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STATE OF WASHINGTON

NO. _____
COURT OF APPEALS NO. 63742-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

YUSSUF ABDULLE,

Respondent.

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STATE'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington, petitioner below, petitions for review.

B. COURT OF APPEALS OPINION

The decision of the Court of Appeals at issue is State v. Yussuf Abdulle, unpublished opinion attached. State v. Abdulle, No. 63742-8-I, slip op. (Court of Appeals Division I, filed May 3, 2010). The Court of Appeals relied on State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968) and State v. Erho, 77 Wn.2d 553, 463 P.2d 779 (1970), reversed the trial court's admission of the defendant's statements to police, and remanded for a new trial.

C. ISSUE PRESENTED FOR REVIEW

Whether this Court's interpretation of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, L. Ed. 2d 694 (1966), through its holdings in Davis and Erho, is erroneous in light of later clarification by the United States Supreme Court.

D. STATEMENT OF THE CASE

The relevant facts are fully set forth in the briefing before the Court of Appeals and in the opinion of the Court of Appeals (attached). Abdulle, No. 63742-8-1 (slip op., at 1-4).

Abdulle was in the back seat of an unmarked police car with a police detective. Another police officer was driving. The backseat police detective testified at the CrR 3.5 hearing that he read Miranda rights to Abdulle, and Abdulle confessed to the detective when they arrived at the police station. Abdulle testified that Miranda rights were read to him, but despite continued coercion from the detective, he never gave a statement. No other witnesses testified at the CrR 3.5 hearing.

The trial court found the detective's testimony more credible and reliable than Abdulle's testimony. CP 72. After making factual findings consistent with the detective's testimony, the trial court concluded by a preponderance of the evidence that Abdulle made his statement knowingly, intelligently, and voluntarily. CP 73. The trial court admitted the statement for trial.

On May 3, 2010, the Court of Appeals reversed the trial court, relying on Davis and Erho, which hold that the "heavy burden" of Miranda requires more than a "swearing contest"

between an officer and a defendant at a pretrial hearing. The Court of Appeals held that Miranda requires, per Davis and Erho, that the State must offer corroborating testimony of other officers present during apprehension or custody if any such evidence exists. Abdulle, No. 63742-8-1 (slip op., at 6). Since the police officer driving the car did not testify at the CrR 3.5 hearing, the Court of Appeals remanded for a new trial. The Court of Appeals failed to accept the State's argument that any error was not preserved, per RAP 2.5(a).

E. ARGUMENT

1. THIS COURT'S DECISIONS IN DAVIS AND ERHO, RELIED UPON BY THE COURT OF APPEALS, MISINTERPRET MIRANDA.

The Court of Appeals decision in this case was based on a decades-old and semi-dormant misinterpretation of Miranda by this Court that misstates the State's obligations under the Fifth Amendment of the U.S. Constitution. Review is warranted under RAP 13.4(b)(3),(4).

Before the Supreme Court issued Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), Washington did not require express warnings for suspects; the issue of

voluntariness of a confession was left for the jury to decide. State v. Haynes, 58 Wn.2d 716, 719-20, 364 P.2d 935 (1961). The jury was instructed to disregard any confession where a police officer or prosecutor denied a suspect communication with counsel or, based on the totality of circumstances, induced an involuntary confession from the suspect. Id. at 722 (citing the former RCW 9.33.020(5)). In 1961, this Court created a new court rule that directed the trial court to resolve these questions of voluntariness pretrial before admission of the confession as evidence. Haynes, 58 Wn.2d at 720 (citing Rule of Pleading, Practice, and Procedure 101.20W, RCW Vol. 0, 1961).

However, in 1963, the Supreme Court overturned this Court in Haynes v. State of Washington, because even though the jury found that the confession was voluntarily made, it was uncontroverted by police that Hayes was not "advised by authorities of his right to remain silent, warned that his answers might be used against him, or told of his rights respecting consultation with an attorney." 373 U.S. 503, 511, 83 S. Ct. 1336, 10 L. 2d 513 (1963). The Supreme Court held that while factual findings and evidentiary conflicts are left to a jury or trial judge, a confession may yet still be

involuntary as a matter of law, if these due process safeguards are not followed. Haynes, 373 U.S. at 515-16.

In 1966, the Supreme Court issued Miranda v. Arizona, which established a new and uniform procedural requirement to ensure that a suspect was told about the privilege against self-incrimination and his right to counsel before waiving those rights. 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Although Miranda said the state must bear a "heavy burden" to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination or counsel, the Court did little to define the weight of that "heavy burden." Miranda, 384 U.S. at 474-75. Thus, the lower courts were left to wonder whether the burden to prove the knowing waiver of rights required proof by a preponderance, by a reasonable doubt, or by some other measure.

Two years after Miranda, but before any additional guidance by the Supreme Court, this Court in State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968), interpreted what quantum of proof was now required by this new "heavy burden." This Court concluded that the "predominate and correct" view of Miranda seemed to require "that the trial court must find admissibility beyond a reasonable doubt before the confession may be submitted to the jury." Id. at 285-86.

While not necessarily endorsing a presumption of police misconduct, this Court held that the burden of Miranda demanded a "more credible and sophisticated technique of proof" by the State to counter a presumption against waiver. Id. at 285, 287. As a result, this Court held that when there is a "swearing contest" between a defendant and a police officer, the State can never satisfy its "heavy burden," without calling or explaining the absence of an available corroborating officer. Id. at 286-88.

Two years after Davis, this Court relied on the analysis of Davis in State v. Erho, 77 Wn.2d 553, 463 P.2d 779 (1970). In Erho, the Court held that when a defendant testifies that he did not waive his rights and an available second officer fails to testify and corroborate testimony that Miranda rights were given, the State could not meet its "heavy Miranda burden of proof when, without explanation, it omits to supply this corroboration." Id. at 559. Although Erho is often factually distinguished, all three divisions of the Court of Appeals have relied on Erho¹ and unpublished opinions.

¹ See State v. Ruud, 6 Wn. App. 57, 61-61, 481 P.2d 1351 (1971); State v. Lanning, 5 Wn. App. 426, 432, 487 P.2d 785 (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

However, two years after Erho, and six years after Miranda, the Supreme Court clarified in Lego v. Twomey, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), that the "heavy burden" of Miranda required proof of a lack of coercion only by a *preponderance of the evidence*, not beyond a reasonable doubt. Id. at 484. The Supreme Court held that admissibility of evidence rests with the trial judge, so if the facts establish that it is more likely than not that the confession was made knowingly and voluntarily, the constitutional rights of the defendant have been protected, and the probative value of a confession should be presented to the jury. Id. at 489.

The Lego Court held that the issue of proof beyond a reasonable doubt is left for the elements of the offense, and a jury considers what weight to give a confession in light of claims of coercion. Id. at 485-86. As with any part of the prosecutor's case, if the trial judge legally finds that a confession is voluntarily made by a preponderance of evidence, the jury at trial may still find it "insufficiently corroborated or otherwise...unworthy of belief." Crane v. Kentucky, 476 U.S. 683, 688-89, 106 S. Ct. 2142,

(1983); State v. Huxoll, 38 Wn. App. 360, 363-64, 685 P.2d 628 (1994); State v. Haack, 88 Wn. App. 423, 433-34, 958 P.2d 1001 (1997).

90 L. Ed. 2d 636 (1986) (holding that the trial court erred in denying a defendant's right to present to the jury allegations of coercion at the time that he gave his statement) (quoting Lego, 404 U.S. at 485-86).

The Supreme Court has since cautioned against expanding current "exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries. . ." Colorado v. Connelly, 479 U.S. 157, 166, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (holding that questions of free will in a confession are irrelevant without a connection between police misconduct and the confession) (quoting Lego, 404 U.S. at 488-89).

Thus, it is now clear that the beyond a reasonable doubt standard applied by this Court from 1968 to 1972 was based on a misinterpretation of Miranda. The Court's holdings in Davis and Erho during this time improperly set an additional barrier to admissibility by requiring additional testimony of a second available officer at a CrR 3.5 hearing before a confession can be admitted. The holdings from Davis and Erho conflict with Lego, and are thus erroneous. Upon a preliminary scan of relevant databases, the State has been unable to find any other federal court or state high

court in the last 40 years that has joined Washington in this expansive interpretation of Miranda.

Indeed, the Supreme Court recently clarified that the "main purpose of Miranda is to ensure that an accused is advised of and understands the right to remain silent and right to counsel...our subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." Berghuis v. Thompkins, 560 U.S. ___, ___ (2010) (slip op., at 11) (holding that a prosecution does not need to show that a waiver of Miranda warnings is expressly made, so long as there is an implicit waiver of these rights.) In our case, this main purpose of Miranda was never at issue, since Abdulle and the detective testified that Miranda was read in full.

The Court of Appeals decisions implementing Davis and Erho compound the error of this prior misinterpretation of Miranda, since now it appears the claim may be raised for the first time on appeal, even if both witnesses testified that Miranda rights were read in full. Abdulle, No. 63742-8-1 (slip op., at 6). The Court of Appeals has improperly created a "missing witness rule" to explain the holdings in Davis and Erho. Id. at 5. This means that there is

no way to avoid reversal except by calling two officers as witnesses in a CrR 3.5 hearing, regardless of how illogical or unpersuasive the defendant's testimony might be.

RAP 13.4(b)(3) authorizes review of this matter since it involves a significant federal constitutional question, and this Court's approach conflicts with all other courts, including the Supreme Court. Moreover, this additional unreasonable and unnecessary hurdle of bringing in another officer is an empty gesture that wastes significant public resources and judicial time. It may also improperly trigger a second trial when raised for the first time on appeal. Thus, this petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

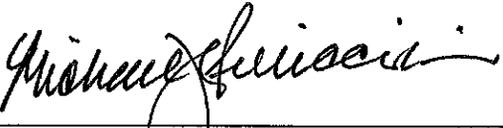
F. CONCLUSION

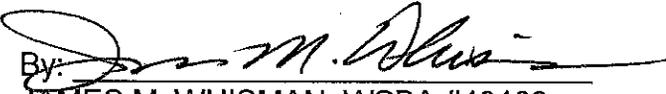
This Court should grant this petition for review to revisit the Court's holdings in Davis and Erho in light of Lego and other cases of the Supreme Court that over the last 37 years have more accurately clarified the State's evidentiary obligations, per Miranda.

DATED this 2nd day of June, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	No. 63742-8-1
)	
Respondent,)	
)	
v.)	
)	
YUSSUF HUSSEIN ABDULLE,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: May 3, 2010
_____)		

ELLINGTON, J. — When a defendant 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 defendant's statements are inadmissible. In this case, the State presented the testimony of only one of two officers present when Yussuf Abdulle waived his right to counsel and made incriminating statements. The court therefore erred in admitting the statements at trial. We reverse.

FACTS

On June 9, 2008, two payroll checks disappeared from the outgoing mail basket placed in the front office at Puget Sound Security (PSS) in Bellevue. Later that day, a man tried to deposit the two checks, endorsed to one Hiback Omar, in a Bank of America account in the same name. Surveillance video showed the man at the Bank of America First Hill branch at 12:12 p.m. and at the International District branch at 12:30 p.m.

Bellevue Police Detective Steven Hoover's investigation focused on Yussuf Abdulle, a former PSS employee who had been recently fired. Abdulle had spent about 30 minutes alone in the PSS front office the morning the checks disappeared.

On August 13, 2008, Hoover arrested Abdulle and transported him to the Bellevue Police Department in an unmarked sedan driven by Detective Rich Newell. At some point during the drive, Abdulle allegedly informed Hoover that he would talk in exchange for a cigarette and a drink of water. Abdulle allegedly confessed upon arriving at the station. The State charged Abdulle with two counts of forgery.

At a CrR 3.5 hearing, Hoover testified that after he arrested Abdulle, he placed him in the back of his unmarked car. Hoover then sat next to Abdulle and Newell drove the car. The car did not have a "silent partner" or any other kind of screening.¹ Hoover asked Abdulle about his background to see if he understood English. He then read Abdulle his Miranda² warnings. Hoover told Abdulle they needed to talk about the checks he took from the PSS and tried to deposit. Abdulle denied taking the checks or cashing them. When Hoover replied that he had surveillance photographs from the two banks, Abdulle said he wanted to talk to an attorney. Hoover then informed Abdulle that if he wanted to talk, he would have to contact Hoover. Afterward, he and Abdulle engaged in "chit-chat," but Hoover did not ask questions about the case, about Abdulle's immigration status, or show Abdulle surveillance photographs.

While still en route, Abdulle told Hoover he would talk in exchange for a cigarette and a glass of water. When they arrived in the police station garage, Hoover asked

¹ Report of Proceedings (RP) (May 11, 2009) at 10.

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

Abdulle if he was sure he wanted to talk, as he had asked for an attorney. Abdulle said yes. Hoover could not recall whether they were still inside the car when this exchange occurred, or whether they were standing outside the car. After they all got out of the car, Newell went to bring Abdulle water and a cigarette.

Abdulle told Hoover that PSS was "out to get him" and he was fired for no reason.³ He said he was mad and needed some money, so he took a check and tried to cash it at a bank in Chinatown.⁴ When Hoover pointed out that two checks were stolen and he had tried to deposit them at two banks, Abdulle said he only remembered one check and one bank. Hoover then showed Abdulle two surveillance photographs from the two banks. Abdulle confirmed he was the person in both photographs. Hoover asked who Hiback Omar was and Abdulle said he was his cousin.

At the hearing, Abdulle gave a significantly different account. Once he was placed in the car, Hoover told him there was a lot of evidence against him. Abdulle denied taking any money. They were already on the freeway when Hoover read Abdulle his Miranda rights, after being told to do so by Newell.

Abdulle requested an attorney. Hoover, however, continued to ask him questions and show him photographs. He also told Abdulle that he would not be deported to Somalia because he is a United States citizen.

Abdulle did not agree to talk to Hoover in exchange for a cigarette and a glass of water. When they arrived at the police station, Abdulle asked Hoover to return a cigarette he had taken from him. Hoover returned the cigarette. Hoover never asked

³ RP (May 11, 2009) at 22.

⁴ When Abdulle said Chinatown, Hoover understood he meant the International District neighborhood of Seattle.

Abdulle whether he was sure he wanted to talk, and continued to ask Abdulle questions, including what he would have done with the money. Abdulle replied that was a trick question and again said he needed an attorney.

The court found Hoover's testimony more credible and reliable than Abdulle's and ruled the statements admissible. The State amended the information to add a first degree theft charge.

Abdulle appeals.

DISCUSSION

Abdulle contends the court erred in admitting his custodial statements into evidence at trial. He argues the State failed to meet its burden of proving that he waived his right to counsel because the only evidence the State presented at the CrR 3.5 hearing was Hoover's uncorroborated testimony.

Custodial statements made by an accused are inadmissible unless preceded by a full advisement of rights and a knowing, intelligent and voluntary waiver of rights, including the right to remain silent and the right to have counsel present at questioning.⁵

When the defendant indicates he wants an attorney, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."⁶ As interpreted by our Supreme Court in State v. Davis⁷ and State v. Erho,⁸

⁵ U.S. CONST. amend. V; Miranda, 384 U.S. at 469-73.

⁶ Id. at 475.

⁷ 73 Wn.2d 271, 438 P.2d 185 (1968).

⁸ 77 Wn.2d 553, 463 P.2d 779 (1970).

that “heavy burden” requires that the State not rest its case on a “swearing contest” when a defendant disputes the giving of the Miranda warnings, but must offer corroborating testimony of other officers present during apprehension or custody if any such evidence exists.⁹ The rationale underlying the holdings in Davis and Erho is akin to the missing witness rule:

[W]here a witness is under the control of the party presenting evidence and is not called and no explanation is given for that failure, the trier of fact may entertain an inference that the testimony of the missing witness would have been adverse. In the context of a suppression hearing based on Miranda, that inference is sufficient to tip the scales in favor of the accused, where the State offers no explanation of its failure to call the witness. In such instances, the State cannot meet its burden as a matter of law, unless there is sufficient other evidence to overcome the inference.^[10]

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 the warnings and intelligent waiver of the right to remain silent.”¹¹ 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.”¹²

Here, the State rested its case upon a “swearing contest” between Detective Hoover and Abdulle. The State did not call Detective Newell to corroborate Detective Hoover’s testimony, and failed to explain on the record whether he was available to testify.

⁹ Davis, 73 Wn.2d at 284–88; Erho, 77 Wn.2d at 559.

¹⁰ State v. Haack, 88 Wn. App. 423, 433–34, 958 P.2d 1001 (1997).

¹¹ Id. at 433.

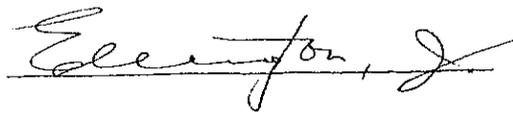
¹² Id.

The State contends Abdulle waived this argument because he failed to raise the issue below. But it is the State's burden to present available corroborating evidence or explain its absence. By failing to do either, the State failed to present sufficient evidence of waiver.

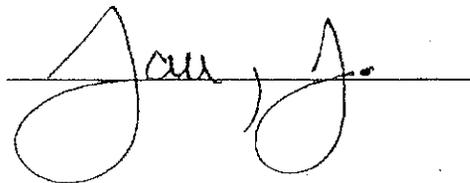
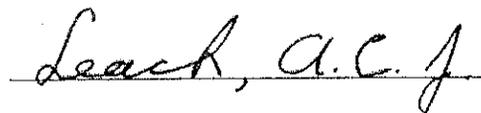
The State also argues that the record does not establish that Newell actually heard any part of the conversation between Abdulle and Hoover, and therefore there is no "missing witness." Again, it is the State's burden to ensure that the record reflects that none of the other officers present heard the Miranda warnings or the defendant's waiver.¹³ Newell was present during the giving of the warnings and during at least part of the subsequent conversation. That Newell heard some or all of the conversation is a reasonable inference, and it was the State's burden to prove otherwise.

The court erred in admitting Abdulle's statements. The State does not argue the error was harmless.

Reversed and remanded for a new trial.



WE CONCUR:

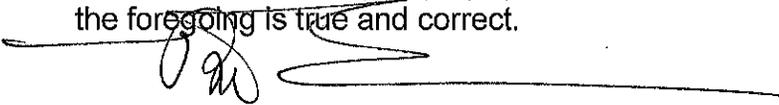


¹³ See Erho, 77 Wn.2d at 558-59.

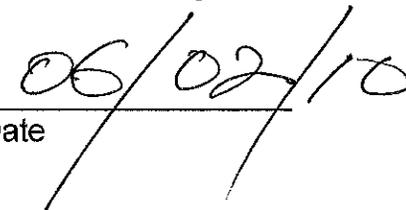
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared Steed, the attorney for the appellant, at Nielsen, Broman & Koch, 1908 East Madison, Seattle, WA 98122, containing a copy of the Petition for Review, in STATE V. YUSSUF ABDULLE, Cause No. 63742-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date