

X

SUPREME COURT NO. 84660-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

YUSSUF ABDULLE,

Respondent.

REC'D

JUN 25 2010

King County Prosecutor
Appellate Unit

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Barbara Mack, Judge

ANSWER TO STATE'S PETITION FOR REVIEW

CLERK

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I. IDENTITY OF ANSWERING PARTY

Respondent Yussuf Abdulle, the appellant below, asks this Court to deny the State's Petition for Review.

II. COURT OF APPEALS DECISION

The State seeks review of the unpublished Court of Appeals decision in State v. Abdulle, No. 63742-8-I (May 3, 2010).

III. COUNTERSTATEMENT OF ISSUE PRESENTED IN STATE'S PETITION

The State bears the burden of proving a knowing, intelligent, and voluntary waiver of the right to remain silent. Washington courts have long held that where an alleged waiver is disputed and the State had control over potentially corroborating evidence regarding the alleged waiver, but failed to present it at trial, the State did not meet its burden.

1. Should this Court adhere to the doctrine of stare decisis and reject the State's attempt to disrupt this well-settled and well-reasoned law?

2. Should this Court deny review where the State has failed to demonstrate the law is harmful and incorrectly decided?

3. Should this Court deny review when the State mischaracterizes the issue presented for review as a Fifth Amendment Miranda¹ issue, rather than a state law evidentiary issue?

IV. STATEMENT OF THE CASE²

During a pre-trial CrR 3.5 hearing, the State sought to introduce statements Abdulle made to police during an investigation of his alleged forgery. The State called only one of two detectives who witnessed the interrogation.

After arresting Abdulle, Detective Steven Hoover put Abdulle in the back seat of a police car on the passenger side. 1RP 10, 59. Hoover sat next to Abdulle. 1RP 10, 59. Detective Rich Newell was in front of Hoover, driving. 1RP 10, 48, 59. The car was a regular, unmarked sedan. 1RP 10-11. Hoover said it was not equipped with a "silent partner" nor any type of screening. Hoover did not say there was any barrier between the front and back seats. 1RP 10-11.

Abdulle said Hoover and Newell began talking to one another inside the car, but Abdulle was unable to focus on what was said because

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

² Abdulle presented a more detailed statement of facts in his Brief of Appellant (BOA), at pages 3-12, which he incorporates herein by reference.

he was nervous and afraid he would be arrested and lose his job. 1RP 48, 59. Hoover said Newell drove toward the Bellevue Police Department to book, fingerprint and photograph Abdulle. 1RP 11.

Hoover admitted Abdulle unequivocally requested counsel during the interrogation, but claimed Abdulle later voluntarily waived his right to counsel and to remain silent.³ Abdulle testified Hoover continued to show him photographs, comment on his immigration status, and question him about the case after his request for counsel. Abdulle intended to remain silent and not answer questions after his request for counsel. 1RP 50. Hoover admitted he engaged in “chit-chat” following Abdulle’s unequivocal request for counsel but claimed the “chit-chat” did not involve questions about the case. 1RP 17-19, 29, 32.

The prosecutor asked the court to believe Hoover's testimony in order to find a voluntary waiver. 1RP 67, 74-75. The State did not produce Newell’s testimony at the CrR 3.5 hearing, nor did it explain Newell’s

³ The State suggests Berghuis v. Thompkins, ___ U.S. ___, ___ S. Ct. ___, 2010 WL 2160784, *9 (No. 08-1470, June 1, 2010) (holding an accused who wants to invoke his or her right to remain silent must do so unambiguously), is relevant to this case. Petition for Review at 9. Here, unlike in Thompkins, even Hoover admitted Abdulle unequivocally requested counsel during the interrogation. Thompkins has no application here.

absence. Accepting Hoover's testimony as more credible and reliable, the trial court found the statements admissible. 1RP 81-83.

The Court of Appeals reversed, finding the trial court erred in admitting Abdulle's statements at trial. Relying on this Court's well settled decisions in State v. Erho, 77 Wn.2d 553, 557-58, 463 P.2d 779 (1970) and State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968), the Court of Appeals concluded that when an accused denies waiving the right to counsel and the State fails, without explanation, to call other officers who were present to corroborate the interrogating officer's testimony, the accused's statements are inadmissible. Abdulle, No. 63742-8-I (slip op., at 1).

V. REASONS WHY THE STATE'S PETITION SHOULD BE DENIED

THE COURT OF APPEALS APPLIED THE PROPER AND LONGSTANDING RULE OF LAW GOVERNING SUPPRESSION HEARINGS

Under state and federal law, the prosecution bears the burden of showing an alleged waiver of the right to remain silent was made voluntarily, knowingly, and intelligently. North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); Miranda, 384 U.S. 436; State v. D.R., 84 Wn. App. 832, 930 P.2d 350, rev. denied, 132 Wn.2d 1015, 943 P.2d 662 (1997). Where an alleged waiver of the right

to remain silent is disputed, and the prosecution had control over potentially corroborating evidence and failed to present it at trial, this Court has found the State did not meet its burden. Erho, 77 Wn.2d at 557-58; Davis, 73 Wn.2d at 271.

The State claims the rules for Miranda⁴ hearings set out in Erho and Davis, conflict with Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), and constitute a “semi-dormant misrepresentation of Miranda.” Petition at 3, 7-8. Contrary to the State’s assertion, the Court of Appeals decision does not conflict with other Washington cases, nor give rise to “a significant federal constitutional question” under RAP 13.4(b)(3). Petition at 10.

The rule of law governing suppression hearings in Washington is well established: when the voluntariness of an alleged waiver is disputed, and independent evidence exists, the State must either present it or explain its absence on the record. Erho, 77 Wn.2d at 557; Davis, 73 Wn.2d at 271; State v. Haack, 88 Wn. App. 423, 433-34, 958 P.2d 1001 (1997), rev. denied, 134 Wn.2d 1016, 958 P.2d 314 (1998). Indeed, as the State acknowledges, notwithstanding Lego, or other federal cases, Washington courts have consistently applied the rule set forth in Davis and Erho in

⁴ Miranda, 384 U.S. 436 (1966).

numerous cases over a 30-year period. Petition at 6-7.⁵ The Davis and Erho decisions have clearly become an established rule of law which should only be changed for the most compelling reasons. See, e.g., State v. Kier, 164 Wn.2d 798, 804-05, 194 P.3d 212 (2008) (the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful); In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (“The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned”). The State cannot show why the established rule in Davis and Erho is incorrect, harmful, or should be abandoned.

Even if these decisions were not well settled, the State’s reliance on Lego is misplaced. Lego “holds only that the preponderance standard for admissibility does not violate the requirement that a conviction must rest upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.” State v. Gross, 23 Wn. App. 319, 323 n. 2, 597 P.2d 894 (1979), rev. denied, 92 Wn.2d 1033 (1979) (citing Lego, 404

⁵ Citing State v. Ruud, 6 Wn. App. 57, 61, 481 P.2d 1351 (1971), rev. denied, 80 Wn.2d 1005 (1972); State v. Lanning, 5 Wn. App. 426, 432, 487 P.2d 785 (1971), rev. denied, 80 Wn.2d 1001 (1971); State v. Davis, 12 Wn. App. 288, 291-92, 529 P.2d 1157 (1974); State v. Dodd, 8 Wn. App. 269, 274, 505 P.2d 830 (1973); State v. Mark, 34 Wn. App. 349, 351-52, 661 P.2d 157 (1983), rev. denied, 100 Wn.2d 1007 (1983); State v. Huxoll, 38 Wn. App. 360, 363-64, 685 P.2d 628 (1994), rev. denied, 102 Wn.2d 1021 (1984); Haack, 88 Wn. App. at 433-34).

U.S. 477). As the Lego Court recognized, in determining the standard of proof to be used in challenging involuntary confessions, “the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake.” Lego, 404 U.S. at 488, supra n.1 (citing Davis, 73 Wn.2d 271). This Court has made clear the burden of proof dispute in Lego is of no consequence on the Court’s prior holdings in Davis and Erho. See State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973) (citing both Lego and Davis for the proposition the State must prove voluntariness by a preponderance of the evidence).

The State also cites Colorado v. Connelly, 479 U.S. 157, 166, 107 S. Ct. 515, 93 L. Ed. 2d 473, for the proposition “the Supreme Court has since cautioned against expanding current exclusionary rules...” Petition at 8. But Davis and Erho are not exclusionary rules. As the Court of Appeals properly recognized, “the rationale underlying the holdings in Davis and Erho is akin to the missing witness rule.” Abdulle, No. 63742-8-I (slip op., at 5) (citing Haack, 88 Wn. App. at 433-34). Notwithstanding any “caution” in Connelly, Washington, like all states, may provide greater protection for individual rights based upon its state constitution. First Covenant Church v. Seattle, 120 Wn.2d 203, 223, 840

P.2d 174 (1992); State v. Gunwall, 106 Wn.2d 54, 59, 720 P.2d 808 (1986).

In the past, when the United States Supreme Court has cut back on federal constitutional protections, Washington has declined to follow the federal courts under state law. See, e.g., State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (rejecting the inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under art. 1 §7); State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984) (declining to adopt “totality of the circumstances test” established in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)); State v. Davis, 38 Wn. App. 600, 686 P.2d 1143 (1984) (declining to follow Fletcher v. Weir, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), holding that under art. 1, § 3, state may not comment on defendant's post-arrest silence even if defendant has not received Miranda warnings)).

Finally, the State mischaracterizes Davis and Erho by suggesting those cases set additional barriers to admissibility that are “an empty gesture that wastes significant public resources and judicial time.”

Petition at 8, 10. As the Court of Appeals correctly noted:

In State v. Haack, this court clarified that the State need not present independent corroboration “in every instance in which the defendant disputes the giving of warnings and

intelligent waiver of the right to remain silent.’ Rather, ‘where such independent evidence exists, it must either be presented or the State must explain on the record why the evidence is not being presented.’

Abdulle, No. 63742-8-I (slip op., at 5) (citing Haack, 88 Wn. App. at 433).
See also State v. Levy, 156 Wn.2d 709, 728, 132 P.3d 1076 (2006) (upholding Court of Appeals finding that an officer who participated in the search of a car was not required to testify under Davis because his testimony would have been cumulative as several other officers also participated in the search).

The Court of Appeals properly applied the longstanding rule of law governing suppression hearings in Washington. The Court of Appeals decision is not inconsistent with Davis, Erho, or Haack. For all the above reasons, the State has not shown why the rule set forth in Davis and Erho is harmful, incorrect, or should be abandoned. Kier, 164 Wn.2d at 804-05; In re Stranger Creek, 77 Wn.2d at 653.

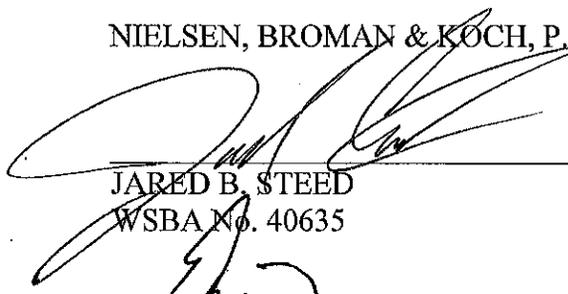
VI. CONCLUSION

This Court should deny the State's petition.

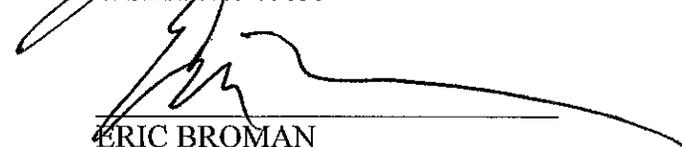
DATED this 25th day of June, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, P.L.L.C.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)

Petitioner,)

v.)

YUSSUF ABDULLE,)

Respondent.)

NO. 84660-0

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 25TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER TO STATE'S PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] YUSSUF ABDULLE
8840 DELRIDGE WAY SW, #201
SEATTLE, WA 98106

SIGNED IN SEATTLE WASHINGTON, THIS 25TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*