

FILED

JUN 28 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 286070

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN EUGENE GRENZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHITMAN COUNTY
The Honorable David Frazier

APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted statements involuntarily made.
2. The trial court erred when it failed to enter written findings of fact and conclusions of law after an evidentiary hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a suspect is in police custody, police must give Miranda warnings before interrogating him. Failure to do so renders the suspect's statement presumably involuntary. And involuntary statements are inadmissible at trial. In fact, the use of involuntary statements against a defendant is constitutionally forbidden because they lack trustworthiness and impede the truth-finding function of the court.

The need for Miranda warnings is triggered at the moment police inquiry focuses on an accused in custody and the questioning is intended to elicit incriminating statements. The focus then turns to whether a person was in custody. Whether a person was in custody for purposes of Miranda is measured by an objective test. Custody for Miranda purposes is narrowly circumscribed and requires formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Courts must evaluate the circumstances surrounding the interrogation and decide whether a reasonable person would have felt that he was not free to terminate the interrogation and leave. Courts must also evaluate the totality of the circumstances under which the statements were

made. Such circumstances include the physical and mental condition of the accused, his experience, and the conduct of the police.

Here, an officer questioned a hearing impaired defendant with questionable mental health about allegations of child molestation at his mother's house. Although the officer knew the defendant had these physical limitations, he did not tape the interrogation, did not use sign language, did not have an interpreter present, and did not provide the defendant with any written materials.

The defendant made several incriminating statements during the interrogation. In the absence of any physical evidence, the State used those statements to charge the defendant with first degree child molestation. The defendant later challenged the voluntariness of the statements and moved to have them suppressed. The trial court denied the motion and admitted the statements at trial. Did the trial court err?

2. A court is required to enter written findings of fact and conclusions of law after a hearing on whether to admit a criminal defendant's statements at trial. The primary purpose in requiring findings and conclusions is to enable an appellate court to review questions raised on appeal.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending. However, appellate courts will not approve of courts entering findings and conclusions after an appellant has

already submitted an opening brief because it raises the appearance of unfairness.

But if the court enters written findings and conclusions after the appellant's brief is filed, reversal is required if the findings prejudice the defendant's appeal or the findings and conclusions appear tailored to meet the issues raised in the appellant's brief.

Here, the defendant challenged the voluntariness of incriminating statements he made during police interrogation and moved to have those statements suppressed. An evidentiary hearing was held and the trial court denied his motion. However, the trial court failed to enter written findings of fact and conclusions of law. Did the trial court err?

C. STATEMENT OF THE CASE

In 2002, Kevin Eugene Grenz (Mr. Grenz) pleaded guilty to assault in the second degree with sexual motivation. CP 126-152. The charge stemmed from allegations of inappropriate sexual conduct against his daughter. Years later, in 2009, Mr. Grenz's daughter, who was then 15 years old, raised new child molestation allegations she believed occurred when she was 5 years old. CP 58-65; 10/5/09 RP 216-222.

An officer arrived at Mr. Grenz's mother's house¹ in an unmarked police car to question him about the new child molestation allegations.

9/30/09 RP 8-11. The officer wore a fleece coat clearly marked SHERIFF

¹ The record indicated the officer arrived at Mr. Grenz's step-mother's house. However, Mr. Grenz told appellate counsel the officer arrived at his mother's house. Mr. Grenz did not understand why witnesses referred to his mother as his step-mother. Where necessary, throughout this brief, counsel referred to Mr. Grenz's mother.

when he approached Mr. Grenz and asked if he was willing to speak to him. 9/30/09 RP 9-11. Mr. Grenz agreed to speak to the officer and motioned for him to enter the house. 9/30/09 RP 11.

Mr. Grenz had a hearing impairment and spoke with an impediment. 9/30/09 RP 31. The officer knew Mr. Grenz had these physical limitations. However, the officer did not tape the interrogation, did not use sign language, did not have an interpreter present, and did not provide Mr. Grenz with any written materials. 9/30/09 RP 25; 9/30/09 RP 31; 9/30/09 RP 36. According to the officer, he just sat close enough to Mr. Grenz and spoke loudly and deliberately enough so Mr. Grenz could read his lips. 9/30/09 RP 12; 9/30/09 RP 24.

The officer claimed he explained to Mr. Grenz he was not under arrest and was not required to speak. 9/30/09 RP 13. But, Mr. Grenz agreed to speak to him anyway. 9/30/09 RP 13. Early on in the conversation, the officer informed Mr. Grenz his daughter raised new allegations of sexual contact that more serious than the allegations made in the previous case. 9/30/09 RP 14. The officer told Mr. Grenz his daughter now alleged he forced her to have oral sex and he rubbed her vagina with his hand and his fingers. CP 58-65; 9/30/09 RP 27.

Mr. Grenz told the officer his attorney assured him he could not get in trouble for that because he pleaded guilty to that crime and it would be double jeopardy for him to be convicted of the same crime twice. 9/30/09 RP 15; 9/30/09 RP 27; 9/30/09 RP 33; CP 126-152.

According to the officer, he reiterated the fact he was talking about new charges. 9/30/09 RP 34. But Mr. Grenz rambled on for about 10 minutes more and told the officer when his wife was injured in a car accident and was unable to provide for his physical needs, he essentially turned his affection to his daughter for love and attention. 9/30/09 RP 27; 9/30/09 RP 34-37.

The State used those statements as a confession of guilt and charged Mr. Grenz with first degree child molestation. CP 1-2; CP 28-29; CP 73-75. During pretrial proceedings, the trial court became concerned about Mr. Grenz's mental health after he wrote several letters to the court. 5/29/09 RP 18. CP 52; CP 54; CP 42-51; CP 9. The content of those letters was so disturbing the trial court halted proceedings and ordered Mr. Grenz to undergo a psychiatric evaluation to determine his competency to stand trial. CP 14-16; 6/4/09 RP 4-12. Mr. Grenz was ultimately found competent to stand trial and proceedings continued. CP 27.

At a 3.5 hearing, Mr. Grenz moved the trial court to exclude his prior conviction for assault in the second degree with sexual motivation. CP 100-101. He argued use of that conviction would prove unfairly prejudicial because it was a sex offense against the same alleged victim. 9/30/09RP 61. The trial court granted the motion and excluded the prior convictions. 9/30/09 RP 67.

Mr. Grenz also challenged the voluntariness of his statements to the officer and moved to have them suppressed. CP 100-101. The trial

court found Mr. Grenz was free to leave his mother's house during the interrogation. Therefore, Miranda warnings were not required. 9/30/09 RP 54. The trial court concluded Mr. Grenz's statements to the officer were made voluntarily and allowed the State to use those statements at trial. 9/30/09 RP 54.

A jury found Mr. Grenz guilty of first degree child molestation. He was sentenced to serve 89 months in state prison. CP 122; CP 126-152. This appeal followed. CP 159-172.

D. ARGUMENT

1. STATEMENTS FROM A HEARING IMPAIRED SUSPECT WITH QUESTIONABLE MENTAL HEALTH WERE INVOLUNTARILY MADE AND THEREFORE IMPROPERLY ADMITTED AT TRIAL.

Federal and state constitutions guarantee the privilege against self incrimination. U.S. Const. amend. V; Wash. Const. art. 1, § 9; State v. Earls, 116 Wn.2d 364, 374, 805 P.2d 211 (1991). The Fifth Amendment to the United States Constitution states, in part, "No person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Our State constitution also protects against self-incrimination. Similar to the Fifth Amendment, Article I section 9 states, "No person shall be compelled in any criminal case to give evidence against himself." Wash. Const. art. 1 § 9. Protection provided by Article I, section 9 is coextensive with protection provided by the Fifth Amendment. State v. Earls, 116 Wn.2d 364.

The purpose of the right against self-incrimination is to make the State obtain its own evidence, and to spare the accused from having to reveal, directly, or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs. State v. Easter, 130 Wn.2d 241, 244, 922 P.2d 1285 (1996). The privilege against self incrimination applies not only to bar compulsion of trial testimony but also applies during custodial interrogations. Miranda v. Arizona, 384 U.S. 436, 483-85, 86 S.Ct. 1602, 1633, 16 L.Ed.2d 694 (1966).

The Miranda warning is designed to prevent the State from using presumptively coerced and involuntary statements against criminal defendants. Connecticut v. Barrett, 479 U.S. 523, 528, 107 S.Ct. 828, 93 L.Ed.2d 920 (1987). When a suspect is in police custody, police must give Miranda warnings before interrogating him. State v. France, 121 Wn.App. 394, 399, 88 P.3d 1003 (2004) (citing State v. Templeton, 148 Wn.2d 193, 208, 59 P.3d 632 (2002)). Failure to do so renders the suspect's statement presumably involuntary. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing State v. Sargent, 111 Wn.2d 641, 647-48, 762 P.2d 1127 (1988)). The use of involuntary statements against a defendant is constitutionally forbidden because these statements lack trustworthiness and impede the truth-finding function of the court. State v. Dictado, 102 Wn.2d 277, 278, 687 P.2d 172 (1984); State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986) (citing Michigan v. Mosley, 423

U.S. 96, 99-100, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)), cert. denied, 480 U.S. 940 (1987).

The need for Miranda warnings is triggered at the moment police inquiry focuses on an accused in custody and the questioning is intended to elicit incriminating statements. State v. Dennis, 16 Wn.App. 421, 558 P.2d 297 (1976), citing Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758 (1964). The focus then turns to whether a person was in custody. Whether a person was in custody for purposes of Miranda is measured by an objective test. State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). Custody for Miranda purposes is narrowly circumscribed and requires formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. State v. Post, 118 Wn.2d 596, 606, 826 P.2 172, 837 P.2d 599 (1992). Courts must look at the circumstances surrounding the interrogation and decide whether a reasonable person would have felt that he was not free to terminate the interrogation and leave. State v. Templeton, 148 Wn.2d 208, 59 P.3d 632 (2002); State v. Lorenz, 152 Wn.2d 22.

Courts must also evaluate the totality of the circumstances under which the statements were made. Such factors include the physical and mental condition of the accused, his experience, and the conduct of the police. State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). A suspect's inebriation may be an additional factor as well as a suspect's deficient mental condition. State v. Saunders, 120 Wn.App. 800, 810, 86

P.3d 232 (2004); State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Colorado v. Connelly, 479 U.S. 157, 164-65, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Although, a claim of mental illness does not necessarily render a confession inadmissible, it is yet another factor courts should consider to determine whether a confession was voluntary. State v. Allen, 67 Wn.2d 243, 406 P.2d 950 (1965).

This Court must make a de novo review of a trial court's determination on the issue of voluntariness. Miller v. Fenton, 474 U.S. 104, 110, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); State v. Atken, 130 Wn.2d 640, 668, 927 P.2d 210 (1996). Only if there was substantial evidence from which the trial court could have found by a preponderance of evidence a confession was given voluntarily, will this Court uphold the trial court's determination. State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

Here, the trial court found circumstances under which Mr. Grenz was interrogated were not custodial in nature because Mr. Grenz was free to leave his mother's house during the interrogation. Therefore, Miranda warnings were not required. 9/30/09 RP 52-54.

However, a closer evaluation of the circumstances under which the officer interrogated Mr. Grenz proved Miranda warnings were, in fact, required. The reason being, Mr. Grenz was probably mentally unstable during the interrogation.

Mr. Grenz's mental health became a serious issue at trial. So much so, the trial court ordered Mr. Grenz to undergo a psychiatric evaluation to determine his competency to stand trial. CP 14-16; 6/4/09 RP 4-12. Mr. Grenz was ultimately found competent to stand trial, but that finding did not prove Mr. Grenz was mentally stable during the interrogation. CP 27; 7/10/09 RP 4. In fact, it was quite possible Mr. Grenz's behavior at trial mirrored his every day behavior. Consequently, it was probably unlikely Mr. Grenz felt free to stop the interrogation and free to leave his mother's house. Therefore the moment the officer posed questions to Mr. Grenz to elicit incriminating statements, he should have advised Mr. Grenz of his Miranda warnings.

Furthermore, the trial court found despite his physical limitations, Mr. Grenz understood the officer's questions. 9/30/09 RP 55. Mr. Grenz was hearing impaired and spoke with an impediment. 9/30/09 RP 31. These physical limitations only served to complicate the nature of the interrogation. The officer here did not tape the interrogation, did not provide a real-time interpreter, and did not communicate with Mr. Grenz in writing. 9/30/09 RP 25; 9/30/09 RP 31; 9/30/09 RP 36. The officer's failure to address Mr. Grenz's special needs put into question whether Mr. Grenz truly understood the officer's questions and truly understood the serious nature of the interrogation.

Given the totality of the circumstances under which the officer interrogated Mr. Grenz, the trial court should have found Mr. Grenz's statements were involuntarily made and therefore inadmissible at trial.

2. THE TRIAL COURT NEGLECTED ITS DUTY WHEN IT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE CrR 3.5 HEARING.

CrR 3.5 governs generally the admissibility of "a statement of the accused." CrR 3.5(a); State v. Williams, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). After a CrR 3.5 hearing, a trial court is required to enter written findings of fact and conclusions of law. CrR 3.5 (c). The primary purpose in requiring findings and conclusions is to enable an appellate court to review questions raised on appeal. Id. (citing Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wn.App. 709, 717, 558 P.2d 821 (1977)).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending. State v. Hillman, 66 Wn.App. 770, 773, 832 P.2d 1369 (citing State v. McGary, 37 Wn.App. 856, 861, 683 P.2d 1125, review denied, 102 Wn.2d 1024 (1984)), review denied, 120 Wn.2d 1011 (1992). However, appellate courts will generally not approve of courts entering findings and conclusions after an appellant has submitted an opening brief because it raises the appearance of unfairness. McGary, 37 Wn.App. at 861. A trial court's late entry of written findings and conclusions after an evidentiary hearing may warrant reversal of a

conviction if an appellant can show prejudice from the delay or that the written findings were simply tailored to meet the issues presented in the appellant's opening brief. State v. Byrd, 83 Wn.App. 512, 922 P.2d 168 (1996), review denied, 130 Wn.2d 1027 (1997); State v. Smith, 76 Wn.App. 9, 882 P.2d 190 (1994), review denied, 126 Wn.2d 1003 (1995).

Reversal is appropriate only where a defendant can show prejudice resulting from the absence of findings and conclusions or following remand. State v. Head, 136 Wn.2d 624, 964 P.2d 1187 (1998). Appellate courts will not infer prejudice; a defendant must show actual prejudice due to tailoring of the findings and conclusions entered after remand. Head, 136 Wn.2d at 625. Therefore, the appropriate remedy here is remand. Head, 136 Wn.2d at 624.

Here, Mr. Grenz challenged the voluntariness of incriminating statements he made to the officer and moved to have those statements suppressed. CP 100-101. A CrR 3.5 hearing was held and the trial court denied his motion. 9/30/09 RP 54. To date, the trial court has not entered written findings of fact and conclusions of law. This Court must either remand this case to the trial court for entry of findings or alternatively reverse and dismiss Mr. Grenz's conviction.

E. CONCLUSION

For the reasons set forth above, Mr. Grenz respectfully asks this Court to reverse his conviction.

Respectfully submitted this 22nd day of JUNE, 2010.



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