

No. 68993-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

E.G.,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that E.G.'s CrR 3.1 right to counsel was not violated, and in failing to suppress his statements to police.

2. The trial court erred in finding that E.G.'s CrR 3.1 right to counsel was not violated, and in failing to suppress the videotape made in the patrol car.

3. To the degree the court's finding at the CrR 3.5 hearing is construed as a CrR 3.1 finding, the finding that E.G.'s statements were part of the routine booking process was not based on substantial evidence in the record.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The right to counsel of an accused held in custody is expressly protected by court rule, which attaches "as soon as feasible after the defendant is taken into custody." CrR 3.1. Where an hour elapsed following E.G.'s arrest, without advisement of the right to counsel, was it error when the trial court failed to suppress E.G.'s incriminating statements?

C. STATEMENT OF THE CASE

On November 25, 2011, fifteen year-old E.G. and his older brother, both minors, were shopping at the Southcenter Mall. RP

18-22. They were asked to leave by members of the private security detail engaged by the mall, for a violation of mall policies – specifically, for their “exposed undergarments.” RP 20-22.¹

The director of mall security testified that when he asked the young men to leave the premises, he concluded from his observations that both seemed to be impaired by alcohol. RP 25-33. The security director informed E.G. and his brother that they were not to return to the mall for the rest of the day. RP 35-37.

Approximately one hour later, the security director noticed E.G. and his brother had re-entered the mall and were approaching the food court area, so he notified Tukwila police. RP 39-41. E.G. and his older brother were escorted to the mall security office by police and charged with criminal trespass and minor in possession of liquor (MIP). CP 1-4.

At trial, E.G. moved to suppress his statements pursuant to CrR 3.5 and CrR 3.1, specifically arguing he was deprived of the right to counsel, which attaches “as soon as feasible after the

¹ The mall's posted guidelines prohibit exposed undergarments, such as E.G.'s boxer shorts, which allegedly peeked from above his jeans on the day of his arrest. CP 16; RP 34-35, 192. The State was not able to provide a copy of these guidelines at the fact-finding hearing, despite E.G.'s objection to a violation of the Best Evidence rule. RP 34-35.

defendant is taken into custody.” CrR 3.1. RP 90-91, 157-58, 162-64, 167-70. E.G.’s motion to suppress statements was denied.

Following a bench trial, the Honorable Barbara Mack found E.G. guilty of both counts. RP 204.

E.G. timely appeals. CP 14.

D. ARGUMENT

THE TRIAL COURT ERRED IN HOLDING THAT CrR 3.1 WAS NOT VIOLATED, AND IN FAILING TO SUPPRESS E.G.’s STATEMENTS TO POLICE OFFICERS.

The right to counsel for an accused held in custody is of such importance in Washington that it is expressly protected by court rule. See CrR 3.1; State v. Templeton, 148 Wn.2d 193, 217, 59 P.3d 632 (2002).

1. CrR 3.1 creates a distinct right to counsel. CrR 3.1 creates a separate and distinct right to counsel which attaches “as soon as feasible after the defendant is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest.” CrR 3.1(b)(1).

CrR 3.1(c) provides as follows:

(c) Explaining the Availability of a Lawyer.

(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

CrR 3.1(c).

One purpose of the rule is to “ensure that arrested persons are aware of their right to counsel before they provide evidence which might tend to incriminate them.” Templeton, 148 Wn.2d at 217. The rule was designed to “provide a meaningful opportunity to contact a lawyer.” State v. Kirkpatrick, 89 Wn. App. 407, 413, 948 P.2d 882 (1997), review denied, 135 Wn.2d 1012 (1998); State v. Jaquez, 105 Wn. App. 699, 715, 20 P.3d 1035 (2001) (internal citations omitted).

CrR 3.1 does not require initiation of formal criminal proceedings before the right to counsel attaches. Rather, being taken into custody creates the right. State v. Schulze, 116 Wn.2d 154, 162, 804 P.2d 566 (1991). “Although the rule does not require

the officers to actually connect the accused with an attorney, it does require reasonable efforts to do so.” Id. “[T]he fact that a warning valid within the meaning of Miranda has been made should not in itself be considered to fulfill the requirement of a formal offer [of counsel under CrR 3.1].” Jacquez, 105 Wn. App. at 715 (reversing conviction where police delayed provision of counsel for 45 minutes after defendant’s request); Kirkpatrick, 89 Wn. App. at 415-16.

A police officer’s failure to comply with CrR 3.1 requires suppression of evidence subsequently gathered by police if tainted by the violation. State v. Kruger, 116 Wn.2d 135, 146, 803 P.2d 305 (1991); Schulze, 116 Wn.2d at 162. In Schulze, the Supreme Court held that suppression of a blood sample taken from a defendant under arrest for vehicular homicide after a CrR 3.1 violation of his right to counsel was not required because the evidence was not tainted by the violation. 116 Wn.2d at 163-64. This was so, because submission to the blood test was mandatory and the advice of counsel would not have changed that fact. Id. (noting that an attorney might have assisted the defendant in other matters, but he could not have instructed his client not to take the blood test).

2. Because E.G.'s CrR 3.1 right to counsel was violated, the trial court's denial of suppression was in error. E.G.'s right to an attorney was violated when he was held in custody for over an hour without being advised of his right to counsel; therefore his custodial statements, whether or not they were the products of interrogation, were tainted by the violation and should have been suppressed. RP 87-88.

In Kruger, the Supreme Court held that violation of the rule required suppression of any evidence obtained after the defendant was denied counsel, including his refusal to take a breath test following his arrest for DUI. 116 Wn.2d at 147. Here, the evidence obtained after the violation of the rule were the statements made by E.G. regarding his age and identity, as well as his statements on the videotape, all of which were used as evidence of intoxication. RP 174. Had E.G. been advised of his right to counsel, he would certainly have been advised to remain silent, rather than provide evidence to the officers which included an element of the crime with which he was charged. The statements were tainted by a violation of CrR 3.1, and should have been suppressed.

3. The error was not harmless. If this Court were to conclude that the statements were not tainted by the violation of

CrR 3.1, but were merely a product of the violation, harmless error analysis controls. Templeton, 148 Wn.2d at 220. When a court rule is involved, this Court determines whether the error was prejudicial in that “within reasonable probabilities, [i]f the error [had] not occurred, the outcome of the trial would have been materially affected.” Templeton, 148 Wn.2d at 220, quoting State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001) (internal quotation omitted).

The error in admitting this evidence is not harmless. The State relied heavily on E.G.’s statements for conviction. In particular, E.G.’s statements regarding his age were relied upon as an element of the minor in possession of alcohol count, and his behavior and statements in the patrol car were used against him to corroborate his impairment on the same count. RP 133-38, 142-45, 174. Absent these statements obtained without counsel, there is a reasonable probability that the outcome of the trial would have been different.

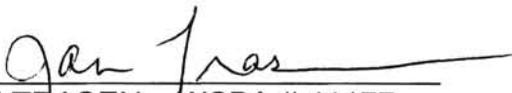
The trial court erred in admitting E.G.’s statements to the police officers and security guards, which were obtained in violation

of CrR 3.1. His case should be remanded for a new trial, with an order suppressing those statements made after the violation.

E. CONCLUSION

For the above reasons, E.G. respectfully asks this Court to reverse and remand.

Respectfully submitted this ^{2nd} day of January, 2013.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68993-2-I
v.)	
)	
EVARD G.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] EVARD G. 3512 S JUNEAU ST #502 SEATTLE, WA 98118	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF JANUARY, 2013.

X _____ 

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