

62822-4

62822-4

No. 62822-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOVANY G.
(DOB 7/6/93),

Appellant.

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

The Honorable LeRoy McCullough

BRIEF OF APPELLANT

ELAINE L. WINTERS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711

2009 JUN 24 PM 4: 29
STATE OF WASHINGTON
CLERK OF COURT

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 7

JOVANY'S STATEMENTS TO DEPUTY HANCOCK WERE IMPROPERLY ADMITTED BECAUSE THE STATE DID NOT PROVE HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS TO REMAIN SILENT AND TO COUNSEL..... 7

 1. To admit a juvenile's custodial statements to the police at a fact-finding hearing, the State must prove the juvenile was advised of his constitutional rights to remain silent and to counsel and that he knowingly, intelligently and voluntarily waived those rights prior to responding to police interrogation 8

 2. The missing witness rule applies when the State attempts to meet its high burden proof that *Miranda* warnings were given and the constitutional rights validly waived before custodial statements are admitted at trial. 10

 3. The juvenile court should not have admitted Jovany's statements to Deputy Hancock due to the State's failure to call Deputy Corliss even though he was close enough to hear the interrogation 12

 a. *The juvenile court's finding that Deputy Corliss was not close enough to hear the Miranda and Juvenile warnings is not supported by substantial evidence*..... 13

b. *The trial court erred by finding the missing witness rule was not implicated because the State had the opportunity to obtain and present testimony from Deputy Corliss to corroborate Deputy Hancock's testimony, and failed to do so without explanation*..... 14

4. The State did not meet its burden of proving Jovany's waiver of his *Miranda* rights was knowing, intelligent, and voluntary..... 17

5. Jovany's convictions must be reversed because the State cannot demonstrate the admission of his custodial statement was harmless beyond a reasonable doubt 19

E. CONCLUSION 21

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991)	11
<u>State v. Broadway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	13
<u>State v. Davis</u> , 73 Wn.2d 271, 438 P.2d 185 (1968)	11-12, 14, 15, 20
<u>State v. Erho</u> , 77 Wn.2d 553, 463 P.2d 779 (1970).....	16, 20

Washington Court of Appeals Decisions

<u>State v. Davis</u> , 3 Wn.App. 684, 477 P.2d 44 (1970)	9
<u>State v. Davis</u> , 12 Wn.App. 288, 529 P.2d 1157 (1974).....	12
<u>State v. Sergent</u> , 27 Wn.App. 947, 621 P.2d 209 (1980), <u>rev. denied</u> , 95 Wn.2d 1010 (1981).	19
<u>State v. Solomon</u> , 114 Wn.App. 781, 60 P.3d 1215 (2002), <u>rev. denied</u> , 149 Wn.2d 1025 (2003)	13, 15

United States Supreme Court Decisions

<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	19
<u>Dickerson v. United States</u> , 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)	8
<u>Fare v. Michael C.</u> , 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979)	10, 17
<u>In re Gault</u> , 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)	9

<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	17
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	8, 9, 10
<u>North Carolina v. Butler</u> , 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)	10

Federal Decision

<u>McClanahan v. United States</u> , 230 F.2d 919 (5th Cir.), <u>cert. denied</u> , 352 U.S. 824 (1956)	11
--	----

United States Constitution

U.S. Const. amend. V	8
U.S. Const. amend. VI	8
U.S. Const. amend. XIV	8

Washington Constitution

Const. art. I, § 9	8
Const. art. I, § 22	8

Washington Statutes

RCW 13.40.140	9
RCW 9.41.040	3, 20
RCW 9A.56.065	3, 20

A. ASSIGNMENTS OF ERROR

1. The juvenile court erred by admitting Jovany's custodial statements to Deputy Hancock. Conclusion of Law E.

2. The juvenile court erred by finding no officers heard Deputy Hancock administer the Miranda warnings and concluding the missing witness doctrine therefore did not apply to the CrR 3.5 hearing. Conclusion of Law F.

3. The juvenile court erred by concluding Jovany knowingly, intelligently, and voluntarily waived his Miranda rights. Conclusion of Law E.

4. In the absence of substantial evidence in the record, the court erred in finding, "neither deputy was close enough to have heard the giving of the warnings." Finding of Fact AA.

5. In absence of substantial evidence in the record, the court erred in finding, "Deputy Hancock the[n] read the Miranda and Juvenile Warnings to the Respondents." Finding of Fact X.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A respondent's custodial statement is only admissible in the State's case-in-chief if the respondent was informed of his constitutional rights to remain silent and to counsel and waived those rights prior to police interrogation. The State has a heavy

burden of demonstrating Miranda was complied with, and the State's failure to call a witness who observed the alleged advisement and waiver of Miranda warning leads to the inference that the missing witness's testimony would not be favorable to the government. The State called one police officer who testified he advised Jovany of his Miranda rights and that Jovany said he understood his rights and wanted to talk to the officer. The State failed to call another police officer who was within earshot at the time. Where Jovany testified no officer advised him of his constitutional rights and he did not make a statement, did the juvenile court improperly admit Jovany's oral admission?

(Assignments of Error 1-5)

2. A juvenile court's finding of fact will be upheld on appeal only if it is supported by substantial evidence. Where Deputy Hancock testified Deputy Corliss was standing two or three feet away from him and was "within earshot" when Hancock advised Jovany of his Miranda rights, is the juvenile court's factual finding that neither Deputy Corliss nor Deputy Curry were close enough to hear the advisement supported by substantial evidence in the record? (Assignment of Error 1-5)

3. The court must look at the totality of circumstances in determining if a respondent's waiver of his Miranda rights is knowing, intelligent, and voluntary. Jovany was only 15 years old when he was arrested at gunpoint and interrogated by Deputy Hancock. Jovany did not understand why he would want a lawyer when questioned by the police or how any statements could be used against him. Was his waiver of his constitutional rights to remain silent and have an attorney present during police questioning knowing, intelligent and voluntary? (Assignments of Error 1, 3).

C. STATEMENT OF THE CASE

Jovany G. appeals his convictions for theft of a motor vehicle, RCW 9A.56.065, and unlawful possession of a firearm in the second degree, RCW 9.41.040(2)(a)(iii). CP 1-2, 16, 25-27. A copy of the juvenile court's findings of fact and conclusions of law is attached as an appendix to this brief.¹

King County Sheriff's Deputy Jeff Hancock stopped a 1989 Toyota Camry that he believed was traveling over the speed limit on Roxbury and drifting outside its lane. 1RP 41, 44-45, 49-50, 92-

¹ Appellant is filing a supplemental designation of clerk's papers which will contain the findings of fact and conclusions.

93.² The Toyota stopped safely on the side of the road on Ninth Avenue S.W. Id. at 49-50. As the Toyota was coming to a stop, the passenger door cracked open. Id. at 51. The front passenger, Jovany G., stood up when the car stopped, but quickly returned to his seat and closed the car door when directed to do so by the deputy. Id. at 53-55, 94.

Deputy Hancock went to the passenger side of the car and looked inside the open window. 1RP 56. He could not see a key in the car's ignition, which appeared to have been punched, and he knew the driver, co-respondent Jesse M., was not old enough to drive.³ Id. at 56-57, 61. Deputy Hancock directed Jesse to turn the car off, which he did using pliers. Id. at 62.

In addition to Jovany and Jesse, there were three back-seat passengers in the Toyota.⁴ 1RP 66. The deputy asked if there were any narcotics or weapons in the car, but none of the car's occupants responded. Id. at 66-67, 102-03. Deputy Hancock believed there was a gun in the car because of the boys' body

² The verbatim report of proceedings is contained in three consecutively-numbered volumes, referred to here by volume number.

1RP – November 17 and 18, 2008 (Volume I)

2RP – November 21 and 24, 2008 (Volume II)

3RP – November 25 and December 3, 2008 (Volume III)

³ Jesse M.'s appeal is also before this Court, No. 62728-7-I.

⁴ All three were released at the scene. 1RP 124.

language; Jovany was trembling and inclined his body away from the officer, and Jesse gripped the steering wheel and looked straight ahead. Id. at 68-70, 128. Deputy Hancock therefore drew his weapon and ordered the car's occupants to put their hands on top of their heads. Id. at 70-72. All of the occupants complied. Id. at 71-72.

At least four deputies responded to Deputy Hancock's request for backup. 2RP 165-66. The officers held guns on the five occupants until they were removed from the car one by one and handcuffed. 1RP 72-73, 104, 128-29; 2RP 166-69. Deputy Ross Curry searched the Toyota as soon as the occupants were handcuffed and separated. 2RP 170-71, 203. Deputy Curry reported finding a .25 caliber pistol inside a stocking cap underneath the front passenger seat against the transmission hump.⁵ 2RP 177, 179, 187-88. The officer reported the cap was "not in plain view. . . . but once I put my head down underneath the seat, I saw a black or dark blue stocking cap." Id. at 177. Deputy Curry opined a person in the driver or front passenger seat could access the gun. Id. at 188.

⁵ The respondents stipulated the gun was operable and they were both under the age of 18. 1RP 21, 27-28; Finding of Fact ZZ.

Deputy Hancock testified that he read the Miranda warnings and juvenile waivers to Jovany and Jesse as they stood next to each other and both agreed to talk to him. He then separated them and each gave a statement. 1RP 76-80, 85-68. After the juvenile court found that the respondents validly waived their Miranda rights, the prosecutor read Deputy Hancock's statement. 2RP 295. According to the deputy, both respondents told him they stole the car; they did not say where they obtained the weapon, but both admitted touching it. 2RP 295.

Mathew Arnold testified that he was the owner of the Toyota, but the car was not registered to him on the date of the arrest. 1RP 138-40, 146, 149. He noticed minor damage to the steering column when he retrieved the car. 1RP 141, 150.

The Honorable Leroy McCullough found Jovany guilty of both theft of a motor vehicle and unlawful possession of a firearm in the second degree. CP 16; 3RP 342-44. After Jovany received a standard range disposition, he appealed to this Court. CP 19-26; 3RP 359.

D. ARGUMENT

JOVANY'S STATEMENTS TO DEPUTY HANCOCK WERE IMPROPERLY ADMITTED BECAUSE THE STATE DID NOT PROVE HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS TO REMAIN SILENT AND TO COUNSEL

At least five police officers were at the scene where Jovany was arrested and interrogated. The State, however, called only one officer, Deputy Hancock, to testify that Jovany was advised of his constitutional rights, waived those rights, and answered the officer's questions. The State did not call any of the other officers at the CrR 3.5 hearing, including one who was close enough to hear Deputy Hancock. Because Jovany testified that he was not advised of his Miranda rights, the State was unable to meet its heavy burden of proving he was advised of and intelligently waived his constitutional rights prior to talking to Deputy Hancock. Jovany's testimony also showed he did not understand the Miranda rights. The juvenile court thus improperly admitted Jovany's custodial statements. Because both convictions rested upon Jovany's admissions to Deputy Hancock, they must be reversed.

1. To admit a juvenile's custodial statements to the police at a fact-finding hearing, the State must prove the juvenile was advised of his constitutional rights to remain silent and to counsel and that he knowingly, intelligently and voluntarily waived those rights prior to responding to police interrogation. The federal and state constitutions provide an accused the right not to incriminate himself and to be represented by counsel.⁶ U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 9, 22. Due to the coercive nature of police custody, police officers must provide a basic advisement of these constitutional rights to a suspect prior to questioning. Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Miranda warnings are a bright-line constitutional requirement. Dickerson v. United States, 530 U.S. 428, 442-44, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). The constitutional rights to silence and to

⁶ The Fifth Amendment provides that no person "shall be compelled in any criminal action to be a witness against himself." The Fifth Amendment is applicable to the States through the Fourteenth Amendment. Miranda, 384 U.S. at 463-64.

The Sixth Amendment provides "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Sixth Amendment also applies to the States. Kirby v. Illinois, 406 U.S. 682, 688-89, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972).

Article 1, section 9 of the Washington Constitution states, "No person shall be compelled in any criminal case to give evidence against himself." Washington courts have given article 1, section 9 the same interpretation as the United States Supreme Court has given the Fifth Amendment. State v. Templeton, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002).

The right to counsel is protected by Article 1, section 22, which states, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

counsel apply to juveniles as well as adults, and courts must take special care in admitting statements obtained from juvenile suspects. In re Gault, 387 U.S. 1, 45, 55, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); RCW 13.40.140.

A suspect must be unequivocally advised of his right to remain silent, that anything he says may be used against him in court, that he has the right to have an attorney present if he chooses to make a statement, and that an attorney will be appointed for him if he cannot afford one. Miranda, 384 U.S. at 479. In Washington, juvenile suspects must also be informed that any statements may be used in juvenile court if they are charged with a juvenile offense or in adult court if the juvenile court declines jurisdiction and they are charged with a crime. State v. Davis, 3 Wn.App. 684, 477 P.2d 44 (1970). To assure these rights are meaningfully given and can be properly exercised, a suspect must be informed of the constitutional rights prior to police questioning. Miranda, 384 U.S. at 467.

An individual may knowingly and intelligently waive his constitutional rights and answer questions or provide a statement to the police. Miranda, 384 U.S. at 479. "But unless and until such warnings and waiver are demonstrated by the prosecution at trial,

no evidence obtained as the result of interrogation can be used against him.” Id.

The issue is not one of form, but whether the accused in fact knowingly and voluntarily waived the rights to remain silent and to counsel. Fare v. Michael C., 442 U.S. 707, 724, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) (quoting North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)). The determination of whether statements obtained as a result of custodial interrogation are admissible against the accused is made by the court after an inquiry into the totality of the circumstances to ascertain if the respondent’s waiver of his constitutional rights was in fact knowing and voluntarily. Fare v. Michael C., 442 U.S. at 724-25; Miranda, 384 U.S. at 475-77. This test mandates inquiry into all circumstances surrounding the interrogation, including the juvenile’s age, experience, background, and intelligence. Fare v. Michael C., 442 U.S. at 725.

2. The missing witness rule applies when the State attempts to meet its high burden proof that *Miranda* warnings were given and the constitutional rights validly waived before custodial statements are admitted at trial. In Washington, the trier of fact may draw the inference that a missing witness’s testimony would be unfavorable

to a party who did not call a witness if the witness is within that party's control and the testimony would logically support that party's position. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). The Blair Court described the "missing witness" or "empty chair" doctrine as follows:

[W]here evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and . . . he fails to do so, -- the jury may draw an inference that it would be unfavorable to him.

Id. (quoting State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)).

A witness is within control of a party when there is such a "community of interest" between the party and witness that, in all reasonable probability, the party would call the witness if the witness' testimony were not damaging. Davis, 73 Wn.2d at 277. A witness is not equally available to both parties simply because he could be subpoenaed by either party. Id. at 276-77 (citing McClanahan v. United States, 230 F.2d 919, 926 (5th Cir.), cert. denied, 352 U.S. 824 (1956)).

In order for the missing witness rule to apply, the evidence in question must be important and necessary, and not trivial or merely cumulative. Davis, 73 Wn.2d at 278. Testimony related to an

element of a crime does not require corroborating evidence when corroborating evidence is available, even when the element is disputed by the defendant. State v. Davis, 12 Wn.App. 288, 291-92, 529 P.2d 1157 (1974). However, testimony related to an alleged waiver of constitutional rights is evidence of "fundamental importance" and is "clearly not unnecessary, 'trivial' or 'comparatively unimportant.'" Davis, 73 Wn.2d at 279.

3. The juvenile court should not have admitted Jovany's statements to Deputy Hancock due to the State's failure to call Deputy Corliss even though he was close enough to hear the interrogation. The State presented only one witness at the CrR 3.5 hearing.⁷ Deputy Hancock testified that he read the Miranda warnings and juvenile waivers to Jovany and Jesse as they stood next to each other and both agreed to talk to him. He then separated them and each gave a statement. 1RP 76-80, 85-68.

Jovany, however, testified that he was not advised of his right to counsel or to remain silent or that any statements could be used against him in court by any of the law enforcement officers that evening. 2RP 220-21, 226, 227-28. He also said he was not questioned and did not make any statements. Id. at 226-27.

⁷ The CrR 3.5 hearing was held during the fact-finding hearing.

Deputy Hancock was asked multiple questions about who was present during the alleged reading of the Miranda warnings and the juvenile warnings. Deputy Hancock said he borrowed a Miranda card from Deputy Corliss and that Corliss was close by and “within earshot” when he read the Miranda rights to Jovany. 1RP 79, 83, 108-09. When asked how far away Deputy Corliss was during this time, Deputy Hancock responded that he was “probably about two to three feet away.” Id. at 109.

a. The juvenile court’s finding that Deputy Corliss was not close enough to hear the Miranda and Juvenile warnings is not supported by substantial evidence. This Court reviews factual findings supporting the court’s CrR 3.5 rulings to determine if they are supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Solomon, 114 Wn.App. 781, 789, 60 P.3d 1215 (2002), rev. denied, 149 Wn.2d 1025 (2003).

Despite the clear testimony of Deputy Hancock, the juvenile court found that “neither deputy was close enough to have heard the giving of the warnings,” apparently referring to Deputies Corliss

and Curry.⁸ Finding of Fact AA. This finding is not supported by the evidence, as Deputy Hancock's testimony unequivocally shows that if he did read the Miranda warnings, Deputy Corliss was close enough to have heard those warnings. According to Deputy Hancock, Deputy Corliss was standing just to his right, a mere two to three feet away, and well within earshot. 1RP 83, 108-09. The trial court erred in entering Finding of Fact AA, that "neither deputy was close enough to have heard the giving of the warnings."

b. The trial court erred by finding the missing witness rule was not implicated because the State had the opportunity to obtain and present testimony from Deputy Corliss to corroborate Deputy Hancock's testimony, and failed to do so without explanation. Jovany argued that his statements to Deputy Hancock should be suppressed because the State did not meet its burden of demonstrating the deputy advised Jovany of his constitutional rights and that Jovany validly waived those rights. This argument was based upon the missing witness rule, and both respondents relied upon Davis, supra. 2RP 265-66, 270, 273-77. Jovany pointed out that Deputy Corliss was particularly available to the State as the officer worked closely with the prosecutor. Importantly, the

⁸ Deputy Curry is referred to in Findings of Fact S-V and Z, and Deputy Corliss is referred to in Finding of Fact W.

respondents were unaware of Deputy Corliss until Deputy Hancock's testimony because Corliss had not made a written statement and was not mentioned in the discovery. 2RP 275-76. The juvenile court, however, admitted the respondents' statements. 2RP 295; Finding of Fact XX; Conclusions of Law E-G. The court found the missing witness rule did not apply because the officer was not closed enough to overhear the Miranda warnings. 2RP 295; Conclusion of Law F. This legal conclusion is reviewed de novo. Solomon, 114 Wn.App. at 789.

The trial court erred in entering Conclusion of Law F, which held, "Neither Deputy Corliss nor any of the other officers were close enough to overhear the Miranda or Juvenile Warnings being read to the Respondents. State v Davis 73 Wn.2d 271 (1968) was not implicated." This error was caused directly by the erroneous finding of fact AA, as discussed above; Deputy Corliss was actually close by. While Deputy Hancock testified that Jovany orally waived his constitutional rights, Jovany testified that he was not read his rights, and did not waive his rights, orally or otherwise. CR 85, 220-21, 227-28. Despite this conflicting testimony concerning whether there was a reading and a waiver of constitutional rights, the State declined to call Deputy Corliss as a witness to corroborate the

testimony of Officer Hancock. The State's failure to call Deputy Corliss as a witness implicates the missing witness doctrine.

This case is analogous to State v. Erho, 77 Wn.2d 553, 463 P.2d 779 (1970). In Erho, there was a 'swearing contest' between the State and the defendant as to whether the defendant had been advised of his rights. Erho, 77 Wn.2d at 559. The trial court was only presented with a single officer concerning the nature of the Miranda warnings given to the defendant, despite the presence of other officers. Id. at 558. From these facts, the Supreme Court reasoned the State failed to meet its burden of proof:

[T]he state appeared content to rest its case, relative to the admonitions given appellant prior to the elicitation of incriminating statement, upon a 'swearing contest.' Where, as here, there appears to be adequate opportunity to obtain and present the corroborating testimony of other officers present at the scene of apprehension and custody, we are satisfied the state fails to meet the heavy Miranda burden of proof when, without explanation, it omits to supply such corroboration.

Id. at 559 (internal citations omitted).

As in Erho, Jovany disputed whether he was advised of his constitutional rights or waived those rights. Like Erho, the State had adequate opportunity to obtain and present the testimony of an officer – specifically, Deputy Corliss – present during the alleged

reading of the Miranda rights. In failing to call Deputy Corliss to corroborate the testimony of Deputy Hancock or to explain their reasons for not calling Deputy Corliss at some time during the five-day fact-finding hearing, the State failed to meet its heavy Miranda burden of proof. The trial court thus erred by admitting Jovany's custodial statements.

4. The State did not meet its burden of proving Jovany's waiver of his *Miranda* rights was knowing, intelligent, and voluntary.

A waiver of the constitutional rights to remain silent and to consult with an attorney before making a custodial statement must be knowing, intelligent and voluntary. Fare v. Michael C., 442 U.S. at 724-25. This Court may not presume a waiver of important constitutional rights, but must "indulge every reasonable presumption against waiver" of those rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Here, there is scant evidence Jovany validly waived his constitutional rights to silence and to an attorney. The only evidence provided by Deputy Hancock was that he read the Miranda and juvenile warnings from a card provided by another officer as the respondents stood together. 1RP77-78. He added

that both boys “said that they understood their rights and that they would talk.” Id. at 81.

When Jovany took the witness stand at the CrR 3.5 hearing, however, he was asked about those constitutional rights and was unable to explain them. 2RP 236-37. While he said the right to remain silent means “to be quiet,” he could not explain why he might want to have an attorney. Id. at 237-38. He did not know what the word “confession” meant or what it meant to have your words used against you. Id. at 238.

Other circumstances also demonstrate the error of the juvenile court’s conclusion that Jovany’s waiver was knowing intelligent, and voluntary. While the automobile Jovany was riding in was stopped by the police, he was held in the car at gunpoint; one officer explained he was providing “lethal cover.” 1RP 70-72; 2RP 169, 200. Eventually five or six police officers and patrol cars were at the scene to take custody of all of the car’s occupants, and the weapons were not put away until this occurred. 1RP 104-05, 128-29; 2RP 166-68, 170, 200. Even before Deputy Hancock drew his weapon, Jovany was trembling. 1RP 69-70. It was 2:30 in the morning and Jovany was tired because he had not gotten any

sleep. 2RP 235. Finally, Jovany was only 15 years old. CP 1; 1RP 27-28.

There is no evidence Jovany was sophisticated or otherwise aware of these constitutional rights. Looking at the entire record, the juvenile court's conclusion that Jovany intelligently waived his constitutional rights is incorrect. The juvenile court erred by admitting Jovany's oral custodial statement.

5. Jovany's convictions must be reversed because the State cannot demonstrate the admission of his custodial statement was harmless beyond a reasonable doubt. When a custodial statement is improperly admitted at trial, the appellate court must reverse the conviction unless the State can demonstrate beyond a reasonable doubt that the constitutional error did not contribute to the conviction. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Sergent, 27 Wn.App. 947, 951-52, 621 P.2d 209 (1980), rev. denied, 95 Wn.2d 1010 (1981).

The harmless error test is designed to prevent the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22. An error is not harmless beyond a reasonable doubt when there is a

reasonable possibility that the outcome of the trial would have been different if the error had not occurred. Id. at 24.

Jovany was convicted of theft of a motor vehicle and unlawful possession of a firearm. The State was required to prove beyond a reasonable doubt that he wrongly obtained the Toyota with intent to deprive the owner of the vehicle, RCW 9A.56.065, and that he was under 18 years of age and had a firearm in his possession, RCW 9.41.040(2)(a)(iii). Johnny was a passenger in the Toyota, and his confession was the only evidence that established he participated in its theft. Additionally, his statement provided the only evidence he knew there was a gun in the car. Clearly Jovany's custodial statement contributed to the juvenile's court's conclusion he was guilty of these crimes. Finding of Fact XX; Conclusion of Law M.

The admission of Jovany's custodial statement is not harmless beyond a reasonable doubt. His convictions for theft of a motor vehicle and unlawful possession of a firearm in the second degree must be reversed and remanded for a new fact-finding hearing. Erho, 77 Wn.2d at 562; Davis, 73 Wn.2d at 290.

E. CONCLUSION

Jovany's adjudications for theft of a motor vehicle and unlawful possession of a firearm in the second degree must be reversed and remanded for a new fact-finding hearing because the State did not meet its heavy burden of establishing Jovany was advised of and validly waived his Miranda rights.

DATED this 21st day of August 2009.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX

**WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 3.5, JuCR 7.11(D) AND CrR 6.1(d)**

Filed February 24, 2009

FILED

OCT 24 PM 3:03

CLERK OF COURT
JUVENILE COURT
COUNTY OF KING

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

vs.

JESSE MACIAS
D.O.B.: 12/18/92

JOVANY M. GAONA
D.O.B.: 07/06/93

Respondents,

No. 08-8-04019-6 (Macias)
08-8-04017-0 (Gaona)

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 3.5, JuCR 7.11(d)
and CrR 6.1(d)

I. PROCEDURAL HISTORY

JESSE MACIAS, by way of information was charged with one count of Possession of a Stolen Vehicle, one count of Unlawful Possession of a Firearm in the Second Degree, one count of Malicious Mischief in the Third Degree and one count of Possession of Vehicle Theft Tools based on his behavior alleged to have occurred on October 26, 2008. JOVANY M. GAONA, by way of information was charged with one count of Theft of a Motor Vehicle and one count of Unlawful Possession of a Firearm in the Second Degree. This case proceeded to Fact Finding before the Honorable Judge LeRoy McCullough on November 25, 2008. The Respondent

ORIGINAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Daniel T. Satterberg, Prosecuting Attorney
Juvenile Court
1211 E. Alder
Seattle, Washington 98122
(206) 296-9025
FAX (206) 296-8869

1 Macias appeared represented by counsel, Jamie Kvistad and Mario Cava. The Respondent
2 Gaona was represented by Counsel Tomackie Kim. Stephen Herschkowitz, Deputy Prosecuting
3 Attorney, appeared on behalf of the State of Washington. The court having heard sworn
4 testimony and arguments of counsel, and having received exhibits, now makes and enters the
5 following findings of fact and conclusions of law as required by CrR 3.5, JuCR 7.11 (d) and CrR
6 6.1(d).

7 8 **II. FINDINGS OF FACT**

- 9 A. The incident occurred on October 26, 2008 in the White Center area of Seattle, King
10 County, Washington.
- 11 B. Respondent Jesse Macias and Co-Respondent Jovany Gaona were under the age of
12 18.
- 13 C. King County Sheriff's Deputy Jeff Hancock was on duty, in uniform and on patrol in
14 his fully-marked police vehicle.
- 15 D. At approximately 0230, Deputy Hancock was driving northbound near Roxbury street
16 when he saw a 1989 Toyota Camry driving east bound on Roxbury street.
- 17 E. The deputy estimated the vehicle was traveling at approximately 44 m.p.h. in a 30
18 m.p.h. zone, when the vehicle then drifted into another lane, straddled the lane
19 divider, and then fully changed lanes without signaling.
- 20 F. Deputy Hancock activated his emergency lights and conducted a routine traffic stop
21 in a residential neighborhood near 9th St. SW, near Roxberry.
- 22 G. As Deputy Hancock was conducting the stop, the front passenger door opened and
23 Co-Respondent Gaona appeared ready to exit from the right front door.
- H. Deputy Hancock then pulled his vehicle directly behind the vehicle and gave a verbal
command to Gaona to get back into the vehicle; Gaona complied.
- I. Deputy Hancock then got out of his vehicle and approached the vehicle on the
passenger side. The passenger side window was partially rolled down. Deputy
Hancock saw Macias seated in the driver's seat, Gaona was seated in the front
passenger seat and three occupants in the rear seats of the car.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 1 J. Deputy Hancock bent down to look inside the car and saw that there was no key in
2 the ignition. Deputy Hancock also recognized Macias sitting behind the steering
3 wheel.
- 4 K. When Deputy Hancock asked the occupants whose car the vehicle belonged to,
5 Macias stated that the car was "my mom's."
- 6 L. Deputy Hancock told Macias to turn off the car and Macias turned off the vehicle
7 with a pair of pliers.
- 8 M. Deputy Hancock then asked the occupants in the car whether there were any drugs or
9 weapons in the car.
- 10 N. None of the occupants verbally responded to Deputy Hancock's question.
- 11 O. Deputy Hancock again asked whether there were any weapons in the car and again
12 none of the passengers verbally responded.
- 13 P. Although there was no verbal response from anyone in the car, Deputy Hancock read
14 the Respondent's body language, i.e., avoidance of eye contact, gripping of the
15 steering wheel, Respondent Gaona turning of his body and the Deputy concluded
16 there was a gun in the car.
- 17 Q. Deputy Hancock un-holstered his service weapon, pointed it at the vehicle and told
18 the passengers in the vehicle to keep their arms raised, and called for police backup.
- 19 R. When backup arrived, all the passengers exited the car as directed by Deputy
20 Hancock or other officers at the scene.
- 21 S. When Deputy Curry, one of the first backup officers to respond, arrived, he saw
22 Deputy Hancock standing with his firearm trained on the Toyota and its occupants.
23 The Second deputy was stationed at the driver's side vehicle.
- T. In Deputy Curry's immediate opinion, there was probable cause for an arrest based
upon the scene and the weapons already drawn.
- U. Deputy Curry assumed the role of cover officer and joined Deputy Hancock on the
passenger side of the Toyota.
- V. Deputy Curry also had his weapon aimed at the automobile and its occupants.
- W. Deputy Hancock testified with detail that after the Respondents were later
handcuffed, but before transportation to the juvenile detention facility, he borrowed a
Miranda rights card from backup Deputy Corliss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 1 X. Deputy Hancock the read the Miranda and Juvenile Warnings to the Respondents.
- 2 Y. The Court found that Deputy Hancock gave credible testimony.
- 3 Z. Deputy Curry did not hear the warnings given and no other officer testified on
4 corroboration.
- 5 AA. The Court found that neither deputy was close enough to have heard the giving of
6 the warnings.
- 7 BB. According to Deputy Hancock, the Respondents showed no sign of confusion,
8 made no request that the deputy repeat the warnings, and the Respondents made no
9 request for the interpretation of the rights given.
- 10 CC. Within five minutes of the backup call, four to five officers were on the scene
11 with separate vehicles.
- 12 DD. Respondent Gaona testified at the CrR 3.5 hearing that neither Deputy Hancock
13 nor any other officer gave him any information on his rights to counsel, to be silent,
14 or any of the other traditional Miranda rights.
- 15 EE. According to Respondent Gaona, who was on the passenger side closest to Deputy
16 Hancock, the deputy stood along the vehicle for 30 seconds without saying or asking
17 anything before pulling out his service weapon.
- 18 FF. The Court found that Respondent Gaona's testimony was not a credible account of the
19 events.
- 20 GG. Further, according to Respondent Gaona, it was between 2:30 a.m. and 3:30 a.m.
21 when we was approached by the officers and he testified that he was tired from a lack
22 of sleep, there were a lot of officers around, "it was confusing" and "it felt weird."
- 23 HH. The Court found in accord with Deputy Hancock's more detailed testimony
regarding the reading of the Miranda rights to the Respondents because:
- a. ~~The Court considered the~~ ^{LM} more detailed testimony of Officer Hancock
regarding the borrowing of the Miranda card;
 - b. ^{Deputy's} The repeated questions about guns or weapons in the vehicle;
 - c. ^{Deputy gave LM} The time, place and circumstances ^{LM} given with particularity; and,
 - d. ^{LM} Considering the Respondent Gaona's less credible testimony that he heard no
questions about guns or weapons from the Deputy even though he was on the
passenger side of the car with the windows rolled down.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 II. The Court found both Deputy Hancock and Deputy Curry's testimony ~~was~~^{LM} credible.

2 JJ. After the occupants of the Toyota were handcuffed and the ~~officers'~~^{LM officers?} guns were
3 holstered, Deputy Curry used his flashlight to search the vehicle incident to arrest.

4 KK. Deputy Curry found a stocking cap or a beanie beneath the front passenger seat.

5 LL. Deputy Curry testified that it seemed ~~off~~^{add LM} that the cap was clean but the surrounding
6 floor where the cap was located was dirty with leaves, tobacco and other debris.

7 MM. When Deputy Curry pulled out the cap, he discovered a .25 caliber firearm
(State's exhibit 1).

8 NN. In Deputy Curry's opinion, the weapon could be quickly loaded for discharge
because there were rounds in the magazine.

9 OO. The deputy then photographed the damaged ignition, the gun, and the cap where it
10 was originally located on the floor in front of the front passenger seat.

11 PP. The car had not been reported stolen at the time of the incident.

12 QQ. Witness Matthew Arnold testified that he was the owner of the subject Toyota on
13 October 26, 2008, that he bought it from a person named "Phat" for \$1400, that he
14 did not recognize either of the Respondents, nor did he give them permission to drive
the subject vehicle.

15 RR. On October 26, 2008 someone named Michael Kohn was the registered owner of
the subject Toyota.

16 SS. Mr. Arnold testified that when he retained the stolen car from the towing yard, he
17 discovered that the steering column had been damaged and dented. The damage was
~~was~~^{LM} nowhere prior to Respondents Macias and Gaona stealing the car.

18 TT. Mr. Arnold testified that he could still use his keys to operate the Toyota.

19 UU. The Court found that Mr. Arnold's credibility was compromised by his admission
20 that the car-purchase transaction was listed as a gift as opposed to a sale.

21 VV. The Court found in accord with Mr. Arnold's testimony regarding the possession
22 and ownership of the vehicle, in part because Mr. Arnold's testimony exposed him to
23 potential penalty, but Mr. Arnold nevertheless indicated that he was the true owner of
the stolen Toyota.

1 WW. As an additional fact, the car registration was switched to Mr. Arnold two days
2 after the subject incident.

3 XX. Both Macias and Gaona separately told Deputy Hancock that they stole the
4 vehicle from somewhere along Aurora Ave N in Seattle. They both said that the
5 vehicle was open and that they did not know the owner. Both also stated that they
6 handled the gun but would not say where they obtained it.

7 YY. Both Macias and Gaona had the ability to readily access the gun, as it was within
8 reach of them both. The gun would not be easy for any of the rear passengers to
9 reach.

10 ZZ. The gun was fully operational as stipulated by both parties.

11 III. CONCLUSIONS OF LAW

12 A. The pre-Miranda statement, including the statement by Respondent Macias that the
13 stolen vehicle was "my mom's" are inadmissible: (1) because the car was pulled over
14 in a residential area at 2:00 a.m.; (2) the deputy activated his lights and directed the
15 Respondents to pull over; (3) the Respondents were juveniles; (4) the deputy saw that
16 there was no key in the ignition; and, (5) Respondent Gaona tried to exit the car and
17 was ordered back into the vehicle.

18 B. This was custody to a degree associated with arrest. The Respondents were not free
19 to leave and no reasonable person in their position would feel free to leave.

20 C. Deputy Hancock had Probable Cause to arrest the Respondents for a crime because of
21 the totality of the circumstances including the facts that: (1) it was 2 a.m.; (2) there
22 were juveniles in the vehicle; (3) there was visible damage to the ignition; (4) there
23 was no key in the ignition even though the vehicle was running, and (5) Respondent
Macias used a pair of pliers to turn the vehicle ignition off.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 D. The deputies' questions should have been preceded by Miranda and Juvenile
2 warnings. The questions that followed were posed after a measure of calm had been
3 restored.

4 E. The State has established by a preponderance of the evidence that the Respondents
5 made a knowing, intelligent and voluntary waiver of their Miranda and Juvenile
6 warnings.

7 F. Neither Deputy Corliss nor any of the other officers were close enough to overhear
8 the Miranda or Juvenile Warnings being read to the Respondents. State v. Davis 73
9 Wn.2d 271 (1968) was not implicated.

10 G. In light of these conclusions and the facts already established, Respondent Macias
11 was found guilty beyond a reasonable doubt of Possession of a Stolen Vehicle and
12 Respondent Gaona was found guilty beyond a reasonable doubt of Theft of a Motor
13 Vehicle.

14 H. Moreover, in light of the above, Respondent Macias, who occupied the driver's seat
15 and who turned off the Toyota's ignition with a pair of pliers and who admitted to
16 stealing the car, was found guilty beyond a reasonable doubt of Malicious Mischief in
17 the Third Degree. Additionally, because of the testimony by Mr. Arnold, the Court
18 found that the steering column was in fact damaged for purposes of this ruling.

19 I. The Court also concluded that both Respondents were guilty of Unlawful Possession
20 of a Firearm in the Second Degree.

21 J. The weapon at issue was located under the passenger's seat of a vehicle, ^{which vehicle was} admittedly
22 stolen by the Respondents in North Seattle. *by*

23 K. The stolen vehicle was ultimately located in the White Center area of Seattle.

1 L. The Court stated that considering the debris where the cap and weapon were found, it
2 is sufficiently clear that the cap and weapon were recently located under the
3 passenger seat.

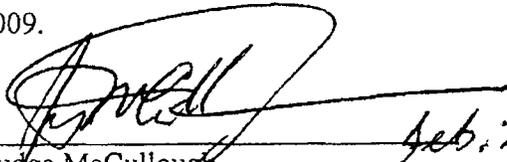
4 M. Both Respondents admitted to handling the gun.

5 N. The Court concluded that under these circumstances there was adequate proof
6 adduced that this was more than just a fleeting possession.

7 O. The Court further concluded that both driver and passenger of the stolen vehicle had
8 easy access to the gun and according to Deputy Curry, could have been easily and
9 quickly obtained and fired.

10 P. Finally, Respondent Macias was found not guilty of Possession of Vehicle Theft
11 Tools because the list delineated in RCW 9A.56.063 does not support the conclusion
12 beyond a reasonable doubt that a common household tool such as a pair of pliers was
13 adapted for the commission of a theft. Not only is a pair of pliers not suggested in the
14 listing of tools, but there is no proof as to how the car was stolen or taken whether by
15 pliers or otherwise.

16
17
18 DATED this 5th day of January, 2009.

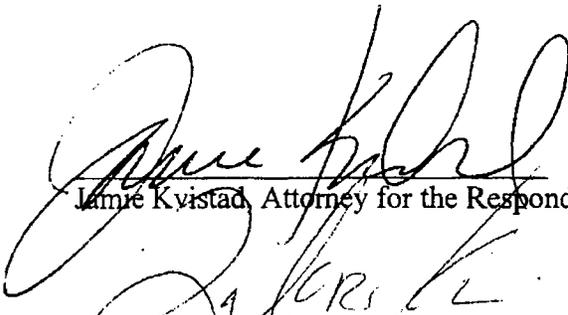
19 
20 Judge McCullough Feb. 24, 2009

21
22 By: 
23 Stephen A. Herschkowitz, WSBA #40001
Deputy Prosecuting Attorney

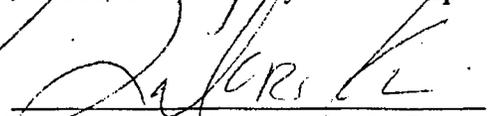
Daniel T. Satterberg, Prosecuting Attorney
Juvenile Court
1211 E. Alder
Seattle, Washington 98122
(206) 296-9025
FAX (206) 296-8869

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23



Jamie Kvistad, Attorney for the Respondent Macias



Tomackie Kim, Attorney for the Respondent Gaona

ORIGINAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Daniel T. Satterberg, Prosecuting Attorney
Juvenile Court
1211 E. Alder
Seattle, Washington 98122
(206) 296-9025
FAX (206) 296-8869

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

STATE OF WASHINGTON)	
Respondent)	CoA No. 59805-8
)	
v.)	
)	
JOVANY G.,)	
Appellant.)	

DECLARATION OF SERVICE

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

1. THAT ON THE 21ST DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S OPENING BRIEF BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL ADDRESSED AS FOLLOWS:

[X] Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

[X] Jovany G
1946 E. 74th Street
Los Angeles, CA 90001

SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY AUGUST, 2009

x *Ann Joyce*

FILED
STATE OF WASHINGTON
2009 AUG 21 PM 4:39