

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

No. 39039-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Tony Hickman,

Appellant.

Lewis County Superior Court Cause No. 08-1-00751-5

The Honorable Judge James Lawler

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting some of Mr. Hickman's custodial statements.
2. The trial court violated Mr. Hickman's Fifth and Fourteenth Amendment privilege against self-incrimination by admitting some of his custodial statements.
3. The trial court erred by overruling Mr. Hickman's *corpus delicti* objection.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where police engage in a two-step "question-first" interrogation, an accused person's post-*Miranda* statements must be suppressed unless the court finds that curative measures insulated the post-*Miranda* statements from the pre-*Miranda* statements. Here, the interrogating officer did not use any curative measures after the first stage of a two-step interrogation. Should the trial court have suppressed all of Mr. Hickman's post-*Miranda* statements?
2. An accused person's statements may not be admitted at trial until the prosecution establishes the *corpus delicti* of the crime by independent evidence. In this case, the state failed to establish the *corpus delicti* by independent evidence. Should the trial judge have sustained Mr. Hickman's *corpus delicti* objection and excluded his statements?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Tony Hickman was charged with Failure to Register as a Sex Offender. CP 28-29. The court held a CrR 3.5 hearing prior to trial. At the hearing, Detective Borden testified that Mr. Hickman's registered address was "701 N. Tower," an address that did not exist. RP 13¹. Borden went to 701 South Tower, spoke to the residents of that address, and learned that Mr. Hickman had moved out in July.² RP 13. Borden asked them to have Hickman contact him. RP 13.

Mr. Hickman called Detective Borden later that day, and was instructed to come into the office to get properly registered. RP 13-14, 19. Detective Borden told Mr. Hickman that they would have a two-part interview: an administrative interview to register him, followed by a review of his rights and a criminal investigation for Failure to Register. RP 14. Detective Borden then questioned Mr. Hickman about his living situation and current address, and had him sign a new registration form. RP 14.

¹ All cites to "RP" refer to the transcript of the March 12, 2009 Jury Trial.

² This information was not admitted at trial.

After obtaining this information, Detective Borden told Mr. Hickman that the interview would now shift to a criminal investigation. RP 15. He read Mr. Hickman his *Miranda* rights, and again reviewed his living situation and current address. RP 15-17. This was followed by another review of rights, and a taped statement. RP 17.

The trial judge found that Mr. Hickman was subjected to custodial interrogation without benefit of *Miranda*, and suppressed his initial unwarned statements. RP 26. The court refused to suppress Mr. Hickman's post-*Miranda* statements, holding that the second part of the interview was sufficiently separate from the first part as a result of Detective Borden's explanation that the second part would be for purposes of a criminal investigation. RP 32. The court did suppress Mr. Hickman's post-*Miranda* statement regarding his new address. RP 32.

At trial, the Detective Borden testified that Mr. Hickman was registered at "701 N. Tower," but conceded that the document was created by someone other than Mr. Hickman, and that any clerical errors could have been made by the staff person who created the form.³ RP 59-62. When Detective Borden learned that "701 N. Tower" did not exist, he

³ He also testified that Mr. Hickman seemed genuinely surprised when told about the mix-up. RP 76.

went to 701 South Tower and asked the occupants to have Mr. Hickman call him. RP 43, 54, 56-57; Exhibit 5, Supp. CP. Mr. Hickman called within two hours of this contact, and came to Detective Borden's office. RP 63.

When the prosecutor offered Mr. Hickman's statements, defense counsel objected, arguing that the state had failed to establish the *corpus delicti* of the crime. RP 58. The objection was overruled, and the court later explained that the error on the registration form was sufficient to establish the *corpus delicti*. RP 58, 81.

Mr. Hickman was convicted, and he appealed. CP 16, 3.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. HICKMAN'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY ADMITTING CUSTODIAL STATEMENTS OBTAINED IN VIOLATION OF *MISSOURI V. SEIBERT*.

The Fifth Amendment to the U.S. Constitution provides that "No person shall... be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment.⁴ U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84

⁴ Similarly, Article I, Section 9 of the Washington State Constitution, provides that "No person shall be compelled in any case to give evidence against himself..." Wash.

S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The law presumes that statements made by a suspect while in custody were compelled in violation of the privilege against self-incrimination. *State v. Corn*, 95 Wn. App. 41, 57, 975 P.2d 520 (1999).

To implement the privilege against self-incrimination and to reduce the risk of coerced confessions, an accused person must be informed of her or his rights prior to custodial interrogation. *Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). Failure to provide the required warnings and obtain a waiver requires exclusion of any statements obtained. *Seibert*, at 608. It is “clearly established” that statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a voluntary, knowing, and intelligent waiver of her or his rights. *Hart v. Attorney General of Florida*, 323 F.3d 884, 891-892 (11th Cir. 2003) (citing *Miranda*, at 475).

Custodial interrogation occurs whenever a person in custody is subjected to “either express questioning or its functional equivalent.”

Const. Article I, Section 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Thus any express questions posed to a person in custody must be preceded by *Miranda* warnings.⁵ *Rhode Island v. Innis*.

Furthermore, an accused person's post-*Miranda* statements may not be admitted if police deliberately employ a two-step interrogation, where warnings are administered only after an initial round of questioning.⁶ See *Seibert, supra*. Under *Seibert*, “[i]f the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.” *Seibert*, at 622 (Kennedy, J., concurring).⁷ Curative measures “should be designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.” *Seibert*, at 622 (Kennedy, J., concurring).

⁵ The sole exception is for routine booking questions asked for record-keeping purposes. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

⁶ If a two-step interrogation is not deliberately employed, post-*Miranda* statements are governed by *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

⁷ Because *Seibert* is a plurality decision and Justice Kennedy concurred in the result on the narrowest grounds, it is his concurring opinion that provides the controlling law. *United States v. Street*, 472 F.3d 1298, 1313 (11th Cir., 2006).

Here, the court should have suppressed Mr. Hickman's post-*Miranda* custodial statements for three reasons.⁸ First, Detective Borden subjected Mr. Hickman to a two-step interrogation. RP 11-21. Second, after suppressing Mr. Hickman's unwarned custodial statements, the trial judge did not find that Detective Borden's use of the two-step interrogation technique was inadvertent. RP 26-32. Third, Detective Borden did not take any curative measures as outlined in *Seibert*. See, e.g., *Seibert*, at 622 (Kennedy, J., concurring) (curative measures could include a substantial break in time and circumstances, or an additional warning explaining the inadmissibility of the unwarned custodial statements).

Because of this, the post-*Miranda* statements should have been suppressed. *Seibert, supra*. The trial court's sole basis for admitting the statements was Detective Borden's explanation (to Mr. Hickman) that the interview would consist of two parts. RP 32. But this explanation did not address the problems that the *Seibert* rule was designed to cure. In the absence of proper curative measures, Mr. Hickman did not know that his

⁸ The court implicitly recognized this when it suppressed Mr. Hickman's statement that he had moved to Vienna Street. RP 32.

pre-warning statements were inadmissible; instead, like the defendant in *Seibert*, he would be left with the wrong impression:

Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail.

Seibert, at 613 (plurality). The trial judge's decision to admit Mr. Hickman's post-warning statements cannot stand. Mr. Hickman's conviction must be reversed, the statements suppressed, and the case remanded to the trial court.

II. THE TRIAL JUDGE SHOULD HAVE EXCLUDED MR. HICKMAN'S STATEMENTS UNDER THE *CORPUS DELICTI* RULE.

The *corpus delicti*, or body of the crime, must be proved by evidence sufficient to establish a criminal act. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). Before an accused person's statement may be admitted into evidence, the *corpus delicti* of the charged crime must be established by independent evidence. *Brockob*, at 328. The independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. *Brockob*, at 329. If the independent evidence

supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Brockob*, at 329-330.

The *corpus delicti* of Failure to Register requires proof that the accused person knowingly failed to register after having been convicted of a qualifying offense. RCW 9A.44.130.

The independent evidence in this case was insufficient to establish the *corpus delicti* of Failure to Register. Although Mr. Hickman's registration card said "701 N. Tower" instead of "701 S. Tower," the testimony suggested that this clerical error was made by the sheriff's department and not by Mr. Hickman: the entry was typed into the form, and Mr. Hickman seemed genuinely surprised when confronted with the discrepancy.⁹ Exhibit 5, Supp. CP; RP 59-62. Accordingly, the evidence supports a reasonable and logical inference of innocence, and is insufficient to establish the *corpus delicti*. *Brockob, supra*. The trial judge should have excluded Mr. Hickman's statements under the *corpus delicti* rule. Accordingly, the conviction must be reversed and the case dismissed for insufficient evidence. *Brockob, supra*.

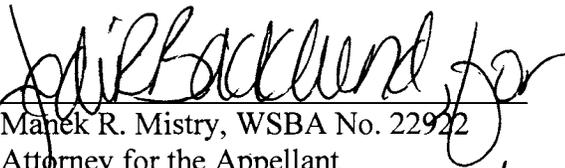
⁹ The residents of 701 S. Tower provided additional information that was introduced at the CrR 3.5 hearing; however, this additional information was not admitted at trial. Compare RP 13 with RP 57.

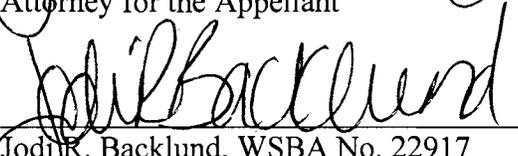
CONCLUSION

For the foregoing reasons, Mr. Hickman's conviction must be reversed, and the case dismissed for insufficient evidence.

Respectfully submitted on July 16, 2009.

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COURT OF APPEALS
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STATE OF WASHINGTON
BY for
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Tony Hickman
705 Vienna St. #1
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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 16, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 16, 2009.



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