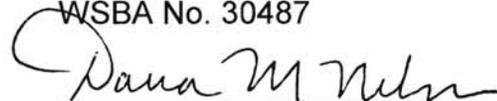
Respectfully submitted,

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF NOVEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LIU WEI
5444 BEACON AVENUE
SEATTLE, WA 98144

SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF NOVEMBER, 2012.

x *Patrick Mayovsky*