

FILED
August 13, 2015
Court of Appeals
Division I
State of Washington

NO. 72745-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN PEREZ REYES,

Appellant.

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

The Honorable Millie Judge, Judge
The Honorable Michael Downes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting Brian Perez Reyes's statements to police, as these statements were obtained through custodial interrogation that required Miranda¹ warnings and Miranda warnings were not provided.

2. The trial court erred in concluding that Miranda was not applicable because Perez Reyes was not in custody to a degree associated with formal arrest after one officer stated to another, "I think we're just gonna have to take him to jail" in Perez Reyes's presence. CP 111 (CrR 3.5 conclusion of law 4.2).

Issues Pertaining to Assignments of Error

1. When investigating officers indicate to a suspect that they have authority to control and restrict the physical movement of a suspect to the degree that a reasonable person in the suspect's position would not feel free to leave, has the suspect's liberty been curtailed to a degree associated with formal arrest and is the suspect in custody?

2. When a suspect is in custody and is subjected to interrogation, must officers provide Miranda warnings to protect the suspect's right against self-incrimination?

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

3. When the trial court relies on unconstitutionally obtained and therefore inadmissible evidence in determining a defendant's guilt, must the defendant's conviction be reversed?

B. STATEMENT OF THE CASE

On June 28, 2014, police investigated injuries to Perez Reyes's three-month-old son, D.P.R. CP 124; 1RP² 8, 37. Perez Reyes had taken D.P.R. to the hospital early in the morning of June 28, 2014 because he was not breathing. CP 124. Medical staff was able to revive D.P.R. but brain scans showed no activity except for spontaneous respiratory drive and widespread subarachnoid hemorrhage and cerebral swelling. CP 124. Doctors determined D.P.R. was brain dead. CP 125. The following day, D.P.R. was removed from life support and died. CP 125.

Officers suspected Perez Reyes was responsible for D.P.R.'s injuries. 1RP 9, 39. Snohomish County Sheriff's Detectives James Scharf and Jeff Ross contacted Perez Reyes in the parking lot of his apartment complex and asked to interview him, to which he agreed. 1RP 10-11, 40. The interview occurred in Ross's vehicle. 1RP 12, 40.

Ross and Scharf questioned Perez Reyes for over three hours. 1RP 17-18. The first portion of the interview lasted about one hour and 15

² This brief references the verbatim reports of proceedings as follows: 1RP—September 5, 2014; 2RP—September 22, 2014; 3RP—October 13, 2014; 4RP—November 20, 2014.

minutes, followed by a 10 to 15 minute break, and then followed by about two more hours of interrogation. 1RP 20, 42. At some point during the questioning, Perez Reyes indicated he had dropped D.P.R. and that D.P.R. had lost consciousness as a result. 1RP 28, 45, 52. During the break, Ross learned that the injuries to D.P.R. were not accidental but inflicted by shaking the baby violently. 1RP 20, 45.

Employing the Reid interrogation technique, officers “tried a lot of themes to try to get [Perez Reyes] to tell us that he shook the baby hard.” 1RP 21, 34, 44, 53. Perez Reyes continually denied he shook D.P.R. violently. 1RP 45.

Following about two hours of questioning during which Perez Reyes continued to deny wrongdoing, Scharf said to Ross, “I think we’re going to have to take him to jail.” 1RP 28-29, 42, 44-45. Scharf testified he was trying to indicate to Ross that further questioning was a waste of time and that they should arrest Perez Reyes. 1RP 45. Ross agreed, and Scharf’s comment solidified Ross’s decision to arrest Perez Reyes. 1RP 31. Both officers stated at that point they would have stopped Perez Reyes had he attempted to end the interrogation and leave. 1RP 32, 46.

The interrogation continued after this point, with Scharf stating the officers were “trying to give [Perez Reyes] an opportunity to explain . . . how [his] son was hurt,” which Ross described as “just a merry-go-round” given

that Perez Reyes was “not willing to give [them] any further information.” 1RP 29. Ross left the vehicle for five minutes to talk to other officers on the scene. 1RP 21-22, 47. When Ross returned, he arrested Perez Reyes, advising him of his Miranda rights. 1RP 22.

The State charged Perez Reyes with second degree murder with a domestic violence allegation. CP 133.

At a pretrial CrR 3.5 hearing, which elicited the foregoing recitation of facts, Perez Reyes argued that a reasonable person in his position would have felt he was in police custody when Scharf stated, “I think we’re going to have to take him to jail.” 1RP 70. The trial court disagreed essentially because officers did not physically restrain Perez Reyes at that point of the interrogation. CP 111; 1RP 71-72. The trial court determined all Perez Reyes’s statements, until he invoked his right to silence after he was provided his rights, were admissible at trial. CP 112.

Following the CrR 3.5 hearing, the State and Perez Reyes requested to proceed by way of a stipulated facts trial to the bench. 2RP 2-4. To facilitate the stipulated facts trial the State amended its information from second degree murder to first degree manslaughter with a victim vulnerability aggravator. CP 105. Like the original charges, the amended information also contained a domestic violence allegation. CP 105. The trial court engaged Perez Reyes in a lengthy colloquy regarding the parties’

stipulation, accepted his waiver of a jury trial, and proceeded under the parties' stipulation for bench trial on agreed documentary evidence. 2RP 10-22; CP 91-99.

The trial court's verdict found Perez Reyes guilty of first degree manslaughter with the victim vulnerability aggravator and concluded the crime was a domestic violence offense. CP 86; 3RP 15. The trial court relied on Perez Reyes's statements to police, finding these statements were inconsistent with other statements he made to D.P.R.'s mother and maternal grandmother. CP 40; see also 3RP 12. The trial court also rejected Perez Reyes's explanation to police that he dropped D.P.R. and concluded D.P.R. "was violently shaken with great force causing his head to hyper flex and hyper extend, which caused nerve damage and bleeding." CP 40; see also 3RP 13.

At sentencing, the State and Perez Reyes agreed the standard range was 78 to 102 months. 4RP 3, 8. The State recommended an exceptional sentence of 168 months. 4RP 3-4. The defense requested a low-end standard-range sentence. 4RP 10-11. Based on the victim vulnerability aggravator, the trial court imposed an exceptional sentence of 144 months. 4RP 15; CP 29. This timely appeal follows. CP 1.

C. ARGUMENT

PEREZ REYES WAS SUBJECTED TO CUSTODIAL INTERROGATION THAT ENTITLED HIM TO MIRANDA WARNINGS

The Fifth Amendment to the United States Constitution provides, “No person . . . shall be compelled in any criminal case to be a witness against himself.” This right against self-incrimination protects an accused from being compelled to provide testimonial or communicative evidence to the State. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

To honor a person’s Fifth Amendment rights, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). “[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings.” State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney,

either retained or appointed.” Miranda, 384 U.S. at 444. Statements elicited that fail to comply with this rule are not admissible as evidence at trial. Id. at 444, 476-77.

“It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (per curiam)). The question of custody is a mixed question of law and fact: “first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).

Turning to the circumstances here, Detectives Scharf and Ross questioned Perez Reyes in a vehicle. 1RP 11-12. The detectives were armed and had police badges. 1RP 33. At the outset of the questioning, the detectives informed Perez Reyes “he was not under arrest and he was . . . there on his own volition.” 1RP 14. Police made clear they were investigating injuries to Perez Reyes’s child. 1RP 11. During the interrogation, employing the Reid interrogation technique, officers “tried a lot of themes to try to get [Perez Reyes] to tell us that he shook the baby

hard.” 1RP 21, 44, 53. Because Perez Reyes repeatedly denied he shook the baby violently, officers continued “going through lots of themes to get him to tell us what the truth was.” 1RP 21, 28, 44-45. Perez Reyes indicated only that he accidentally dropped the baby, which caused the child to lose consciousness. 1RP 28, 45, 52. Officers did not believe him. 1RP 29. They made clear they were investigating Perez Reyes because they believed he was the cause of his son’s injuries, explaining to Perez Reyes,

[T]here’s a couple of cops sitting in a car talking with you. That’s not normal, every day stuff. Okay? Even I would be scared if that -- if I was in your shoes. Okay? So let’s . . . move past the, we think he did this intentionally, because we don’t. Like I said just a minute ago, I think you are a good kid. You have a bright future, but you need to start being honest about the things that have happened.

1RP 34.

Given that Perez Reyes continued to deny wrongdoing, after about two hours of this questioning, during which a 10 to 20 minute break was taken, Scharf said to Ross, “I think we’re going to have to take him to jail.” 1RP 28-29, 42, 44-45. Scharf testified he suggested taking Perez Reyes to jail to communicate to Ross, “I think we’re wasting our time here. We should probably just move on.” 1RP 45. In Ross’s mind, this solidified his “decision to arrest [Perez Reyes],” and Ross indicated he would have stopped Perez Reyes if he had attempted to leave the scene. 1RP 31-32.

Scharf indicated the same. 1RP 46. At this point in the interrogation, Perez Reyes was, for all intents and purposes, under arrest.

It was reasonable for Perez Reyes to believe so. After hearing that interrogating officers were thinking about taking him or her to jail, any reasonable person would feel his or her freedom was constrained to a degree associated with formal arrest. A reasonable person would understand, at the point of such a statement, that his or her physical liberty is subject to the complete whim of police officers. No reasonable person in such circumstances would feel free to terminate the interrogation and walk away.

Moreover, the officer's statement indicated that being taken to jail was the only available option, regardless of what Perez Reyes did or said. He would be taken to jail if he confessed (which the officers were urging him to do) or he would be taken to jail if he continued to deny unlawful activity. Given that being taken to jail, i.e., arrest, was the only option on the table, a reasonable person would feel especially powerless to terminate the encounter and leave. Accordingly, Perez Reyes was entitled to Miranda warnings to honor his right against self-incrimination and to counsel. Because the officers did not inform Perez Reyes of his Miranda warnings at the point they indicated Perez Reyes would be taken to jail, all of Perez Reyes's subsequent statements must be suppressed.

In its findings of fact upon stipulated bench trial, the trial court determined Perez Reyes's statements to police were inconsistent with his statements to his son's mother and maternal grandmother. CP 40 (finding of fact 1.26). In addition, the trial court focused on the fact that Perez Reyes told police he dropped D.P.R. on his head during an attempted bottle feeding and that D.P.R. was not breathing when he picked D.P.R. up, which the trial court opined was inconsistent with D.P.R.'s injuries. Compare CP 40 (finding of fact 1.26) with CP 40 (finding of fact 1.29). Thus, the trial court plainly relied on Perez Reyes's unconstitutionally elicited statements as evidence of his guilt. Because the trial court erred in suppressing these statements, Perez Reyes's conviction must be reversed. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

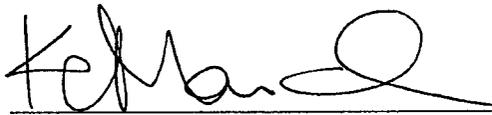
D. CONCLUSION

Perez Reyes was subjected to custodial interrogation without Miranda warnings when an officer indicated he thought Perez Reyes should be taken to jail. Because these unconstitutionally elicited statements were considered by the trial court in established Perez Reyes's guilt of first degree manslaughter, Perez Reyes's conviction must be reversed.

DATED this 13th day of August, 2015.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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