

No. 36241-4

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v

TODD DWAYNE ROGERS,

Appellant.

COURT OF APPEALS
DIVISION TWO
03 APR -7 PM 1:58
STATE OF WASHINGTON
BY *[Signature]*

*PM 4-4-08
App. From App. 4/3/08*

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR PIERCE COUNTY

BEFORE THE HONORABLE FREDERICK FLEMING

APPELLANTS'

PRO SE SUPPLEMENTAL BRIEF

Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, Washington
99362

Todd Dwayne Rogers, pro se

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A. SUPPLEMENTAL ASSIGNMENT OF ERRORS

- a). The trial court erred when it allowed the state to use Todd's custodial statement as impeachment during cross-examination

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERRORS

- a). Whether the trial court erred when it allowed the state to use the defendant's statement as impeachment during cross-examination

C. SUPPLEMENTAL STATEMENT OF THE CASE

For purposes of this supplemental brief the appellant, Todd Dwayne Rogers, incorporates and adopts by reference the statement of the case established in his opening brief, the verbatim report of proceedings and the clerk's papers filed herein, and supplements' with the following.

PRO SE SUPPLEMENTAL BRIEF

D. ARGUMENT

a). THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO USE TODD'S CUSTODIAL STATEMENT AS IMPEACHMENT DURING CROSS-EXAMINATION

Due Process under the Fourteenth Amendment requires that a confession by a defendant be made voluntary. State v Pierce, 94 Wn. 2d 345, (citing Miranda v Arizona, 384 U.S. 436, 86 S. Ct. 1602, L.Ed. 2d at 351). See also Lego v Twomey, 404 U.S. 477, 483-85, 92 S. Ct. 619, 30 L.Ed 2d 618 (1972). Richardson v Newland, 342 FS. 2d 900 9th Cir. (2004). Todd now asserts that his confession was not voluntarily made, even after the presence of his Miranda (infra) rights under the State's constitutional provisions were given, due to the error of being subjected to continuous psychological pressure and the employment of physical techniques learned in interrogation training, resulting in not only overcoming his reluctance to talk, but the eliciting of an incriminating statement as well.

The defendant's custodial statement was not made in the absence of physical training technique maneuvers and psychologically pressuring tactics and/or trickery that obviously had been employed in calculating manner to elicit an incriminating statement from him, which therefore renders the confession made under these circumstances inadmissible. Washington Practice § 3319 at 878 (citing Miranda, Third Edition) Indeed federal courts have concluded that neither physical intimidation nor psychological pressure is permissible for extracting a confession. United States v Haswood, 350 F.3d at 1027. (citing United States v Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981).

To the extent that the defendant was convicted post-Miranda (infra) it was error for the trial court to allow the state to proceed with its case for purposes of subjecting Mr. Rogers to impeachment regarding his custodial statement during cross-examination of his trial. Furthermore the defendant was not effectively apprised of how he was and is entitled to the protections of his constitutional privilege(s) and rights under Miranda (infra) being scrupulously honored.

The defendant need not be informed that his rights (warnings) be given in oral form, but rather, language that adequately informs. State v Rupe, 101 Wn. 2d 664, (1984) Additionally, the Supreme Court in Miranda (infra) opined that (warnings) be enunciated in nature and wording, which also permits them to be offered to a suspect in writing alone, provided that they are presented on a waiver of rights form to be executed by a suspect prior to interrogation. Washington Practice § 3311 at 863 (citing Miranda, Third Edition) The means to which making a confession are within waiving the inherent rights under Miranda (infra) at 724. If a confession once made, however, lacks proof of an effective waiver of rights during a custodial interrogation, a confession is not made voluntarily. Michigan v Mosley, 423 U.S. 96, 104, 46 L.Ed. 2d at 106. See also: State v Haynes, 16 Wn. App. 778, 786.

Mr. Rogers does not advance that Miranda (infra) invalidates a confession for purposes of admitting as evidence into trial. See State v Putman, 65 Wn. App. 606 (1992) Also: (citing RCW 10.58.030..... (2006)). But rather that Miranda (infra) outlined the procedure by which a confession may be obtained anywhere in the United States, but especially in the state of Washington, [unless rights effectively waived] a confession cannot be admitted as evidence

except where the trier of fact finds that rights were properly given. State v Haack, 88 Wn. App. at 424.

So as to elucidate the error; the defendant was not effectively apprised that:

- (i) his constitutional privilege under the Fifth Amendment as well as others; also including under Miranda were to be scrupulously honored, and
- (ii) He possessed and possesses the right, absent a showing of an effective waiver of his rights under Miranda therefore rendering his statement made under these circumstances inadmissible, to have a jury determine his guilt or innocence based on the facts and/or real evidence in his case

Where the trial court and the state failed to analyze and/or consider these critical factors carefully, in order to establish whether Mr. Rogers made his confession freely and voluntarily, it is wholeheartedly incorrect to assume [even arguendo] that Mr. Rogers thereafter made a voluntary confession. As our courts have soundly declared "that where a defendant is not effectively apprised of the relevant factors pertaining to his constitutional privileges and the protections of them surrounding his confession, it cannot be inferred that it was therewith voluntarily made".

A trial court is required to correctly enter written findings and conclusions regarding the voluntariness of a confession. State v Davis, 34 Wn. App. 546 (citing Superior Court Criminal Rule 3.5 (c)). That did not happen in the defendant's case. Assuming "arguendo" that the prosecution rebuts that the trial court made no error in its [findings of facts] regarding the admissibility of the defendants' statement for purposes of impeachment, due to in part:

that it had not only been allowed to use the confession in its case in chief; and also that the court did not find that the officers conduct while speaking with the defendant did not rise to the level of coercion; and further, seeing that, because the defendant had opted to go to trial that he would more than likely give an exculpatory version of the incident, that, hence, for these reasons the courts' ruling was appropriate, the prosecution, however, can make no showing that not only after his rights under Miranda (infra) had been read to him, that in fact, once he had invoked his Fifth Amendment privilege that it had been scrupulously honored nor can it also establish that the defendant effectively waived his right as well as others under Miranda (infra), which therewith the efforts of a police-initiated but yet continuously unceasing interrogation became a product, when considering or evaluating the aforementioned means, of a calculated plan to procure an incriminating statement that if once changed from the time before trial, no matter how slight or much, could inevitably be used against him at trial. Should the state be able to make such showing(s) their showing is invited and thereupon anticipated. The state bears the burden of not only having to prove the validity of an effective waiver of a defendant's rights by a preponderance of evidence, but also subsequently when a statement has been obtained once the assertion of right to remain silent in the presence of a continuously unceasing interrogation that it is admissible for trial. State v Coles, 28 Wn. App. 563 (citing State v Gross, 23 Wn. App. at 567.)

Insofar as supplementing this issue, a federal court held, that it was error for a district court to allow the government to make reference to a defendants' silence after receiving Miranda warning even though it was true, as the government emphasized, that defendant

later decided to waive his right to remain silent and talk to United States Marshals. Id However, defendants' waiver of Miranda rights did not mean that the government was free to mention and therefore penalize him for his earlier reliance on that right. Id Because the impermissible inference of guilt that arises when the jury learns of a defendant's post-arrest silence, which troubled the federal court in Doyle, remains even where a defendant later decides to talk to authorities. United States v Turner, 966 F.2d at 442. In the instant case, the trial court erred by allowing the state to use Mr. Rogers custodial statement for the purpose of cross-examination after concluding that his "will to resist was not overborne," and therefore his statements were admissible. (CP 355) But contrary to this opinion and ruling, it is only when after a defendant has waived his right to remain silent, and where both a passage of a significant period in time and the provision of a fresh set of Miranda warnings, the police may reapproach a defendant and resume questioning. And in so doing, the police again must "scrupulously" honor a defendant's right to cut off questioning and may not persist in repeated efforts to wear down [his] resistance and overcome his free choice or [will]. State v Cornethan, 38 Wn. App. 231 (1984) See also: Washington Practice § 3312 at 866 (citing Miranda, Third Edition) Additionally, it has also been held in the Turner court, that not only by allowing the state to use a defendant's post-arrest silence would be a due process violation, but [even in the event if a defendant decides to talk to authorities later] he cannot be subjected to impeachment relating to his testimony or [statement(s)] offered for the first time at trial because it would unfairly penalize him for exercising his Miranda rights. Furthermore, and if the government could not upon a [court's

determination] be allowed to use it in its case in chief, that surely it would not be allowed to use it in its cross-examination of a defendant. Turner (supra) at 442. (citing United States v Szymaniak, 934 F.2d 434, 439 (2nd Cir. 1991) See also State v Setzer, 20 Wn. App. 46 (1978).

This court should first determine whether substantial evidence supports the challenged findings of fact. State v Mendez, 137 Wn. 2d 208, 214 (1999) (citing State v Hill, 123 Wn. 2d 641, 647 (1994)). The court then reviews the court's conclusions of law de novo. State v Broadway, 133 Wn. 2d 118, 131 (1997).

The courts'"supervisory responsibility to deter police misconduct and to preserve the dignity and integrity of the judicial process forbids a blanket ruling that such evidence is invariably admissible for purposes of impeachment." State v Grieve, 67 Wn. App. 166, 175 (1992) (emphasis in original). Thus, the use of previously custodial statements for purposes of impeachment must be determined on a case by case basis. See Grieve (supra) 67 Wn. App. at 175.

A statement obtained in violation of Miranda and used for impeachment purposes must have been made free of coercion and must satisfy constitutional due process standards of voluntariness. State v Brown, 113 Wn. 2d 520, 556 (1989); State v Davis, 82 Wn. 2d 790, 793 (1973). The test for voluntariness is whether "the confession [is] the product of an essentially free and unconstrained choice by its maker. Scheneckloth v Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L.Ed. 2d 854 (1973).

The Court must examine the totality of the circumstances in determining voluntariness, including the presence of threats or violence, direct or implied promises, or the use of improper influence or police trickery. Scheneckloth (supra) 412 U.S. at 227;

State v Davis, 34 Wn. App. 546, 550 (1983). Further, in assessing the totality of the circumstances, a court must consider any promises or misrepresentations made by the interrogating officers. United States v Springs, 17 F.3d. 192, 194 (7th Cir. 1993); United v States v Walton, 10 F.3d 1024, 1028-29 (3rd Cir. 1993). If promises or misrepresentations were made to defendant, the court must determine whether there is a causal relationship between the official's statements and the confession. Walton (supra) 10 F.3d at 1029-30. The inquiry is whether the defendant's will was overborne. See State v Rupe, 101 Wn. 2d 664, 679, 683 (1984).

Here under the facts of this case, the trial court suppressed the use of Mr. Roger's statement during the states' case in chief. (RP 120-22; CP 356-60) In its written findings, the court concluded that Todd "invoked his right to remain silent... and that constitutional right was not scrupulously honored by law enforcement". (CP 359) But later the trial court incorrectly determined that the officer's conduct was not coercive, and that Todd's will to resist was not overborne. Todd was held for nearly four hours, handcuffed and isolated for much of that time. (RP 33,55,25,26) He was then handcuffed to a chair in a small room with two detectives for an extended period of time (RP 26,28-29) After Todd invoked his right to remain silent, the officers engaged in a calculated plan to employ psychological pressure to overcome Todd's reluctance to speak with them. (RP 28,30,45-46,68-69) These tactics and psychological maneuvering were applied to Todd for nearly an hour before Todd's will was overborne and he finally provided a statement. (RP 28-29,30, 45-46,68-69) Moreover, a review of the taped statement shows that the officers made some sort of representations to Todd about the law of self-defense and justifiable homicide before he agreed to

talk, and Todd relied upon these representations. (RP 1192-93, 1197; Exh P 215)

Under the basis of these particular facts, Todd's statement cannot be deemed voluntary. The tactics and trickery employed by the officers render the statement wholly unreliable. The trial court should have prohibited the State's use of this unreliable statement for impeachment purposes.

The trial court's error was prejudicial to Todd's defense. In his statement, Todd told a different account of what occurred on the balcony. He did not tell police that Jason (victim) planned to rob him or that Jason and Timothy (victim) tried to throw him over the balcony. (RP 1344, 1355; Exh. P 215) He told police that Timothy pulled out a gun and started firing. (RP 1349; Exh P 215) He also told police he knew before he arrived that Jason would be at the party, and that he expected there might be a fight. (RP 1286-87, 1288, 1329; Exh P 215).

In the case at bar there exist no other means of eradicating the unwarranted conviction(s) save reversal. This very conviction(s) has and is working to Mr. Rogers prejudice and disadvantage as he is serving a prison term on a number of unsubstantiated facts relating to, but not excluding him making a presumed voluntary confession. Indeed our courts have declared that unless a confession though once obtained in violation of a defendant's due process rights constitutes harmless error, which it cannot, it may not be admitted into evidence for any purpose, including impeaching a defendant by demonstrating a prior inconsistent statement. See Setzer (supra) 20 Wn. App. at 46.

The trial court and the State's failure to exclude that statement from trial in this case can never be deemed harmless, even

if there is ample evidence apart from the confession to support the conviction. Malinski v New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029 (1945) Additionally, the error(s) on behalf of each party minus the defendant, have resulted in a man serving an substantial amount of prison time, due to those very errors. That man of course Mr. Rogers. The error(s) are all non-invited nor contributed to on Mr. Rogers behalf, again for a lack of better terms, circumstances beyond Mr. Rogers control if you will?

To the extent that Mr. Rogers is a progeny of Miranda (infra) he now declares that after indicating to law enforcement that once he had invoked his Fifth Amendment privilege and the interrogation did not cease ,that any statement taken after his invocation of this privilege cannot be other than the product of compulsion, subtle or otherwise. Miranda (infra) at 723.

Therefore it is Mr. Rogers precatory that due to his Fifth Amendment privilege not being scrupulously honored thereby resulting in a violation of it, justifies a remedy of suppressing the statement made by him. State v Warner, 125 Wn.2d 877 (1995).

And notwithstanding insofar as what the prevailing opinion is, regarding a compelled confession after reversing a conviction, one federal court judge in Wan v United States, 266 U.S. 1, 69 L.Ed 131, 45 S.Ct. 1 (1924), stated on behalf of this unanimous court that:

"In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the

compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. Bram v United States, 168 U.S. 532 [42 L ed 568, 18 S.Ct. 183]." 266 U.S., at 14-15, 69 L ed at 148.

To the extent when after applying this same line of reasoning aforetohere in this case, if questioning [once] begins is noncoercive, and does not contain the potentiality of compulsion inherent... in in-custody interrogations but is conducted during a routine investigation without pressure exerted by the examiner, it is permissible. State v Creach, 77 Wn. 2d 194 (1969) But the defendant, now here asserts, that his statement had been made under compulsion as a result of psychological pressure, trickery, and physical training technique manuevers while held in the atmosphere of an inherently compelling police-initiated and yet unceasing interrogation. And as once already previously stated, a statement taken under such circumstances as these is impermissible.

Even though our Supreme Court has held that a defendant's claim of being under psychological compulsion or [pressure] alone cannot support a finding of a defendant restrained for Miranda purposes. And, the reason for this is, that the defendant is required to show [some] objective facts as to how his freedom of movement was restricted. State v Post, 118 Wn.2d 596 (1992) See also: State v Sargent, 111 Wn. 2d 641 (1998) In the immediate case, it is the defendant's assertion that he has made the requisite showing of some objective facts that are reflected herein the record. Indeed, and unless the state can meet not only the burden of proof of showing that the defendant waived his right to remain silent before the results of the custodial interrogation, as well as after the assertion of his Fifth Amendment privilege being scrupulously honored, and thereafter the interrogation had ceased,

it has been held that under such grounds as these that a judgment should be reversed and the case remanded for a new trial. Coles (supra) at 563.

The jury's opinion of Mr. Rogers' credibility was crucial to his defense. And it is clear that the jury struggled with the question of whether the State's theory of the case or Defense's theory of the case was believable. Further, but it cannot be said, that the statement Mr. Rogers made to police had no impact on the outcome of trial.

Given that Mr. Rogers invoked his right to remain silent that the officers did not honor his invocation and instead, used the aforesaid means to get him to confess, the trial court should have never allowed the State to use Todd's statement against him during cross-examination at trial.

E. CONCLUSION

Based on the aforespoken reasons stated within, this court should reverse the conviction(s) of the trial court and remand this case for a new trial.

Dated: March 31th, 2008

Todd Dwayne Rogers
Todd Dwayne Rogers pro se

AFFIDAVIT

STATE OF WASHINGTON)

) ss: 36241-4

COUNTY OF _____

I, Todd Dwayne Rogers, declare under penalty of perjury that the following statements within this affidavit are true and correct to the best of my knowledge and has been executed on this 2nd day of April, 2008, at the Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA. 99362

in the County of Walla Walla, Washington: I am incorporating this Affidavit by reference of the cause No.:36241-4 with my Pro Se Supplemental Brief. This is to certify that each and every statement contained therein is true and correct to the best of my knowledge and belief.

Todd D. Rogers
(Affiant's Name)

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright, 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,
V.
TODD DWAYNE ROGERS,
Appellant.

NO. 36241-4

AFFIDAVIT OF SERVICE
BY MAILING

I, Todd Dwayne Rogers, being first sworn upon oath, do hereby certify that I have served the following documents: Appellants' Pro Se Supplemental Brief, and Affidavit of sworn Statement(s).

Upon: COURT OF APPEALS, DIVISION II
David Ponzoha, Clerk
950 Broadway, Suite 300
Tacoma, WA. 98402-3636

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 3rd day of April, 2008.

COURT OF APPEALS
DIVISION II
08 APR -7 PM 1:59
STATE OF WASHINGTON
BY DEPUTY

Todd Rogers # 820892
Name & Number Todd Rogers # 820892

SUBSCRIBED AND SWORN to before me this 3rd day of April, 2008.

Wanda K. Heimann
WANDA K. HEIMANN
NOTARY PUBLIC-STATE OF WASHINGTON
MY COMMISSION EXPIRES 8-20-11

Wanda K. Heimann
Notary Public in and for the State of
Washington. Residing at Walla Walla,
WA. My Commission Expires: 8/20/11

DECLARATION

I, Todd Dwayne Rogers, declare that, on April 3, 2008, I deposited the foregoing document,

A Pro Se Supplemental Brief, and Affidavit of Sworn statement(s)

or a copy thereof, in the internal mail system of

Washington State Penitentiary
[name of institution]

and made arrangements for postage, addressed to:
Washington Court of Appeals, Division II Tacoma, WA. 98402-3636
David Ponzoha, Clerk
950 Broadway, Suite 300

[name and address of court or other place of filing];
Kathleen Proctor Tacoma, WA. 98402-2171
Pierce County Prosecuting Atty Ofc
930 Tacoma, Ave. S Rm 946
[name and address of parties or attorneys to be served].

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

DATED at Walla Walla, WA. on April 3, 2008.
[city] [state]

[signature]

CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of SAE
to K Proctor
& S Cunningham
4/10/08 SW
Date Signed