

NO. 44083-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BONNELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge
The Honorable Mark McCauley, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting appellant's prior conviction for second degree assault as the predicate offense for proving first degree unlawful possession of a firearm.

2. The trial court erred in finding appellant was not entitled to Miranda¹ warnings during custodial questioning by a community corrections officer.

3. The trial court erred in denying appellant's motion to suppress evidence discovered as a result of the incriminating statements made to the community corrections officer.

4. The court erred in entering conclusions of law 2, 3, and 4 as to the admissibility of the evidence and appellant's statements. CP 38-39.²

Issues Pertaining to Assignments of Error

1. The predicate serious offense conviction used to prove appellant's first degree unlawful possession of a firearm conviction was his prior conviction for second degree assault with a deadly weapon. Appellant challenged the constitutionality of the assault conviction on the basis his guilty plea did not correctly describe the elements of the offense.

¹ Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² The "Findings of Fact, Conclusions of Law, and Order Re: CrR 3.5/3.6 Hearing" is attached as an appendix.

The State provided no evidence appellant was properly advised of the elements of second degree assault with a deadly weapon. Did the court erroneously admit appellant's prior conviction for second degree assault as the predicate offense for proving first degree unlawful possession of a firearm where the guilty plea was constitutionally invalid?

2. Appellant was arrested for a community custody violation. Without giving an advisement of rights, the community corrections officer asked appellant what evidence would be found during a search of his house. Appellant denied any drugs were in the house but acknowledged officers would find drug paraphernalia and other contraband. Officers then searched appellant's house and found drugs and a handgun. Is reversal required where appellant made incriminating statements without an advisement of his right to remain silent and the statements were not harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Suppression Hearing

Appellant Robert Bonnell was under the supervision of community corrections officer Robert Shaffer after having been convicted of

possession of methamphetamine. 1RP³ 7, 88. Bonnell went to Shaffer's office on February 1, 2012 for his monthly reporting. 1RP 9. Shaffer seized stun knuckles from Bonnell and ordered him to provide a urine sample. 1RP 10, 162.

Shaffer accompanied Bonnell to the bathroom but Bonnell said he "couldn't go." 1RP 10. Shaffer went to his office and told Bonnell to remain in the waiting room until he could provide a urine sample. 1RP 11. A few minutes later, Bonnell knocked on Shaffer's office door and said, "I'm beginning to be a lot like my dad," and showed Shaffer a wet spot on his crotch area. Shaffer told Bonnell to return the next morning to provide a urine sample. 1RP 11, 163.

Bonnell returned the next day at 4:25 p.m. He did not provide an answer when asked why he arrived late to the office. 1RP 11. A folding knife was taken from Bonnell's front pants pocket. 1RP 11. Shaffer told Bonnell he was going to visually inspect Bonnell's genitals to make certain he did not have a fake bladder. 1RP 11-12.

In the bathroom, Bonnell pulled his shirt up and his pants down but "would not show his entire genitals." When Shaffer told Bonnell he needed to "see everything," Bonnell acknowledged having a fake bladder.

³ This brief refers to the verbatim report of proceedings as follows: 1RP – August 2, 6, 13, 15, 24, 28, and 28, 2012, and September 7, 2012; 2RP – October 5, 2012.

1RP 12. Shaffer seized the fake bladder and asked Bonnell "how long he had been using." Bonnell responded "for a little while," and acknowledged trying to use the fake bladder the day before. 1RP 13, 163-64. Shaffer did not clarify what drugs Bonnell was using. 1RP 164, 167. Shaffer handcuffed Bonnell in the bathroom and told him he was being arrested for a community custody violation. 1RP 13.

Shaffer took Bonnell to his office. Shaffer again asked Bonnell how long he had been using and Bonnell said about a week. Shaffer told Bonnell he did not believe him and asked what officers would find during a search of his house. Bonnell said he had a sword that he was previously ordered to remove and a methamphetamine pipe in the front room. Bonnell denied there were any drugs in his house. 1RP 13. "At that point," Shaffer said, he had reasonable suspicion to search the house. 1RP 13-14. Shaffer never advised Bonnell of his Miranda rights. 1RP 23-24. He did not obtain a warrant to search Bonnell's house. 1RP 24.

A key from Bonnell's key chain was used to open the front door to his house. 1RP 16. Inside community correction officers found .38 caliber ammunition on a dresser. 1RP 16, 103. No methamphetamine pipe was found in the house. 1RP 165-66.

A locked black box was on the entertainment center. 1RP 16-17. Officers unlocked the box with a key from Bonnell's key ~~chain~~.

The box contained a .22 caliber pistol and a large can of butane lighter fluid. 1RP 17, 91-92. At the police station, police discovered the lighter fluid can had a false bottom. Inside were empty baggies and some baggies containing a substance that tested positive for methamphetamine. 1RP 19, 38, 105, 113-16, 130.

At the station, police officer David Peterson read Bonnell his Miranda rights. 1RP 30, 35. Bonnell would not make eye contact with Peterson and said, "I'm so screwed it doesn't matter." 1RP 37. When questioned about the methamphetamine in the lighter, Bonnell acknowledged it was his. He told Peterson he divided the methamphetamine into separate baggies for personal use so he did not use too much at once. 1RP 38-39. When asked about the handgun, Bonnell responded, "I'm 55 years old and my life is over." 1RP 39. Shaffer later searched Bonnell's truck parked outside his office and found a knife, brass knuckles, several bullets, and a second fake bladder. 1RP 20-21, 98.

Based on this evidence, Bonnell was charged with one count each of first degree unlawful possession of a firearm and possession of methamphetamine. CP 1-3, 49-50.

Before trial, Bonnell sought to suppress his statements to Shaffer because he was not read his Miranda rights. CP 17-24. Bonnell also argued the handgun and methamphetamine seized during the search of his

house were discovered as a result of Bonnell's statements and should therefore be suppressed as well. 1RP 5-6, 49; CP 17-24.

The State responded the search of Bonnell's car and house was reasonable once Bonnell failed to give a urine sample and the officer's seized a fake bladder from him. CP 10-16, 25-27. The State maintained Shaffer was not required to read Bonnell his Miranda warning before questioning because, "Miranda does not apply to hearings for violations of the judgment and sentence and that is certainly what was going on here." 1RP 43-44, 52. The State argued officers were "entitled to use" the information obtained from Bonnell's statements as basis for searching his house. 1RP 44.

Bonnell responded that although Miranda warnings might not be required for a "probation violation hearing," that was not what occurred in this instance. 1RP 46-48. Bonnell maintained that absent his statements to Shaffer, there was not a sufficient nexus between the incident at Shaffer's office and the basis for searching his house. 1RP 49-50.

The prosecutor then noted that although Shaffer was not required to give Bonnell Miranda warnings before questioning, it would not use Bonnell's statements in its case-in-chief. 1RP 52. Citing Oregon v.

Elstad,⁴ the State argued suppression of the evidence seized during the search of Bonnell's house was not required even if Bonnell should have been read his Miranda rights before being questioned by Shaffer. 1RP 53.

The trial court denied the motion to suppress the evidence, noting "everything was basically done appropriately." 1RP 53. The court found the search of the house was reasonable because Bonnell violated the terms of his community custody by failing to give a clean urine sample. The Court noted neither party presented a "case right on point that says they had to Mirandize him then when they're questioning him about the violation [of] the judgment and sentence[.]" 1RP 54. The Court also found there was no "rule or any case" requiring suppression of seized evidence discovered as a result of a Miranda violation. 1RP 54.

The trial court denied Bonnell's motion to reconsider. CP 28-34, 48; 1RP 64-65. The court entered written findings of fact and conclusions of law, denying Bonnell's motion to suppress the evidence found during a search of his house. CP 35-39. Written conclusion of law three stated:

Community Corrections Officer Shaffer properly questioned the defendant in regard to this violation of his Judgment and Sentence. The information provided by the defendant, and the fact of his refusal to provide a urinalysis, provided reasonable cause for the community corrections

⁴ Oregon v. Elstad 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985)

officer to believe that the defendant had violated the Judgment and Sentence by consuming drugs and reasonable cause to believe that drugs would be found in the defendant's residence and his vehicle.

CP 38.

The written order stated that Bonnell's statements to Shaffer could not be used in the State's case-in-chief but were admissible "for cross examination of the defendant and rebuttal as permitted by the rules of evidence." CP 39.

2. Trial Testimony

Peterson and Shaffer testified at trial as they had at the suppression hearing. Shaffer acknowledged no fingerprints were obtained from the items seized in Bonnell's house. 1RP 100. No record of the handgun was found when the serial number was traced. 1RP 101, 120.

Bonnell's stepbrother, Roger Hall, testified the box discovered in Bonnell's house was actually his. 1RP 133-34. Hall explained he had terminal cancer and gave Bonnell the box eight months earlier so that he could pass it on to Hall's son. 1RP 134-35. The box contained a handgun, ammunition, a can of lighter stuff, and other items Hall could not recall. 1RP 136, 143. Hall did not keep the box himself because he was not eligible to have firearms. 1RP 136. Hall was not aware the lighter fluid had a false bottom containing methamphetamine. 1RP 137. When

Bonnell asked what the box contained, Hall told him he did not need to know. Hall gave Bonnell the key to unlock the box. 1RP 136.

Bonnell testified Hall brought the box and its contents to him for safekeeping. 1RP 150, 154-56. Bonnell never opened the box and never saw what was inside. 1RP 150-51, 154, 157. He did not know the box contained a handgun or lighter fluid with a false bottom containing methamphetamine. 1RP 150-51, 154.

Bonnell explained he smoked marijuana the day before his meeting with Shaffer. 1RP 159. He knew smoking marijuana was a violation of his community custody conditions and that his urine sample would test positive. 1RP 157-60. Bonnell acknowledged he had stun knuckles for self-defense and ammunition in his car. 1RP 152, 170.

Bonnell denied telling Shaffer he had a methamphetamine pipe inside his house. 1RP 158-59, 161, 171. Rather, Bonnell told Shaffer he would find a marijuana bong in the front room of the house. 1RP 158, 161. Bonnell made the comment "I'm so screwed it doesn't matter," because he knew he had violated his community custody conditions by smoking marijuana. 1RP 149, 159-60. Bonnell denied talking to Peterson about baggies in relation to methamphetamine. Rather, he told Peterson the baggies were used for rationing his marijuana for personal use. 1RP 149-50, 159, 171.

After hearing the above, a Grays Harbor County jury found Bonnell guilty as charged. CP 70-71. The trial court sentenced Bailey to concurrent standard range prison sentences of 78 months for the unlawful possession of a firearm and 24 months for the possession of methamphetamine. CP 76-85. Bonnell timely appeals. CP 88-98.

3. Predicate Offense

The State charged Bonnell with first degree unlawful possession of a firearm based on his prior conviction for second degree assault with a deadly weapon. CP 1-3, 49-50. Bonnell pled guilty to the second degree assault charge in 1994. Bonnell's guilty plea stated he was charged with "2nd degree assault," the elements of which were "assault a person with a weapon." CP 44-47. Bonnell's guilty plea statement said he pointed a shotgun at a police officer and that he believed "a jury would convict on the basis of the evidence that would be presented by the State." CP 46-47.

Before trial, Bonnell moved to exclude evidence of the prior assault conviction on the basis his guilty plea omitted the essential element of "deadly weapon," which the State needed to prove beyond a reasonable doubt. CP 40-47. Bonnell argued that because he was misinformed as to the essential elements of second degree assault with a deadly weapon, his guilty plea was involuntary and could not be used to prove unlawful possession of a firearm in the first degree. CP 40-47; 1RP 71.

The state did not dispute the guilty plea form did not include the element of “deadly weapon.” The State maintained however, that Bonnell’s guilty plea statement sufficiently demonstrated he understood his actions in relation to what the State was required to prove. Supp. CP ____ (State’s Response to Defendant’s Motion For Limine, dated 8/21/12, at 1-2). The State argued Bonnell, “by his admission, acknowledged what he did and understood the nature of what it was that he had to do to be convicted of the offense.” 1RP 71. The State submitted Bonnell’s second degree assault judgment and sentence as extrinsic evidence. Supp. CP ____ (State’s Response to Defendant’s Motion For Limine, dated 8/21/12, at 3-10). The judgment and sentence contained no information as to the elements of the offense.

The trial court denied Bonnell’s motion, noting “I didn’t receive anything in the way of like an affidavit or any offer of proof[.]” 1RP 72. The judge explained that he remembered “this case because it was one of my early cases,” and “it was big news in the newspaper about stand off with a shotgun.” 1RP 72. The trial court explained its reasons for denying the motion as follows:

I’m sure I or one of the other judges informed him when he was brought in on initial appearance of the information [*sic*] the elements sets forth and I’m sure his attorney at the time discussed those with him.

I mean I – I suppose a hearing could flush that out, but I don't have any doubt. I mean I even recollect I think at sentencing – I don't know the exact words, but I – I'm sure I informed him how lucky was he [*sic*] not shot and killed when he was holding a shotgun and you, [*sic*] know – and I think he was – the defense was basically that he was distraught and depressed and whatever else, may be on drugs, but there was never any inkling of his doubt that he had a deadly weapon in his possession.

So I don't know how he could honestly come in here and make a claim that what he had was not a deadly weapon. He sets it forth and on top of it, I'm almost sure looking at this handwriting it was his attorney that wrote it out. I mean it was – wasn't a mistake by the prosecutor, it was a mistake by the defense attorney. We can get Mr. Morgan in here for a hearing, but I just don't see this as something where I could have any doubt that he was fully informed of the elements of the offense and really had no defense[.]”

1RP 72-73.

The trial court concluded, “I just don't think I have a basis to set this aside just on a motion with a copy of the statement that admittedly doesn't put in deadly weapon in the heading there on the front page.” 1RP 73. After the trial court's ruling, the State filed an amended information alleging in the alternative that Bonnell was guilty of second degree unlawful possession of a firearm based on a 2011 predicate offense of possession of methamphetamine. 1RP 74-75; CP 49-50.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING BONNELL'S SECOND DEGREE ASSAULT CONVICTION AS A PREDICATE SERIOUS OFFENSE BECAUSE THE CONVICTION WAS THE RESULT OF A CONSTITUTIONALLY INVALID GUILTY PLEA.

The predicate serious offense conviction used to prove Bonnell's first degree unlawful possession of a firearm conviction was Bonnell's 1994 conviction for second degree assault. Because the assault conviction was the result of an invalid guilty plea, the trial court erred in admitting evidence of this predicate serious offense. Reversal of Bonnell's conviction for first degree unlawful possession of a firearm is therefore required.

- a. The Predicate Offense was Properly Challenged.

Under RCW 9.41.040(1)(a), a person is guilty of first degree unlawful possession of a firearm if the person owns or has in his or her possession a firearm, after having previously been convicted of any serious offense. Assault with a deadly weapon is a 'serious offense.' RCW 9.41.010(16)(n).

RCW 9.41.040 requires a constitutionally valid predicate conviction. State v. Gore, 101 Wn.2d 481, 486, 681 P.2d 227 (1984). The constitutional validity of predicate prior convictions is an essential element the State must prove beyond a reasonable doubt. State v.

Summers, 120 Wn.2d 801, 812, 846 P.2d 490 (1993); State v. Swindell, 93 Wn.2d 192, 197, 607 P.2d 852 (1980). If an essential element of the current offense is a conviction based on a guilty plea, the conviction's constitutionality may be challenged. State v. Hickok, 39 Wn. App. 664, 666, 695 P.2d 136 (1985), (citing State v. Holsworth, 93 Wn.2d 148, 160, 607 P.2d 845 (1980)).

A defendant may raise a defense to a firearm possession charge by challenging the constitutional validity of the predicate conviction. Summers, 120 Wn.2d at 812. The defendant bears the initial burden of offering "a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction." Summers, 120 Wn.2d at 812. A "colorable" argument does not require affirmative evidence of actual prejudice. See Holsworth, 93 Wn.2d at 160, (rejecting argument that the defendant must affirmatively show he suffered actual prejudice).

Once this showing is made, the burden shifts to the State to prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. Summers, 120 Wn.2d at 812. The State can use extrinsic evidence to meet its burden. State v. Chervenell, 99 Wn.2d 309, 313-14, 662 P.2d 836 (1983).

A challenge to the constitutional validity of the predicate conviction is not an attempt to invalidate the judgment. "Rather,

defendant seeks to foreclose the prior conviction's present use to establish an essential element of RCW 9A.04.010." Summers, 120 Wn.2d at 810 (quoting Swindell, 93 Wn.2d at 196).

The validity of a predicate offense is a question of law. State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (2005). This Court reviews a determination of the validity of a predicate offense de novo. State v. Carmen, 118 Wn. App. 655, 665, 77 P.3d 368 (2003), rev. denied, 151 Wn.2d 1039 (2004).

b. Bonnell's Argument Is Colorable and Fact Specific.

Here, neither Bonnell's guilty plea, nor the judgment and sentence, properly informed him of the essential elements of the charge of second degree assault with a deadly weapon.

Bonnell's guilty plea stated only that he was charged with "2nd degree assault," the elements of which were "assault a person with a weapon." CP 44-47. A person is guilty of second degree assault if he "assaults another with a deadly weapon." RCW 9A.36.021(1)(c). "Deadly weapon" means, "any explosive or loaded or unloaded firearm, and shall include any other weapon, device instrument, article or substance, including a vehicle...which, under the circumstance in which it is issued, attempted to be used, or threatened to be use, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110.

Second degree assault on the basis of assault with a deadly weapon requires a determination the weapon was in fact a deadly weapon and did not merely appear to be so to the victim. State v. Carlson, 65 Wn. App. 153, 828 P.2d 30, rev. denied, 119 Wn.2d 1022 (1992). Thus, at trial, the State would have been required to prove the shotgun pointed at the officer was one “readily capable of causing death or substantial bodily harm.” RCW 9A.04.110.

Because there is no evidence Bonnell was aware of the essential elements of second degree assault with a deadly weapon, he did not enter the plea knowingly, and intelligently. Due process requires a guilty plea be knowing, voluntary, and intelligent. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Holsworth, 93 Wn.2d at 148. A guilty plea is not knowing and intelligent if the defendant has been misinformed about the elements of the offense. See Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (plea invalid when defendant unaware his conduct failed to satisfy element of offense); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) (plea invalid when defendant did not know that charge to which he pleaded was enacted after his criminal conduct); In re Pers. Restraint of Hews, 99 Wn.2d 80, 660 P.2d 263 (1983) (defendant must understand that his alleged criminal conduct satisfies the elements of the offense); State v.

Chervenell, 99 Wn.2d at 318-19 (plea involuntary if defendant lacks understanding of law in relation to facts).

The record does not show Bonnell was advised of the elements of second degree assault with a deadly weapon before he plead guilty. Bonnell thus presented a “colorable, fact-specific challenge” to the constitutionality of his plea under Holsworth, Swindell, Gore, and Summers.

c. The State Failed to Meet Its Burden.

Because Bonnell presented a “colorable” argument as to the invalidity of the second degree assault conviction, the State was required to prove beyond a reasonable doubt the assault conviction was constitutionally sound. It failed to meet its burden.

The State did not dispute that neither Bonnell’s guilty plea, nor the judgment and sentence, properly set forth the essential elements of the charge. The State provided no other extrinsic evidence Bonnell was properly advised as to the elements of second degree assault with a deadly weapon. Rather, the State maintained “there is every reason to believe that the defendant completely understood the nature of the offense to which he was pleading.” Supp. CP ____ (State’s Response to Defendant’s Motion For Limine, dated 8/21/12, at 1). The State maintained Bonnell’s plea statement made clear that he understood his actions and what was

required for conviction of second degree assault. 1RP 71. A similar argument was rejected in Chervenell.

In Chervenell, the Court considered challenges to the use of convictions based on guilty pleas in habitual criminal proceedings. 99 Wn.2d at 310-11. Chervenell was convicted of armed robbery and found to be a habitual offender based on two felonies, one of which was a conviction for possession of over 40 grams of marijuana. Chervenell, 99 Wn.2d at 311.

The information charging Chervenell alleged he possessed marijuana but did not specify an amount. Chervenell's plea form also did not reference an amount. No evidence showed the court or Chervenell's attorney advised him that the State was required to prove the amount in his possession. After Chervenell entered his plea the prosecutor stated the amount possessed exceeded 40 grams. Chervenell, 99 Wn.2d at 318.

The Court concluded the State failed to produce sufficient evidence to prove beyond a reasonable doubt that Chervenell was aware of the nature of the charge against him when he pleaded guilty. Chervenell, 99 Wn.2d at 317, 319.

The Court noted a plea was constitutionally valid only if the defendant understood the "law in relation to the facts." Chervenell, 99 Wn.2d at 318-19 (quoting McCarthy v. United States, 394 U.S. 459, 466,

89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). However, the prosecutor's comment "did not describe the amount possessed as an element of the offense, but merely stated it as one of the facts surrounding the offense." Chervenell, 99 Wn.2d at 318. The Court concluded that even if Chervenell was made aware of the factual assumptions on which the court and the State were proceeding, no evidence showed he was made aware of the relation between them and the law. Chervenell, 99 Wn.2d at 319; See also Henderson v. Morgan, 426 U.S. 637, 645, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976) (holding a plea cannot be a voluntary and intelligent admission "unless the defendant received real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.")

Like Chervenell, here there is insufficient evidence Bonnell understood the "law in relation to the facts." 99 Wn.2d at 318-19. Although Bonnell acknowledged pointing a shotgun at the officer, no evidence demonstrates he was aware of the State's burden of proving the shotgun was in fact a "deadly weapon," or what that meant according to the law. Accordingly, the State failed to prove beyond a reasonable doubt that the assault conviction was constitutionally sound.

d. The Trial Erred in Denying the Motion

In denying Bonnell's motion, the trial court did not dispute Bonnell's guilty plea omitted the element of "deadly weapon." The court also did not find the State met its burden of proof beyond a reasonable doubt. 1RP 73. Rather, the trial judge concluded, based on his own recollection of the case, that "there was never an inkling of his [Bonnell's] doubt that he had a deadly weapon in his possession." 1RP 72. This was reversible error.

Trial judges sitting as triers of fact are not allowed to rely on personal knowledge to compensate for missing evidence. Dep't of Licensing v. Sheeks, 47 Wn. App. 65, 72, 734 P.2d 24, rev. denied, 108 Wn.2d 1021 (1987); cf. Choate v. Swanson, 54 Wn.2d 710, 716-17, 344 P.2d 502 (1959) (rejecting contention that trial judge unfairly allowed personal knowledge and experience to influence his decision in part because the judge expressly disclaimed reliance on personal knowledge); See also Hensey v. Hennessy, 201 N.C. App. 56, 685 S.E.2d 541, 549 (N.C. App. 2009) ("[A] judge's own personal memory is not evidence.")

Moreover, a court cannot take judicial notice of a disputed question of fact. Vandercook v. Reese, 120 Wn. App. 647, 651-52, 86 P.3d 206 (2004). "A judge's memory of oral testimony is not a proper

subject of judicial notice under ER 201[.]”⁵ Reese, 120 Wn. App. at 651. This is because the judge offering his own recollection of evidence from a separate trial “must testify as a witness-and he or she is not permitted to do that in a proceeding over which he or she is then presiding.” Reese, 120 Wn. App. at 651-52 (citing ER 605).⁶

These prohibitions are based on the recognition that a trial judge in his deliberations is limited to the record made before him at trial, and to draw conclusions based on facts outside the record denies the accused constitutional due process of law. People v. Harris, 57 Ill. 2d 228, 231, 314 N.E.2d 465 (Ill. 1974) (citing People v. Wallenberg, 24 Ill. 2d 350, 354, 181 N.E.2d 143 (Ill. 1962) (determination made by the trial judge based on private knowledge, untested by cross-examination or any of the rules of evidence, constitutes a denial of due process of law); See also State v. Dorsey, 701 N.W.2d 238, 249-50 (Minn. 2005) (“An impartial trial requires that conclusions reached by the trier of fact be based upon the facts in evidence . . . and prohibits the trier of fact from reaching

⁵ ER 201(b) provides: “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

⁶ ER 605 provides: “The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.”

conclusions based on evidence sought or obtained beyond that adduced in court.”).

Furthermore, a trial judge relying on evidence not presented or calling upon his memory frustrates appellate review, because the appellate court is restricted to the record before it to reach its determination of the soundness of the decision below. Pan American Stone Co., Inc. v. Meister, 527 So.2d 275, 276 (Fla. App. 4 Dist. 1988).

Based on the evidence before it, the trial court lacked proof beyond a reasonable doubt that Bonnell was properly informed of the essential elements of second degree assault with a deadly weapon. The plea was therefore invalid and the court erred in denying Bonnell’s motion to exclude the conviction.

2. IN THE ABSENCE OF MIRANDA WARNINGS,
ADMISSION OF BONNELL’S STATEMENTS
REQUIRES REVERSAL.

a. Miranda Rights Must Precede Custodial
Interrogation.

The Fifth Amendment to the United States Constitution commands “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” The right against self-incrimination protects an accused from being compelled to provide the state with “testimonial or

communicative” evidence. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

To preserve an individual’s Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda v. Arizona, 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). Statements elicited in violation of this rule are not admissible as substantive evidence. Sargent, 111 Wn.2d at 444, 476-77.

There is no dispute Shaffer did not read Bonnell his Miranda rights before questioning him. There is no dispute Bonnell gave an incriminating statement in response to Shaffer’s questions. There is no dispute Bonnell was in custody when questioned. The only dispute is whether the detective subjected Bonnell to “interrogation.” Because Shaffer’s questioning qualifies as “interrogation,” Bailey’s statements should have been suppressed.

“Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.” Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). “Interrogation” under Miranda refers not only to express questioning, but also to any words or actions reasonably likely to elicit an incriminating response from the suspect. Innis, 446 U.S. at 301; Sargent, 111 Wn.2d at 650. “The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts.” Sargent, 111 Wn.2d at 651; State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992).

Applying the proper objective test here compels the conclusion that interrogation occurred. There is no dispute Shaffer’s question called for a response. There is no dispute Bailey’s response to these questions was incriminating. The trial court’s ruling hinged on the idea the community corrections officer could properly question Bailey about his judgment and sentence without benefit of Miranda. Contrary to the trial court’s finding, custodial interrogation by a probation or parole officer is governed by Miranda. Willis and Sargent are instructive in this regard.

In Sargent, a probation officer conducted a pre-sentencing interview without providing Miranda advisements. Sargent, 111 Wn.2d at 642. During that interview, the probation officer asked Sargent if he was

guilty and suggested Sargent would “have to come to the truth with himself” if he was to benefit from mental health counseling. Sargent, 111 Wn.2d at 643. The probation officer concluded the interview by giving Sargent his card and telling him to call if there was anything else Sargent regarded as significant. Sargent, 111 Wn.2d at 643. Several days later, Sargent called the probation officer, who visited Sargent in his cell (again without administering Miranda warnings), handed him a legal pad and pencil, and sat with Sargent as he wrote a confession to the crime. Sargent, 111 Wn.2d at 643.

Sargent’s original conviction was reversed on appeal. On remand, the State sought to introduce Sargent’s written confession at the new trial. Sargent, 111 Wn.2d at 644. The trial court suppressed Sargent’s statements from the initial interview, concluding that the interview was custodial interrogation requiring Miranda warnings. Sargent, 111 Wn.2d at 644.

One of the issues raised on the next appeal was whether Sargent’s first interview was custodial interrogation by a state agent thereby requiring Miranda warnings. Sargent, 111 Wn.2d at 645. Rejecting the State’s argument that preparation of a presentence report was a routine post-conviction procedure in which Miranda warnings are not customarily given, the Court noted the decisive question was the nature of the question

asked, not why the question is asked. Sargent, 111 Wn.2d at 651-52. Noting the officer's statements and actions were unnecessary to the performance of his duties and were reasonably likely to result in an incriminating statement, the Court concluded the questions constituted "interrogation" for Miranda purposes. Sargent, 111 Wn.2d at 651-52.

Finding the probation officer's allegiance was "unquestionably" to the State, the Court found the officer was engaged in custodial interrogation in the first interview with Sargent. Sargent, 111 Wn.2d at 652-53. The Court concluded, "Miranda warnings were required, but were not given." Sargent, 111 Wn.2d at 652.

In Willis, a probation officer asked Willis, who was in custody on unrelated charges, specific questions about how he supported his drug habit. In response, Willis admitted not only to "ripping people off and stealing cars" but to stealing a particular truck. The State later charged Willis with taking a motor vehicle without permission and relied on his statements to the probation officer in its case-in-chief. Willis, 64 Wn. App. at 635-36.

The Court of Appeals noted that even if the probation officer had no specific knowledge police officers suspected Willis of committing other crimes, the defendant's perception of an interrogation, not the questioner's intent, was determinative. Viewed in this context, "it is

apparent the responses sought would in all likelihood be incriminating. Thus, the session fits the Innis definition of an ‘interrogation.’” Willis, 64 Wn. App. at 637-38.

Citing Sargent, the Court of Appeals concluded Willis should have been advised of his Miranda rights before questioning. Willis, 64 Wn. App. at 640. The Court noted the inherent compulsion present in custodial police questioning was “equally applicable” to a correction officer’s questioning of a jailed defendant. Willis, 64 Wn. App. at 639-40. Rejecting the State’s assertion that Sargent’s holding was limited to situations where a probation officer acted at the request of a judge, the Court noted, “whether he [probation officer] was acting in behalf of the prosecution or the court or, instead, acting in his role as community corrections officer, did not lessen the pressure on Mr. Willis to answer.” Willis, 64 Wn. App. at 640.

Like Sargent and Willis, here Shaffer’s questions to Bonnell were reasonably likely to result in an incriminating statement. That Bonnell was only restrained rather than in jail at the time of interrogations makes no difference. See Sargent, 111 Wn.2d at 649-50 (recognizing freedom of movement is the “determining factor” in deciding whether an interview is custodial). Bonnell was under the same psychological pressure to answer Shaffer’s questions as he would have been during a police interrogation.

Shaffer's questions constituted "interrogation" for Miranda purposes. The trial court erred in finding otherwise.

b. Bonnell's Incriminating Statements Were Not Harmless Beyond A Reasonable Doubt

A statement obtained in violation of Miranda is an error of constitutional magnitude. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); Spotted Elk, 109 Wn. App. at 261. Such error is harmless only if it is "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." Miller, 131 Wn.2d 78 at 90.

Here, Bonnell's statements to Shaffer were not harmless beyond a reasonable doubt. Though Bonnell's statements were not used in the State's case-in-chief, they nonetheless were part and parcel of Shaffer's decision to search Bonnell's house. As Shaffer acknowledged, his questioning of Bonnell was the "point I believed that I had reasonable suspicion that there were other law violations – or should I say community supervision violations in his residence." 1RP 14-15. There is no evidence

Shaffer would have searched the house absent Bonnell's incriminating statements.

Reversal and remand for a new trial is required because the State cannot show beyond a reasonable doubt that error in obtaining Bonnell's statements in no way affected the final outcome of the case. Miller, 131 Wn.2d 78 at 90.

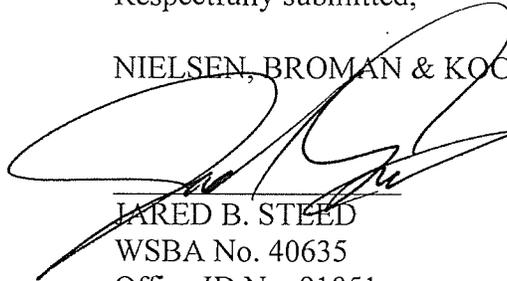
D. CONCLUSION

For the reasons discussed above, this Court should reverse Bonnell's convictions and remand for a new trial.

DATED this 28th day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

APPENDIX

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SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

ROBERT D. BONNELL,

Defendant.

No.: 12-1-42-8

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER RE: CrR 3.5/3.6
HEARING**

THIS MATTER coming on before me, Judge of the above-entitled court, the defendant appearing in person and with his attorney, David Bustamante, the State appearing through Gerald R. Fuller, Chief Criminal Deputy, Grays Harbor County prosecuting attorney, and the Court having heard testimony enters the following:

UNDISPUTED FACTS

1.

On February 1, 2, 2012, the defendant was on community custody to the Department of Corrections following his conviction for VUCSA-Possession of Methamphetamine in Grays Harbor County Cause 11-1-1-2. Conditions of sentence were set forth in the Judgment and Sentence, Exhibit 2. These included that the defendant was not to possess or consume any controlled substance nor possess drug paraphernalia without a valid prescription and be subject to random urinalysis testing to insure compliance, as well as not possess a firearm or ammunition..

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER - 1-

51

II. STEWARD MENEFEE
PROSECUTOR GENERAL
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST WALSHWAY, ROOM 102
MUSKOGEE, WASHINGTON 98582
(360) 240-3151 FAX 240-3001

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2.

On February 1, 2012, the defendant reported to the office of his Community Correction Officer, Mark Shaffer. Shaffer accompanied the defendant to the restroom, instructing him that he was to provide a urinalysis. The defendant told Shaffer that he would be unable to give a urinalysis at that time. The defendant was instructed to return the following morning at 9:00 a.m. As he left the defendant knocked on Shaffer's door and told Shaffer "I'm getting to be like my dad. I wet myself". Bonnell showed Shaffer a wet spot on the front of his pants in the crotch area.

3.

The defendant did not return to the Department of Corrections office until approximately 4:52 p.m. the following day. Shaffer and Community Correction Officer Perry then accompanied him to the restroom to observe him provide the urinalysis sample. He was found to be wearing an artificial bladder. The officers removed the device. The defendant was then told that he was being taken into custody for refusing to give a urinalysis.

4.

The defendant was escorted back to Shaffer's office. The defendant acknowledged that he had tried to use the device the previous day. When asked how long he had been using drugs the defendant stated that he had been using for about a week. When asked what Shaffer might find if the residence were searched, the defendant stated that they would find a sword that he had been told to remove from the residence and a meth pipe behind the chair in the front room.

5.

Community Correction Officer Shaffer determined that he was going to search the defendant's residence. Shaffer contacted the Hoquiam Police Department and asked to have them meet him at the residence. Shaffer was familiar with the defendant's residence, having been there on a prior occasion.

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6.

Once at the residence Shaffer used the defendant's key to open the door. Officers Blodgett and Peterson of the Hoquiam Police Department quickly went through the residence to insure that no other individuals were inside and that it was safe for the corrections officers to conduct their search. Once inside, correction officers located a firearm in a box in the living room. The box was opened by Shaffer with a key from the defendant's key chain. Also located in the box was a butane can.

7.

Correction Officer Shaffer asked the Hoquiam officers to come into the residence and take charge of the weapon. They cleared the weapon and took it into evidence. They then left, transporting the defendant to the Hoquiam Police Department. After the officers left one of the correction officers was able to open the butane can and found a false bottom containing plastic baggies and what he believed to be methamphetamine. These items were taken to the Hoquiam Police Department.

8.

Once at the Hoquiam Police Department Detective Peterson place the defendant in an interview room. The defendant was advised of his Miranda warnings from Exhibit 1. The defendant was awake and alert and appeared to be in possession of faculties. No threats or promises were made. The defendant acknowledged that he understood his rights and agreed to speak to Officer Peterson. When asked about the firearm the defendant remarked "I'm so screwed, it doesn't matter".

9.

Within about fifteen minutes after Officer Peterson left the residence with the defendant, Shaffer and Perry arrived at the Hoquiam Police Department with the butane canister and the controlled substances. They showed the items to Detective Peterson, outside the presence of the defendant. Detective Peterson later asked the defendant about the methamphetamine. The defendant acknowledged that the substance was methamphetamine and that it was his. When

1 asked again about the pistol the defendant stated "I'm fifty-five years old and my life is over".
2 When asked if he wished to provide a written statement the defendant stated "no, I've been in
3 plenty interrogations and I know this isn't going to help me".

4 10.

5 The following morning Shaffer searched the defendant's vehicle that was parked on the
6 street outside his office. He seized ammunition, a knife and another artificial bladder.

7
8 **DISPUTED FACTS**

9 There are no disputed facts.

10
11 Based upon the foregoing findings of fact, the court enters the following:

12
13 **CONCLUSIONS OF LAW**

14 1.

15 The court has jurisdiction over the defendant and subject matter herein.

16 2.

17 Community Corrections Officer Shaffer had reasonable cause to believe that the
18 defendant violated a condition of his Judgment and Sentence by refusing to provide a urinalysis.

19 3.

20 Community Corrections Officer Shaffer properly questioned the defendant in regard to
21 this violation of his Judgment and Sentence. The information provided by the defendant, and the
22 fact of his refusal to provide a urinalysis, provided reasonable cause for the community
23 corrections officer to believe that the defendant had violated the Judgment and Sentence by
24 consuming drugs and reasonable cause to believe that drugs would be found in the defendant's
25 residence and his vehicle.

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4.

The statements given by the defendant to his community corrections officer at the office were voluntary as were the statements made to Officer Peterson at the Hoquiam Police Department.

5.

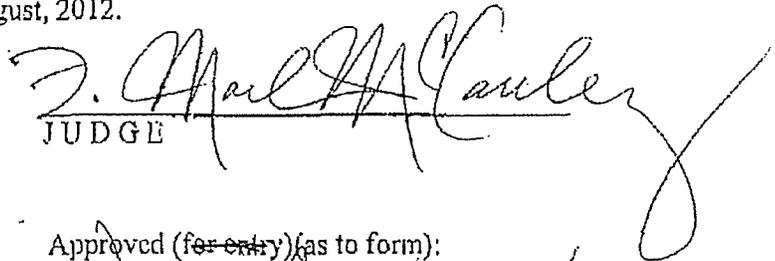
The defendant was properly informed of his Miranda rights by Officer Peterson and gave a valid waiver.

ORDER

IT IS THEREFORE ORDERED that the Motion to Suppress is denied, and it is FURTHER ORDERED, that the out of court statements of the defendant to Officer Peterson are admissible for use by the State of Washington in its case in chief subject to admissibility pursuant to the rules of evidence, and it is

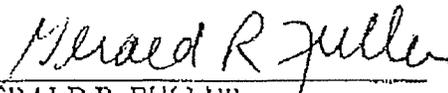
FURTHER ORDERED that the statements made to Community Corrections Officer Shaffer are not admissible for use by the State in its case in chief, but may be used for cross examination of the defendant and rebuttal as permitted by the rules of evidence.

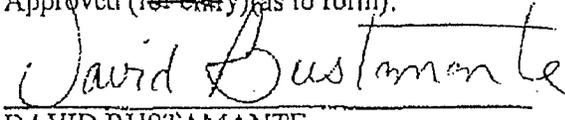
DATED this 15th day of August, 2012.


JUDGE

Presented by:

Approved (for entry) (as to form):


GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143


DAVID BUSTAMANTE
Attorney for Defendant
WSBA #30668

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 44083-1-II
)	
ROBERT BONNELL,)	
)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT BONNELL
DOC NO. 705966
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF JUNE, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

June 28, 2013 - 1:29 PM

Transmittal Letter

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Court of Appeals Case Number: 44083-1

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