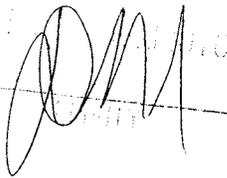


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COURT OF APPEALS

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40049-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

JOCEPHUS OSBORN
Appellant

40049-9-II

On Appeal from the Superior Court of PIERCE COUNTY

Cause No. 08-1-03404-8

The Honorable Thomas P. Larkin

APPELLANT'S REPLY

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II. SUMMARY OF THE CASE

Pierce County Sheriff's Officers detained Jocephus Osborn and Corey Hayes on suspicion of a residential burglary reported by a Tacoma utility street crew in a neighborhood plagued with unsolved burglaries. RP 1241-42.

Detective Deborah Heishman and Deputy Kevin Fries interrogated Osborn and Hayes on different days. PTRP 52; RP 1246. Both confessed to dozens of burglaries and separately took the officers on a 'drive-around' to point out houses they had entered. PTRP 48-49; 52-55; Hayes eventually pleaded guilty. PTRP 119. Osborn did not.

The officers testified at Osborn's pretrial CrR 3.5 hearing that Hayes and Osborn each spontaneously decided it was in his best interests to confess to dozens of burglaries of which the police otherwise had no evidence. PTRP 49. Heishman and Fries assured them that, by saving investigators the trouble of compiling evidence, confessing to additional burglaries would earn the good graces of the officers, and it was likely the prosecutor — following the usual practice — would roll all the charges into one or a very few counts. RP 75-76, 78, 86-87, 90. Osborn believed Fries could arrange this. RP 94-95. The illusory promise was repeated, both before and after Osborn's ride-along. RP 96.

This was a trick. The State charged Osborn with thirty-three counts of residential burglary. CP 5-16. He was convicted after a jury trial and was sentenced to 116 months. CP 103-134; 141; RP 1621. On appeal, Osborn contends that Fries and Heishman overstepped the permissible boundary of due process and effectively nullified the Miranda¹ advisement that anything he said could or would be used against him.

III. ARGUMENTS IN REPLY

1. Osborn did not make a knowing and an intelligent waiver.

Washington courts begin with a presumption that a defendant did not make a knowing, intelligent and voluntary waiver of fundamental constitutional rights. *State v. Riley*, 19 Wn. App. 289, 294, 576 P.2d 1311 (1978), citing *Barker v. Wingo*, 407 U.S. 514, 525, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Specifically, “*Miranda* prohibits the presumption of waiver from a mere warning followed by a confession or admission[.]” *State v. Blanchey*, 75 Wn.2d 926, 933, 454 P.2d 841 (1969), quoting *Miranda*, 384 U.S. at 475.

There is a difference between a voluntary admission and a knowing and intelligent waiver. An admission may be voluntary in the sense of not being physically or psychologically coerced, yet still not constitute an

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

intelligent and understanding decision to forego the right to counsel or to remain silent. *Blanchey*, 75 Wn.2d at 934. This difference is why the State bears the heavy burden to prove, not merely that the defendant talked after being read his rights, but that he knowingly and intelligently made an affirmative decision to waive his constitutional right to remain silent. *Miranda*, 384 U.S. at 475. The attendant facts must show clearly and convincingly that the defendant relinquish his rights intelligently and with knowledge of the consequences. *Blanchey*, 75 Wn.2d at 933; *State v. Reuben*, 62 Wn. App. 620, 625, 814 P.2d 1177 (1991); *State v. Neff*, 163 Wn.2d 453, 461, 181 P.3d 819 (2008). In considering whether a waiver was knowing and voluntary, the Court may consider the defendant's unfamiliarity with police interrogation procedures by virtue of his never having been previously convicted. *State v. Earls*, 116 Wn.2d 364, 373, 805 P.2d 211 (1991).

The State simply has not met its burden here. Osborn was not familiar with the routine because he had no prior convictions. RP 1607. Moreover, the trial court also is responsible for making sure a waiver by an unrepresented suspect was intelligent and competent. *State v. Imus*, 37 Wn. App. 170, 195, 679 P.2d 376 (1984).

For the State to assure a person that a right exists and then to act contrary to that assurance violates due process. *Raley v. Ohio*, 360 U.S.

423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959). Any evidence that an accused was “tricked, or cajoled into a waiver” shows that the defendant did not make a valid waiver of his privilege. *Miranda*, 384 U.S. at 476; *Blanchey*, 75 Wn.2d at 934. “Cajolery” includes “a deliberate attempt at persuading or deceiving the accused, with false promises, inducements or information, into relinquishing his rights and responding to questions posed by law enforcement officers.” *Blanchey*, 75 Wn.2d at 934.

The interrogation procedure used by the Pierce County Sheriff’s Department interrogators to induce Osborn to confess to multiple uncharged burglaries violated Wash. Const. art. 1 § 9 and the Fifth Amendment and the Due Process clause of Wash. Const. art. 1, § 3. Heishman and Fries joined forces in a bait and switch scheme to sell Hayes and Osborn on the fantastic proposition that confessing to a string of burglaries would result in fewer charges, not more.

Osborn rests on the unrefuted arguments in the opening brief. The implied promise to file a single charge or just a few charges in exchange for multiple admissions was consistent with the routine police procedure of dismissing some charges if a defendant admits to others — after charges have been filed. *See, e.g., In re Personal Restraint of Gardner*, 94 Wn.2d 504, 617 P.2d 1001 (1980) (suspect pleads guilty to two burglaries and State drops 30 additional charges in exchange for help

recovering stolen property.) But a plea deal is a written contract that is enforceable against the State. Here, Fries and Heishman deceived Osborn and Hayes with unenforceable “pseudo” plea deals that in reality were unilateral, unconditional confessions. The suspects could accept the deal only by actual performance in return for the State’s worthless “we’ll see.”

The trial court should have considered the implied promises in deciding whether to admit Osborn’s incriminating statements. *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The test for admissibility is whether the police “resorted to tactics that in the circumstances prevented the suspect from making a rational decision whether to confess or otherwise inculcate himself.” *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008), citing *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir.1995).

This Court should hold that due process is violated when the police advise a suspect of the letter of the Miranda rights, then undermine the effectiveness of that advisement by implying that the reality is different. Where, as here, the police persuade a suspect that, rather than being used against him, incriminating statements will actually help him clean the slate and secure some sort of illusory amnesty, the resulting glut of convictions should be vacated and remanded for trial.

2. Osborn established cause and effect.

Washington's Due Process clause is more protective of than the Fourteenth Amendment² in the matter of *Miranda* rights in that it prohibits interrogation procedures that have the potential to impair or diminish *Miranda*. *State v. Davis*, 38 Wn. App. 600, 605, 686 P.2d 1143 (1984). The guarantees embodied in *Miranda* protect us from improper police conduct but are meaningless if the police can employ interrogation techniques that undermine the protections. *Davis*, 38 Wn. App. at 605. Accordingly, a decision to incriminate himself must be demonstrably a product of a suspect's knowing and intelligent balancing of competing considerations. *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir. 1986). The police may not bring to bear tactics that are so manipulative as to diminish the suspect's ability to make "an unconstrained, autonomous decision to confess." *Miller*, 796 F.2d at 605; *Baldwin*, 60 F.3d at 365.

Likewise, in criminal prosecutions in Washington, the State may not use unlawfully-obtained evidence. *State v. Turpin*, 94 Wn.2d 820, 826, 620 P.2d 990 (1980); *State v. Miles*, 29 Wn.2d 921, 927, 190 P.2d 740 (1948). To do so is beneath the dignity of Washington courts. *State*

² Const. art. 1, § 3: "No person shall be deprived of life, liberty, or property without due process of law." U.S. Const. amend. 14: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; ..."

v. *Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

Suppression is required whenever there is a meaningful causal connection between the State's unlawful activity and the acquisition of evidence. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The required causal connection need not be iron-clad. It is sufficient that the misrepresentation was material to the decision to talk. *State v. Allen*, 63 Wn. App. 623, 626, 821 P.2d 533 (1991).

The State does not claim the conduct of Heishman and Fries comported with the *Miranda* doctrine. In fact, the State concedes that Osborn was not told he would needlessly multiply his jeopardy thirty-odd fold by confessing to uncharged crimes with zero assurance and less likelihood that the State would reciprocate with leniency, but rather that the police affirmatively led him to believe his unilateral confessions were a routine precondition to the prosecutor's rolling the charges into one.

Instead, the State attempts to refute the causal relationship between the officers' relentless, albeit implicit, deception of this young man and his decision to spill the beans. Respondent's Brief (RB) at 7, 9-10. This claim is unsustainable on its face.

If Osborn's situation were an isolated incident, the Court might be inclined to accept the State's improbable causation argument for lack of absolute contrary proof of deliberate coercion by misinformation. But the existence of the second suspect, Hayes — who apparently succumbed to the same delusion that 30-odd burglary charges are better than a single charge — renders the State's position untenable.

Reversal is required.

3. The State does not dispute the constitutional presumption the error was prejudicial. *See, State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The State does not claim the error was “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Id.*; *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

Moreover, the Osborn record does not inspire confidence that the State could have proved any of the charges beyond a reasonable doubt without the confessions. The Court should reverse Osborn's convictions.

4. Washington courts disfavor purported waivers of constitutional rights where the defendant did not understand both the waiver and its consequences. *Neff*, 163 Wn.2d at 461. In *Neff*, as here, the defendant could not knowingly waive his right to appeal where, as here, he

thought he was “making a plea deal with the prosecutor” but in reality was not. *Neff*, 163, Wn.2d at 461.

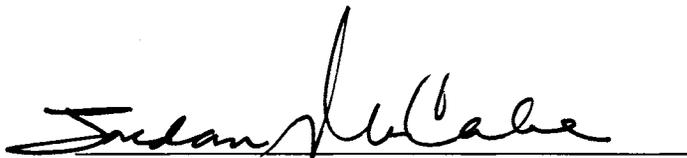
The underhanded methods employed in the investigation and prosecution of this case may have cleared the police blotter of unsolved burglaries, but they inspire contempt for law enforcement and bring our courts into disrepute. *See, Chenoweth*, 160 Wn.2d at 473.

The remedy is to reverse and remand in an opinion that instructs police interrogators to clearly distinguish between plea agreements and gratuitous invitations to confess. Suspects should be warned that any apparent offer to write off potential charges is illusory unless (a) the police put it in writing and (b) the suspect is represented by counsel.

IV. CONCLUSION

For the reasons stated, this Court should reverse Mr. Osborn’s convictions and vacate the judgment and sentence.

Respectfully submitted this 24th day of August, 2010.

A handwritten signature in black ink, appearing to read "Jordan B. McCabe", is written over a horizontal line.

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CERTIFICATE OF SERVICE

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