

NO. 45396-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW CHERRY,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The police obtained Cherry's consent to search his car by impermissible tactics in violation of his right to remain silent and right to be free from unlawful invasions of his private affairs**

Mr. Cherry invoked his right to remain silent after his arrest, in response to *Miranda*<sup>1</sup> warnings, but the police continued to question him. 7/31/13RP 7-8, 10. Ordinarily, there would be no question that such interrogation is contrary to case law construing the Fifth Amendment and article I, section 9. *See State v. Easter*, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996). Information obtained by police questioning after a person invokes his right to silence is inadmissible. *Id.*

The prosecution claims broad authority to continue questioning a person when police are asking for the suspect's consent to search his property. But the prosecution does not explain how this exception applies (1) once a person has invoked the right to remain silent, and (2) when the police obtain "consent" by eliciting incriminating statements despite the suspect's invocation of his right to remain silent and then use these statements as substantive evidence against the accused at trial.

After Mr. Cherry unequivocally stated the desire to cut off police questioning, the police elicited incriminating statements in the course of trying to obtain Mr. Cherry's consent. *See* Appellant's Opening Brief at 13-15; *see also* 7/31/13RP 8, 12, 23. Even if an arrested person's mere agreement that the police may search his property is not "testimonial," the State was not entitled to introduce Mr. Cherry's admissions that the police elicited in the course of trying to gain his consent.

The police used the guise of seeking consent as a vehicle to continue the conversation with Mr. Cherry after he had invoked his right to cut off questioning, meaning the police were prohibited from eliciting further information from him. *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *Easter*, 130 Wn.2d at 242. The State relied on these later statements at trial. 9/11/13RP 83-87, 156-57. They were obtained in violation of Mr. Cherry's right to remain silent and should have been suppressed. Additionally, for the reasons set forth in the Opening Brief, his consent to search was not validly

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

obtained and evidence found after the police violated his right to remain silent should have been suppressed.

**2. The prosecution properly concedes the findings of fact are invalid but this error is not harmless**

Judge Dixon presided at the CrR 3.6 hearing but he did not make the legal or factual rulings contained in the written findings of fact. The prosecution agrees that the findings signed by Judge Laurie “are invalid.” Response Brief at 23, 24. These written findings must be disregarded on appeal because they were signed by a judge who lacked authority to sign them and they contain findings that are not part of the record.

The prosecution asks this Court to find the error harmless and rely entirely on the oral ruling by Judge Dixon. The oral ruling short and conclusory, with few factual findings. The oral ruling does not set forth a valid legal justification for Mr. Cherry’s seizure and the subsequently involuntarily obtained consent to search his car.

**3. Mr. Cherry’s timely request for counsel due to irreconcilable differences with his attorney required the judge to investigate the nature of the conflict**

As explained in Appellant’s Opening Brief, the court did not meet its obligation to determine whether Mr. Cherry’s request for new

counsel was premised on an irreconcilable conflict of interest as Mr. Cherry told the court. *United States v. Nguyen*, 262 F.3d 998, 1003 (9<sup>th</sup> Cir. 2002). The prosecution urges the court to rely on defense counsel's cursory claim that he did not see a reason for the court to remove him from the case, but this assertion is not the legal standard.

Mr. Cherry's request was timely and his complaint should have been explored by the judge in private and in depth. The court conducted no inquiry. 6/25/13RP 4-5. It dismissively told Mr. Cherry he had "no right to choose" his attorney. *Id.* at 5. The judge asked no questions of defense counsel, Craig Kibbe. *Id.*

At a later hearing Mr. Cherry again told the judge there were "irreconcilable differences between me and my attorney that I need to address the court about." 7/10/13RP 3. But the court ruled the issue would not be revisited and stopped Mr. Cherry as he started to explain the irreconcilable differences with his attorney. *Id.*

Mr. Cherry raised the issue again before trial started, in a letter in which he sought a private hearing with the judge, "off the record." CP 31-32. The letter complained about defense counsel's refusal to investigate, interview the expert witness, and refusal to seek evidence that would dispute the State's claim that the pipe contained drug

residue. *Id.* The judge did not give Mr. Cherry any chance to explain any of the assertions in the letter. Instead, the judge said it would not “change” the decision to have Mr. Kibbe represent Mr. Cherry.

8/26/13RP 2-3.

The prosecution misrepresents the record by blaming Mr. Cherry for failing to articulate the basis to dismiss his attorney, because Mr. Cherry’s efforts were obstructed by the court’s unwillingness to hear his complaints or give him the chance to speak outside the prosecutor’s presence. The court’s failure to give Mr. Cherry the chance to explain the nature of the conflict repeatedly and timely raised by Mr. Cherry undermined his right to counsel under the Sixth Amendment and article I, section 22.

B. CONCLUSION.

For the foregoing reasons and those raised in Appellant's Opening Brief, Mr. Cherry's convictions should be reversed, improperly obtained evidence suppressed, and a new attorney appointed for further proceedings.

DATED this 25th day of September 2004.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy P. Collins', written over a horizontal line.

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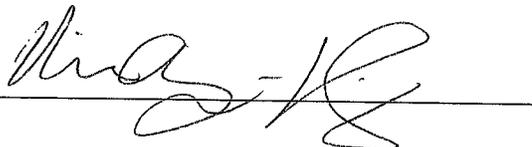
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# WASHINGTON APPELLATE PROJECT

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