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NO. 36336-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

S.A.W.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY
JUVENILE DEPARTMENT

The Honorable Richard C. Adamson, Commissioner

BRIEF OF APPELLANT

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A. SUMMARY OF APPEAL

Mason County prosecuted appellant S.A.W. for trafficking in stolen property, possession of stolen property (PSP) in the first degree, and taking a motor vehicle without permission (TMWWOP) in the second degree in relation to the theft of a motorcycle, but only presented evidence that at some time the motorcycle was stolen by persons unknown and was later sold to a third party. The only evidence that S.A.W. rode upon the motorcycle or knew it was stolen was derived from his statement to law enforcement. The court did not hold a CrR 3.5 hearing and defense counsel did not object to the admission of the statement on *corpus delicti* grounds. The court subsequently convicted S.A.W. of TMWWOP based solely on this statement and utilized the statement to prove the knowledge element of PSP.

On appeal S.A.W. contends the juvenile court erred in failing to hold a CrR 3.5 hearing to determine the statement's admissibility and that defense counsel was ineffective for failing to object to the lack of a hearing and in the alternative to the lack of *corpus delicti* for the statement.

B. ASSIGNMENTS OF ERROR

1. The juvenile court erred in failing to hold a hearing to determine the admissibility of statements pursuant to CrR 3.5.

2. Defense counsel rendered ineffective assistance of counsel by failing to object to the lack of a CrR 3.5 hearing.

3. Defense counsel rendered ineffective assistance of counsel by failing to object to the absence of *corpus delicti* for the crime of taking a motor vehicle without permission, as charged in Count III.

4. The juvenile court erred in entering Finding of Fact G, which states, “[S.A.W.] did not express any confusion over his rights, and spoke voluntarily with Deputy Philpott.” CP 5.

5. To the extent the entry of a finding on this issue deems the statement true, the trial court erred in entering Finding of Fact H which states, “[S.A.W.] admitted that he knew the motorcycle had been stolen from Northup and knowing that, had ridden on the motorcycle.”

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Consistent with CrR 3.5 and the Fourteenth Amendment guarantee that any incriminating statement obtained by the government from the accused be voluntary, the court must hold a

hearing prior to admitting any confession by the accused. Did the juvenile court err in failing to hold a CrR 3.5 hearing? Where the question of voluntariness was contested, must S.A.W.'s convictions be reversed and remanded for a new trial? (Assignments of Error 1, 4, and 5)

2. The Sixth Amendment guarantees an accused person the effective assistance of counsel. Where S.A.W.'s statement to law enforcement was the sole evidence offered to prove TMWWOP as charged in Count III and the knowledge element of PSP as charged in Count II, did defense counsel render ineffective assistance of counsel where she failed to request a CrR 3.5 hearing or raise a *corpus delicti* objection to the admission of the statement? (Assignments of Error 2 and 3)

D. STATEMENT OF THE CASE

On December 17, 2006, Shane Northup received an anonymous telephone call stating that his Honda CRF 450 motorcycle, which he had bought used two years earlier, was at an address on South Shore across from the Sunset Beach Store in Mason County, Washington. RP 50.¹ Northup had stored the motorcycle in a garage; after the call he discovered the door to the

¹ A single volume of consecutively-paginated transcripts is referenced herein as "RP" followed by page number.

garage was broken and the motorcycle and a number of wheels and other loose parts had been stolen. RP 50, 64.

Northup drove his pick-up truck to the address he was given in the anonymous telephone call and found the motorcycle propped against a post. RP 51. After loading the motorcycle in his truck he pounded on the door of the house at that address to ask who had stolen it. Id. A man who identified himself as Terry Brown came outside and said he had gotten the motorcycle from appellant S.A.W. and Northup's problem lay with him. RP 51, 66-67.

Brown, a 34-year-old felon with numerous prior convictions, claimed he had been contacted by a friend whom he knew as "Alex." RP 70, 74. Alex told Brown he knew Brown was trying to buy a dirt bike and that S.A.W. had a motorcycle he wanted to get rid of. RP 76. Brown claimed he agreed to trade his truck for the motorcycle and that subsequently Alex drove the motorcycle in the back of his Ford Explorer to Brown's house, and with S.A.W.'s assistance unloaded the motorcycle. RP 76-77.

Law enforcement officers contacted S.A.W. and asked him if he committed the crime. S.A.W. repeatedly denied involvement, telling police Brown had stolen the motorcycle and that he learned about it from Alex Cava, who was a neighbor. RP 30-31.

Eventually, after police told S.A.W. several times they did not believe he was telling the truth, S.A.W. stated he rode the motorcycle with Alex Cava's permission and that he knew the motorcycle had been unlawfully taken when he did so. RP 31, 42.

The Mason County Prosecuting Attorney charged S.A.W. by amended information with one count of trafficking in stolen property, one count of taking a motor vehicle without permission in the second degree, and one count of PSP in the first degree. CP 15-16. A trial was held before the Honorable Richard C. Adamson, Commissioner. The court did not hold a CrR 3.5 hearing and defense counsel did not object to the admission of S.A.W.'s statement to law enforcement.

At the trial's conclusion, with respect to Count III, charging TMVWOP, the court ruled, "the proof of that [crime] was in [S.A.W.]'s statement to Deputy Philpott." RP 120. With respect to Count II, the court ruled,

The chronology here is that that riding of the vehicle, whenever it occurred, occurred obviously prior to the time Mr. Brown came into possession of the vehicle, or of the motorcycle. And the fact that [S.A.W.] had previously ridden on it, knowing it was stolen, then goes to the second half of the element, which is knowing it had been stolen.

RP 120-21. The court ruled that by assisting Cava in delivering the motorcycle to the house, S.A.W. constructively possessed it. RP 121. The court acquitted S.A.W. of trafficking in stolen property as charged in Count I. RP 116-18. The court entered written findings of fact and conclusions of law in support of its ruling. CP 17-18. This appeal follows. CP 3.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING PURSUANT TO CrR 3.5.

Under CrR 3.5(a), “when a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.” The Washington Supreme Court has held that although the rule itself is not of constitutional magnitude, CrR 3.5 enforces constitutional rights found by the United States Supreme Court. State v. Williams, 137 Wn.2d 746, 751, 975 P.2d 963 (1999) (citing Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Under the Fourteenth Amendment, “a defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his

confession are actually and reliably determined.” Jackson v. Denno, 378 U.S. 368, 380, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Although the court in Williams held an accused person was not entitled to raise the failure to advise of CrR 3.5(a) rights as an error for the first time on appeal, the Court distinguished the circumstance presented here: where the court simply failed to hold the hearing mandated by Jackson at all. See Williams, 137 Wn.2d at 751-52 (distinguishing State v. Lopez, 67 Wn.2d 185, 189, 406 P.2d 941 (1965) and State v. Alexander, 55 Wn. App. 102, 776 P.2d 984, rev. denied, 110 Wn.2d 1039 (1988)).

Like this case, Alexander was a juvenile case in which the court determined post-Miranda statements to be voluntary based solely on the testimony of the officer who took the statements, and without holding a CrR 3.5 hearing or advising the defendant of his right to testify regarding voluntariness. The Court noted, “Whether requested or not . . . a CrR 3.5 hearing is mandatory to protect the juvenile's constitutional rights ‘by assuring a defendant of his right to have the voluntariness of the statement or confession determined . . . to allow the court to rule on its admissibility.’” Alexander, 55 Wn. App. at 105 (quoting State v. Tim S., 41 Wn. App. 60, 701 P.2d 1120 (1985)).

In Lopez, the Court found harmless the failure to litigate the admissibility of the defendant's statement to law enforcement where there was no question as to the statement's voluntariness. 67 Wn. App. at 188. The Court was careful to note, however, that where there is a factual question regarding voluntariness, "such question should be determined in a separate proceeding before the confession be submitted ... in the trial of the case." Id. (citing Jackson, 378 U.S. at 395). The Court cautioned,

If prosecuting attorneys need be warned of the danger of using this decision as a precedent in cases where there is any question of the voluntariness of the statement made by the defendant, their attention is directed to the annotation in 89 A.L.R. 2d 478 (1963) "Impeachment of the accused as witness by use of involuntary or not properly qualified confession." Their attention is also directed to the minority opinion of Justice Black urging that there be a complete new trial in Jackson v. Denno, supra.

Lopez, 67 Wn.2d at 190.

The gravamen of the defense theory here was that S.A.W.'s statement to law enforcement was coerced and therefore unreliable. RP 38-39, 109-10. Defense counsel cross-examined Deputy Philpott regarding the number of times he told S.A.W. he believed S.A.W. was lying and whether S.A.W. committed the crime. RP 38-39. Defense counsel introduced into evidence

Respondent's Exhibit 9, S.A.W.'s written statement, and argued, "at best this is an unsophisticated juvenile, and at worst he could be nearly illiterate. This was a coercive statement and I would ask that the court weigh that in considering proof." RP 97, 110.

The court, however, faulted defense counsel for not requesting a hearing pursuant to CrR 3.5, and on this basis refused to consider S.A.W.'s claims regarding the voluntariness of his statement. RP 110. After remarking that defense counsel had not requested a hearing pursuant to CrR 3.5, the court stated, "[defense counsel] was attacking the credibility or the voluntariness of her client's statement, Respondent's Exhibit No. 9, and I was simply saying that that issue is no longer before me." Id. This was erroneous: under CrR 3.5, it was the *court's* duty to hold a hearing on voluntariness, and under Alexander, it was improper for the court to presume even post-Miranda statements voluntary without affording the defendant an opportunity to be heard.

Unlike Lopez, the error cannot be assumed to be harmless. In Lopez, the defendant took the witness stand and affirmatively acknowledged in open court that he voluntarily gave a statement to law enforcement. Lopez, 67 Wn.2d at 188. Here, however, S.A.W. did not testify.

The voluntariness of a confession depends upon the totality of the circumstances . . . In order to have full knowledge of the facts and circumstances surrounding a statement it is necessary that the defendant be allowed to testify in his own behalf. Here, the court made its decision to admit this statement based only on the officer's version of the facts, without permitting the defendant the opportunity to testify or present other evidence, if any.

Alexander, 55 Wn. App. at 105.

The juvenile court did not comply with the mandatory requirement of a hearing to determine the voluntariness of S.A.W.'s statement and instead deemed the statement voluntary, probative, and dispositive of two of the charged counts based solely on the testimony of the officer that took the statement. RP 120-21. This Court should reverse S.A.W.'s convictions and remand for a new trial on the TMVWOP and PSP counts.

2. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST A HEARING PURSUANT TO CrR 3.5 TO DETERMINE THE ADMISSIBILITY OF S.A.W.'S STATEMENTS TO LAW ENFORCEMENT, AND BY FAILING TO OBJECT TO THE STATEMENT'S ADMISSIBILITY ON *CORPUS DELICTI* GROUNDS.

As noted in Argument 1, *supra*, the obligation to hold a CrR 3.5 hearing first and foremost lies with the court. CrR 3.5(a). Thus as a preliminary issue, the court's failure to hold a hearing to

determine the admissibility of S.A.W.'s statements was error that independently warrants reversal.

S.A.W. argues in the alternative that the failure of counsel to vigorously contest the admissibility of the statement by ensuring the court complied with its obligations under CrR 3.5 and presenting evidence the statement was involuntary was ineffective. S.A.W. further argues defense counsel should have objected to the admissibility of the statement on *corpus delicti* grounds.

The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of trial. U.S. Const. amend. 6;² Const. art. 1, §§ 3,³ 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984). State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); To obtain relief based on ineffective assistance of counsel, an appellant must establish that (1) his counsel's performance was deficient and (2) his counsel's deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Williams v. Taylor, 529 U.S. 362, 391, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000). A claim of ineffective assistance of counsel presents a mixed question of law

² In relevant part, the Sixth Amendment provides that in criminal prosecutions the accused shall "have the Assistance of Counsel for his defence."

³ Const. art. 1, § 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

and fact that is reviewed de novo. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

a. Defense counsel was ineffective for failing to ensure the court held a CrR 3.5 hearing. The Strickland test was adopted in Washington to “ensure a fair and impartial trial.” State v. Garrett, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing Thomas, 109 Wn.2d at 225). To establish the first prong of the Strickland test, an accused must show that “counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” Thomas, 109 Wn.2d at 229-30. If defense counsel's conduct may be characterized as a legitimate trial strategy or tactic, it is not considered ineffective. Id. at 229-30. However, “tactical” or “strategic” decisions by defense counsel must still be reasonable decisions. Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

Here, defense counsel pinned S.A.W.'s defense on two related theories: first, that Brown was not a credible witness because of his criminal background and the exposure he faced if prosecuted for trafficking in or possessing stolen property, and second, that S.A.W.'s statement to law enforcement was not reliable because it was coerced. RP 106-10. But defense counsel

did not request a CrR 3.5 hearing even though the question of voluntariness was key to the defense theory. RP 110. Given that the State's sole evidence of the TMWOP count and the knowledge element of the PSP count derived from the statement S.A.W. gave to Deputy Philpott, and in light of the State's burden to prove voluntariness at a CrR 3.5 hearing, it was objectively unreasonable for defense counsel to fail to present the issue to the court through the procedure prescribed by court rule.

S.A.W. was, moreover, prejudiced by defense counsel's omission. The record suggests that the combined effects of coercive interrogation tactics on the part of law enforcement and S.A.W.'s lack of education or illiteracy may have caused him to fail to understand the rights he was being read. See RP 38-39; Ex. 9. The court understood at least the interrogating officer's insistence that S.A.W. was not telling the truth to be relevant to voluntariness, but because defense counsel did not note a CrR 3.5 hearing deemed the issue waived. RP 39, 110. To the extent this Court might decline to consider S.A.W.'s challenge to the failure to hold a CrR 3.5 hearing on appeal, this Court should hold defense counsel was ineffective for failing to request a CrR 3.5 hearing on voluntariness.

b. Defense counsel should have objected to the lack of evidence of *corpus delicti*. An out-of-court confession is only admissible against a criminal defendant if the State establishes the *corpus delicti* of the charged crime by independent proof. State v. Brockob, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006).

A defendant's incriminating statement alone is not sufficient to establish that a crime took place. The State must present other independent evidence to corroborate a defendant's incriminating statement. In other words, the State must present evidence independent of the incriminating statement that the crime a defendant *described in the statement* actually occurred.

Id. (citations omitted, emphasis in original).

The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration *of the crime described in a defendant's incriminating statement.*" Id. at 328 (citing State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996) (emphasis in original)). In Brockob, the Court noted that Washington is among a minority of states that has declined to adopt the more relaxed *corpus delicti* rule endorsed by federal courts. 159 Wn.2d at 328. The Court emphasized that Washington requires the independent evidence to corroborate the defendant's statement. Id. The Court explained,

The trustworthiness rule requires only that the State produce independent evidence showing that the incriminating statement is reliable. Opper v. United States, 348 U.S. 84, 92, 75 S.Ct. 158, 99 L.Ed.2d 101 (1954). The State may establish the elements of the crime by combining the facts of the statement with the independent evidence, and the independent evidence need not establish the *corpus delicti* at all. Id. In contrast, Opper describes the corroboration rule, which is used in Washington, as requiring the State to produce evidence that establishes “the whole of the *corpus delicti*” independent of the defendant’s incriminating statement.

Brockob, 159 Wn.2d 328 n. 12.

With this test in mind, the Court evaluated whether the State had established the *corpus delicti* in the three cases before it. The Court held that (1) the State had not established the *corpus delicti* of possession of pseudoephedrine with intent to manufacture methamphetamine where the independent evidence merely showed the defendant had shoplifted a large quantity of Sudafed; (2) the State did prove the *corpus delicti* for this offense where the defendant not only possessed a large quantity of ephedrine but the independent evidence showed he had coffee filters and was working in concert with another person to acquire more ephedrine; and (3) in a prosecution for attempted second-degree robbery, where the independent evidence supported hypotheses of both

guilt and innocence, it did not corroborate the defendant's statement. Id. at 330-34.

Turning to the facts at hand, the State's independent evidence did not establish the *corpus delicti* for the crime of TMVWOP. Although Northup's testimony proved his motorcycle had been stolen and that he later recovered it from Terry Brown who had purchased it from either Alex Cava or S.A.W., there was no evidence that anyone rode or drove upon the motorcycle. The State did not introduce evidence that the motorcycle's odometer showed usage or present the testimony of witnesses who observed the motorcycle being ridden.

Division One of this Court has held that although the crime of TMVWOP does not require independent proof of the identity of the person charged or the *mens rea* of the offense, the *corpus delicti* of the crime consists of (1) proof that a vehicle was stolen and (2) proof that "someone" rode in it. State v. C.M.C., 110 Wn. App. 285, 287, 40 P.3d 690 (2002). Under Brockob, these two factors are the minimum of what must be required to independently corroborate a criminal defendant's confession to having ridden in or on a stolen vehicle. Because the independent evidence here did not establish

these elements, defense counsel was ineffective for having failed to object to the lack of *corpus delicti*.

c. S.A.W. was prejudiced by his counsel's deficient performance. The second prong of Strickland requires the defendant to show prejudice. 466 U.S. at 693. To show prejudice, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. Rather, he need only show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Given the lack of any independent evidence that S.A.W. was seen riding the motorcycle or that he knew it was stolen, S.A.W. was plainly prejudiced by counsel's failure to raise an objection to the lack of *corpus delicti* for his statement to law enforcement. This Court should reverse his convictions and remand for a new trial.

F. CONCLUSION

Based on the foregoing, S.A.W. requests reversal of his convictions for TMVWOP and PSP and remand for a new trial.

DATED this 26th day of October, 2007.

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