

COA NO. 66017-9-I

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

REC'D  
JAN 31 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JOSE ANAYA,

Appellant.

2011 JAN 31 PM 4:54

COURT OF APPEALS  
STATE OF WASHINGTON  
*[Signature]*

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

The Honorable Beth Andrus, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to suppress appellant's incriminating statement to police, in violation of appellant's Fifth Amendment right to avoid self-incrimination.

2. As part of its CrR 3.5 ruling, the court erred in entering "finding of fact" 7 and 11 and conclusions of law 2(a)(1) and 2(a)(2). CP 19-20.<sup>1</sup>

Issue Pertaining to Assignments of Error

Without the benefit of Miranda<sup>2</sup> warnings, appellant made an incriminating statement in response to police questioning. Is reversal of both convictions required because the trial court wrongly concluded police did not "interrogate" appellant?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Jose Anaya by amended information with delivery of a controlled substance (cocaine) and making a false statement to a public servant. CP 5-6. The court denied Anaya's pretrial CrR 3.5 motion to suppress an incriminating statement, which consisted of giving a

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<sup>1</sup> The trial court's "Written Findings of Fact and conclusions of Law on CrR 3.5 Motion to Admit the Defendant's Statements" is attached as appendix A to this brief.

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

false name to police upon being contacted shortly after a suspected drug transaction. CP 17-21. A jury subsequently convicted on both counts. CP 15-16. The sentencing court imposed concurrent sentences of 60 months confinement for the controlled substance conviction and one year for the false statement conviction. CP 23, 28. This appeal follows. CP 34-43.

2. Jury Trial

On March 29, 2010, Seattle police conducted an undercover "buy and slide" operation in the Pioneer Square area of downtown Seattle known as "Roll the Rock." 1RP<sup>3</sup> 71-74. In a "buy and slide" operation, an undercover officer buys drugs, a separate police team contacts and identifies the seller, and then that team releases the seller from the scene. 1RP 71-73. This is an investigative stage used to gather information and prepare for a "take-down" date, which involves police rounding up and arresting all suspects on a given day for which there is probable cause to arrest. 1RP 72.

Officer Erin Rodriguez, the undercover buyer, was given pre-recorded buy money to buy drugs. 1RP 74, 82. Rodriguez approached a female, identified as Denise Little, and asked for a "twenty," which is slang for twenty dollars worth of narcotics. 1RP 102-03. Little took

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<sup>3</sup> The verbatim report of proceedings is referenced as follows: 1RP - 8/19/10 and 8/23/10; 2RP 8/24/10, 8/25/10 and 9/9/10.

Rodriguez about a block away and stopped in front of Mason's Furniture. 1RP 104-05. Little approached a man and appeared to speak to him. 1RP 122. Little returned to Rodriguez, who gave Little the pre-recorded buy money. 1RP 105, 122. Little and the man then made a "hand-to-hand exchange." 1RP 105, 107.

Rodriguez did not see what Little gave the man, nor did she see what the man gave Little. 1RP 108. The exchange occurred quickly. 1RP 119. Little then approached Rodriguez and handed her narcotics. 1RP 108, 114. Rodriguez gave a "good-buy" signal and walked away from the area. 1RP 108. The suspected narcotics received from Little, weighing 0.2 grams, later tested positive for cocaine. 1RP 137.

In court, Rodriguez identified Jose Anaya as the man who conducted the hand-to-hand transaction with Little. 1RP 103, 105. Rodriguez did not stare at the person she later identified as Anaya because that could have blown her cover. 1RP 119. Detective Daniel Romero, who accompanied Rodriguez as an undercover surveillance officer, also identified Anaya in court.<sup>4</sup> 1RP 73-74, 78. He did not actually see anything exchange hands. 1RP 78.

Officer Matthew Pasquan was the undercover trailer officer. 2RP 8. He identified Anaya in court as the man who conducted a hand-to-hand

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<sup>4</sup> The undercover operation involved about 35 cases. 1RP 89.

transaction with Little. 2RP 10, 12-13.<sup>5</sup> Pasquan could not see what was exchanged. 2RP 26. He observed the event from 40 feet away. 2RP 15-16, 22. After the exchange, Pasquan watched the "Hispanic man" he later identified as Anaya walk down the block. 2RP 17. Another team of officers contacted Anaya at that point. 2RP 17.

Part of Pasquan's role was to observe what suspected dealers do after the buy occurs because the latter often work in concert with others by giving them drugs or money after the buy. 2RP 9-10. The man Pasquan identified as Anaya did not conduct any further hand-to-hand exchanges after his encounter with Little. 2RP 25. Pasquan did not see him drop or slough anything. 2RP 25-26.

Officer Forrest Lednicky and Sergeant Yoon were given a description via radio of the last location in which the man later identified as Anaya was seen. 2RP 35. The description was of a Hispanic male in his forties wearing a dark colored jacket and tan pants. 2RP 43-44.

Upon contacting Anaya about a block away from Mason's Furniture, Lednicky asked Anaya for physical identification because "people are not always truthful" and "will give me a false name." 2RP 34,

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<sup>5</sup> Pasquan had been involved in five to eight cases as part of the undercover operation. 2RP 24.

36. People give false names for a number of reasons, including having a warrant out for their arrest on another case. 2RP 48.

Officer Lednicky testified it was important to identify Anaya because, as part of this undercover operation, "we were gathering facts on potential drug dealers in the Pioneer Square area. Because of the nature of the operation we had to identify him because of what he was involved in with the undercover officer we could not let him go without actually being able to ID who he was." 2RP 36-37.

Lednicky asked for a name after Anaya said he had no physical identification. 2RP 37. Anaya gave him the name of "Luis Montos" and a birth date. 2RP 37-38. Lednicky ran a computer check and was unable to locate any record with the name provided by Anaya. 2RP 39.

Police conducted an exhaustive search of Anaya's person for weapons and contraband and found nothing of evidentiary value. 2RP 40-41, 49. The pre-recorded buy money was not on Anaya's person. 2RP 49. Assuming Little and Anaya exchanged money for drugs, Officer Pasquan agreed Anaya should have had the marked money on him when police contacted him. 2RP 26.

No drugs were found on Anaya, although drug dealers often have drugs on them. 1RP 83-84; 2RP 51-52. No small bills were found on Anaya's person, although it is common for drug dealers to possess them.

2RP 50. There was no money in different pockets, although that would be consistent with drug dealing. 2RP 50-51. Some small-time drug dealers are users and sell drugs to support their habit. 2RP 52. Lednicky did not notice any behavior consistent with Anaya being high on drugs. 2RP 52. Drug dealers often have drug paraphernalia, such as a crack pipe, on them. 1RP 84-85; 2RP 52-53. Anaya had no drug paraphernalia on him. 2RP 53.

At no time did Lednicky see Anaya slough anything. 2RP 47. Lednicky agreed police found zero evidence from the search to support the idea Anaya was dealing drugs. 2RP 53-54. After searching Anaya, police transported him to police headquarters for fingerprinting. 2RP 40.

Anaya, testifying in his own defense, told the jury he was living in the Mission at Second and Main. 2RP 56. At around 4 p.m. on the day in question, he was waiting for the bus on Third Avenue to take him up to Beacon Hill, where he planned to ask an acquaintance if he had any flooring work for him. 2RP 57-59, 64-65. Other people were waiting for the bus. 2RP 59. A car pulled up to the bus stop, at which point police officers got out and called him over. 2RP 59-60.

The officer asked where the money and drugs were. 2RP 60. Anaya said he did not know what the officer was talking about. 2RP 60-61. The officer then asked for his name. 2RP 61. Anaya admitted he gave the name "Luis Montos." 2RP 56, 60. He gave a false name because he

had a warrant out for his arrest and thought he could possibly avoid going to jail by giving a false name. 2RP 60, 63, 70. The officer told him "you gave me a false name because you were selling drugs." 2RP 61.

Anaya denied knowing Denise Little and standing in front of Mason's Furniture. 2RP 62, 65. He denied selling or buying drugs that day. 2RP 62. The defense theory was that Anaya was in the wrong place at the wrong time: Anaya was waiting for a bus and had nothing to do with the drug deal. 2RP 102, 113.

C. ARGUMENT

THE COURT WRONGLY FAILED TO SUPPRESS AN INCRIMINATING STATEMENT MADE BY ANAYA GIVEN IN RESPONSE TO CUSTODIAL INTERROGATION.

Anaya's incriminating statement regarding the false name, admitted as evidence of guilt at trial, should have been suppressed because he was subject to custodial interrogation without being read his Miranda rights. Reversal of his convictions for delivery of a controlled substance and making a false statement to a public servant is required because this constitutional error was not harmless beyond a reasonable doubt.

1. CrR 3.5 Hearing

Testimony provided during the CrR 3.5 hearing was consistent with that provided at trial. On March 29, 2010, Officer Lednický was assigned to contact individuals suspected of delivering narcotics in the

Pioneer Square area. CP 18 (FF 1). This was a "buy and slide" operation, which involved three sequential steps: (1) an undercover officer buys drugs; (2) police identify the seller; and (3) police release the seller from the scene. 1RP 37-38. A buy and slide operation is different from a normal undercover "buy bust" operation, where the seller is immediately arrested. 1RP 37.

On the day in question, Officer Lednicky and Sergeant Yoon received a "good-buy" sign and a description of the suspect from an undercover officer. 1RP 38-39. Officer Lednicky and Sergeant Yoon, driving an unmarked patrol car, contacted Anaya near the intersection of Third Avenue and Main Street. CP 18 (FF 2); 1RP 38-39. The two officers, armed and in police uniform, left their police car and contacted Anaya as he walked along the sidewalk. CP 18 (FF 1, 3, 4); 1RP 46. They ordered Anaya to "stop" so as to speak to him. CP 18 (FF 4). They told Anaya they wished to speak with him and told him to come closer to their police car. CP 18 (FF 4). Anaya cooperated and was not handcuffed. CP 18 (FF 5).

Officer Lednicky approached Anaya, placed his hand on Anaya's elbow and walked him from the sidewalk to the police car. CP 18 (FF 6). Sergeant Yoon possibly had his hands on Anaya. 1RP 50-51. Lednicky did not need to use force to gain Anaya's cooperation in walking toward

the police car. CP 18 (FF 6). Police told Anaya that he was a possible suspect they were looking for and they just needed to identify him. 1RP 41. Anaya therefore knew police were investigating a criminal matter. 1RP 47. Lednicky told Anaya he was not under arrest, but would be released as soon as they could identify him. 1RP 41. Anaya was not free to leave if he wished because police wanted to identify him. 1RP 43.

Anaya was unable to provide a driver's license or any other form of identification upon request by the officers. CP 19 (FF 8). Without notifying Anaya of his Miranda rights, Lednicky asked Anaya for his name and date of birth. CP 19 (FF 9). Anaya provided a name and date of birth. CP 19 (FF 10). No other questions were asked concerning the suspected drug transaction. CP 19 (FF 12). Officer Lednicky then checked the name and date of birth provided by Anaya on the computer in his patrol car. CP 19 (FF 14). Sergeant Yoon remained outside the car with Anaya. CP 19 (FF 14). The officers could not confirm the identity provided by Anaya. CP 20 (FF 15). The officers then handcuffed, searched and transported Anaya to a police precinct for fingerprinting. CP 20 (FF 16).

The court's true findings of fact are unchallenged except for finding 7, in which the court found "Officer Lednicky told the Defendant . . . he would be released once the police were able to confirm

his identity." CP 19 (FF 7). Substantial evidence does not support the finding that Officer Lednicky told Anaya he would be released once the police were able to "confirm" his identity. See State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002) (the substantial evidence standard of review applies to the trial court's challenged findings). Lednicky said nothing to Anaya about needing to "confirm" his identity. He simply told Anaya he would be released as soon as they could identify him. 1RP 41.

The trial court determined Anaya was in "custody" when police asked him questions because his movement was restricted by Officer Lednicky's order to stop and to remain near the police car for several minutes. CP 19 (FF 13). The court, however, also ruled Anaya's statement to police regarding the false name and date of birth was admissible because police did not subject Anaya to "interrogation." CP 20 (CL 2(a)(1)). According to the court, the questions posed to Anaya were not reasonably likely to elicit an incriminating response and constituted those normally attendant to arrest. CP 20 (CL 2(a)(1)).

2. Miranda Rights Must Precede Custodial Interrogation.

The Fifth Amendment to the United States Constitution commands "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The right against self-incrimination protects an accused from being compelled to provide the state with "testimonial or

communicative" evidence. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

To preserve an individual's Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings." State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444. Statements elicited in noncompliance with this rule must not be admitted as evidence at trial. Id. at 444, 476-77.

An "incriminating response" encompasses "any response — whether inculpatory or exculpatory — that the prosecution may seek to introduce at trial." Rhode Island v. Innis, 446 U.S. 291, 301 n.5, 100 S. Ct.

1682, 64 L. Ed. 2d 297 (1980). "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." Miranda, 384 U.S. at 476-477.

Police did not read Anaya his Miranda rights before questioning him. Anaya gave an incriminating statement in response to the officer's question. At trial, the prosecutor used Anaya's use of a false name showed consciousness of guilt regarding the charged drug delivery. 2RP 93, 96, 99, 101, 116.

The trial court determined Anaya was in custody when questioned. CP 19 (FF 13). The issue on appeal is whether the officer subjected Anaya to "interrogation." If the officer's question qualifies as "interrogation" and no exception to the Miranda requirement applies, then Anaya's statement should have been suppressed.

3. Whether Interrogation Took Place Is A Question Of Law Reviewed De Novo.

"[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the

police should know are reasonably likely to elicit an incriminating response from the suspect." Innis, 446 U.S. at 301. "The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts." Sargent, 111 Wn.2d at 651.

"It is the function of an appellate court to determine questions of law." State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). Questions of law are reviewed de novo, as are claimed denials of a constitutional right. State v. Campbell, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995); State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

Whether an interrogation was "custodial" is a question of law reviewed de novo. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004); Solomon, 114 Wn. App. at 787-89 (mixed question of law and fact reviewed de novo) (citing Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)).

Whether a question qualifies as "interrogation" should also be reviewed de novo. However, it has been stated "[w]hether an interrogation took place is a question of fact, subject to a clearly erroneous standard of review." State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992) (citing United States v. Booth, 669 F.2d 1231, 1238 (9th Cir. 1981)); see also State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633

(2009) (citing Walton for same standard without analysis). This is not the correct standard of review.

Walton relied on the Ninth Circuit's decision in Booth for this proposition. Booth held whether a suspect is in "custody" and whether "interrogation" occurred are both factual determinations subject only to the clearly erroneous standard of review. Booth, 669 F.2d at 1235-38. Booth is no longer good law on this point.

The United States Supreme Court in Thompson later held the issue of whether a suspect is in "custody" for Miranda purposes is a mixed question of law and fact subject to independent review. Thompson, 516 U.S. at 111-12. Thompson rejected the reasoning relied on by Booth. Thompson, 516 U.S. at 112-16.<sup>6</sup> Washington courts have followed suit. Lorenz, 152 Wn.2d at 30; Solomon, 114 Wn. App. at 787-89.

The Ninth Circuit no longer follows Booth, and instead recognizes whether questioning was an "interrogation" for Miranda purposes is a mixed question of law and fact, subject to de novo review. United States v. Chen, 439 F.3d 1037, 1040 (9th Cir. 2006); United States v. Foster, 227

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<sup>6</sup> The Supreme Court vacated the Ninth Circuit's decision because it applied the wrong standard of review. Thompson, 516 U.S. at 116. The Ninth Circuit had relied on Krantz v. Briggs, 983 F.2d 961, 963-64 (9th Cir.1993). Id. at 106 n.4. Krantz in turn relied on Booth and cases traced back to Booth. Krantz, 983 F.2d at 963-64.

F.3d 1096, 1102 (9th Cir. 2000). The analytical framework employed in Thompson compels this standard of review.

In addressing the "custody" part of the custodial interrogation question, the Supreme Court recognized the factual inquiry determines "the circumstances surrounding the interrogation." Thompson, 516 U.S. at 112. The legal inquiry determines, given the factual circumstances, whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Id. This is an objective test. Id. at 112. This legal inquiry "calls for application of the controlling legal standard to the historical facts" — an application reviewed de novo. Id. at 112-13.

There is no sound basis to apply a different kind of analysis to the issue of whether an "interrogation" took place for Miranda purposes. The presence or absence of "interrogation" is an objective test, as is the test for whether a suspect is in "custody." Sargent, 111 Wn.2d at 651; Thompson, 516 U.S. at 112. This is a legal standard. The legal inquiry calls for application of the "interrogation" standard to the historical facts of the case. Whether an interrogation took place is the ultimate inquiry calling for independent review.

This approach is consistent with established Washington law, from which cases like Walton have strayed. "A finding of fact is the assertion

that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." Williams, 96 Wn.2d at 221 (internal quotation marks omitted) (quoting Leschi Improvement Council v. Wash. State Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974)). "If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact, but if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law." State v. Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986). Accordingly, "if a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law." Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987); accord State v. Hutsell, 120 Wn.2d 913, 918-19, 845 P.2d 1325 (1993).

The term "interrogation" carries legal implications. It has its own legal test for whether it exists. The determination of whether an interrogation took place is a conclusion of law because it "is made by a process of legal reasoning from facts in evidence." Niedergang, 43 Wn. App. at 658-59. Whether the trial court derived proper conclusions of law from its findings of fact is a question of law reviewed de novo. Solomon, 114 Wn. App. at 789 (citing State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)).

4. Police Interrogated Anaya Without The Benefit Of Miranda Warnings And The Routine Booking Exception To The Miranda Requirement Is Inapplicable.

The trial court's ruling that police did not interrogate Anaya when they asked him for his name is wrong as a matter of law. CP 20 (CL 2(a)(1) and 2(a)(2)). In an otherwise fractured opinion, a majority of the United States Supreme Court in Pennsylvania v. Muniz determined police questions regarding name, address, height, weight, eye color, date of birth, and current age qualify as interrogation for Miranda purposes. Pennsylvania v. Muniz, 496 U.S. 582, 601-02, 608-10, 110 S. Ct. 2638, 110 L. Ed.2d 528 (1990). Specifically, a four-justice plurality concluded the biographical answers provided in response to interrogation were nonetheless admissible because the questions fell within a "routine booking question" exception, which exempts questions to secure the biographical data necessary to complete booking or pretrial services from Miranda protection. Muniz, 496 U.S. at 601-02 (Brennan, J., plurality opinion).<sup>7</sup> One justice rejected the routine booking exception altogether

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<sup>7</sup> The plurality opinion in Muniz regarding the booking exception is not binding. In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed.2d 260 (1977). In Muniz, however, no concurring opinion joined with the

while maintaining the answers were the product of custodial interrogation. Muniz, 496 U.S. at 608-10 (Marshall, J., concurring in part and dissenting in part).<sup>8</sup>

In light of Muniz, the real issue is not whether the question posed to Anaya qualified as interrogation. It did. Rather, the issue, properly conceptualized, is whether the question falls within an exception to the Miranda requirement.

In support of its ruling, the trial court cited Walton,<sup>9</sup> in which a defendant's pretrial booking statements about his address were not suppressible because routine background questions necessary for identification and to assist a judge in setting reasonable bail did not qualify as interrogation. Walton, 64 Wn. App. at 414. Routine questions during the booking process following arrest do not generally violate the prohibition against interrogation found in Miranda because such questions rarely elicit an incriminating response. State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987).

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plurality in regards to the routine booking exception issue, and therefore there is no holding in relation to that issue.

<sup>8</sup> The four remaining justices did not reach the booking exception issue, relying on the notion that the responses were not "testimonial" and thus unprotected by Miranda. Muniz, 496 U.S. at 608 (Rehnquist, J., concurring in part and dissenting in part).

<sup>9</sup> 1RP 56.

Anaya, however, was not subject to a routine booking process when police questioned him. Anaya was questioned on the street during the course of an investigative encounter. 1RP 37-39. Anaya was not placed under arrest before or after he was questioned. 1RP 43-44. "[B]ooking is essentially a clerical procedure, occurring soon after the suspect arrives at the police station." United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir.1983). To qualify for the application of the exception, the questions must be asked during a true booking. Mata-Abundiz, 717 F.2d at 1280. Such is not the case here. See also State v. Stevens, 181 Wis.2d 410, 434, 511 N.W.2d 591 (1994), overruled on other grounds, Richards v. Wisconsin, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed.2d 615 (1997) (refusing to extend booking exception to questions regarding name and residence asked at time of arrest); United States v. Ortiz, 835 F. Supp. 824, 835 (E.D. Pa. 1993) (if routine booking questions are to receive "the Muniz vaccine," they must be made as part of a lawful arrest; premise of the Muniz plurality was that the defendant was already subject to "booking" and therefore questions about "biographical data" were not investigatory and thus exempt from Miranda).

The routine booking exception is inapplicable to this case. The question posed to Anaya had an investigatory purpose. Police wanted his name so that they could arrest him at a later time in connection with the

undercover drug operation. 1RP 37-38. The question was posed during the course of an active investigation, at a time when police had no intention of arresting and booking Anaya. 1RP 37-39, 41, 43, 46-47. No Washington Court has ever extended the booking exception to cover questions posed to a suspect who is in custody for Miranda purposes but was not arrested and subsequently booked.

Even if the booking exception is expanded to encompass pre-arrest encounters in general, Anaya's incriminating statement should still be suppressed because the exception is inapplicable under the particular facts of this case. Objectively viewed, police should have known asking Anaya for his name was reasonably likely to elicit an incriminating response.

"Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." Innis, 446 U.S. at 300-01. The test for whether a question qualifies as "interrogation" is "whether under all of the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating response from the suspect." State v. Bradley, 105 Wn.2d 898, 903-04, 719 P.2d 546 (1986).

The focus of the definition of "interrogation" is on the defendant's perception, not the officer's intent. State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992). "The standard is an objective one, focusing on what

the officer knows or ought to know will be the result of his words and acts. The subjective intentions of the officer are not at issue." Sargent, 111 Wn.2d at 651.

"A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." Innis, 446 U.S. at 301. "But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating distinguish degrees of incrimination." Id. at 301-02.

Routine booking question exception does not apply if a police officer knows, or should know, that a routine booking question, although innocuous on its face, is reasonably likely to evoke an incriminating answer. Hughes v. State, 346 Md. 80, 91, 695 A.2d 132 (1997) (citing Mata-Abundiz, 717 F.2d at 1280 ("If . . . the questions are reasonably likely to elicit an incriminating response in a particular situation, the exception does not apply.")). The proper focus of analysis is whether the police reasonably should have known the question was likely to elicit an incriminating response. This inquiry is not subject to categorical

exceptions untied to the particular facts of a case. Bradley, 105 Wn.2d at 903-04.

The issue in this case is whether, given the circumstances, a police officer could reasonably foresee Anaya would give an incriminating statement in the form of a false name when asked his identity. Applying the objective test here compels the conclusion that an officer in Lednicky's position could reasonably foresee Anaya would give a false name in response to direct questioning. Innis, 446 U.S. at 301-02.

Anaya had just engaged in a suspected drug transaction when Officer Lednicky contacted him on the street. 1RP 38-39; CP 18 (FF 1 and 2). Police told Anaya that he was a possible suspect they were looking for and they just needed to identify him. 1RP 41. Anaya therefore knew police were investigating a criminal matter. 1RP 47. Lednicky told Anaya he was not under arrest, but would be released as soon as they could identify him. 1RP 41.

An objective officer in Officer Lednicky's position is reasonably aware of the following circumstances: (1) Anaya had just engaged in a suspected drug transaction; (2) those suspected of illegal activity commonly give a false identity when given the option in order to avoid arrest; and (3) the likelihood of a suspect giving a false name is increased when the suspect is aware that police intend to release a person after

receiving a name. Lednicky's trial testimony, in which he expressed his understanding that suspects give false names, is consistent with these observations. 2RP 36, 48; see also 2RP 61 (according to Anaya, the officer told him "you gave me a false name because you were selling drugs."). Providing a false name shows consciousness of guilt. State v. Chase, 59 Wn. App. 501, 507, 799 P.2d 272 (1990); see also 2RP 93, 96, 99, 101, 116 (prosecutor's theory of case was that Anaya's use of a false name showed consciousness of guilt regarding the charged drug delivery).

Under these circumstances, it was reasonably foreseeable Anaya would give a false name in response to police questioning. Anaya was interrogated and the "routine booking exception" cannot apply because the question about identity was reasonably likely to elicit an incriminating response in the form of a false name.

In ruling Anaya was not interrogated, the trial court relied on State v. McIntyre, 39 Wn. App. 1, 6, 691 P.2d 587 (1984). CP 20 (CL 2(a)(2)). McIntyre is inapposite. In that case, police arrested McIntyre in a house after McIntyre had earlier assaulted a police officer and taken his gun. McIntyre, 39 Wn. App. at 3-4. As police led him outside, McIntyre said he was sorry and had not meant to hurt anyone. Id. at 4. This statement was not in response to questioning. Id. Miranda warnings were not required because questioning did not prompt McIntyre's statement. Id. at

6. In contrast, police questioning indisputably prompted Anaya's incriminating statement.

The McIntyre court also stated "[t]he actions by the police were those normally attendant to arrest, and were not equivalent to interrogation." Id. at 6. Properly understood, the factual scenario in McIntyre involved a volunteered statement that was not made in response to any questioning. See State v. McWatters, 63 Wn. App. 911, 915, 822 P.2d 787 (1992) (defendant's incriminating statement not made in response to an officer's question is freely admissible). Again, that is a far cry from Anaya's case. Anaya did not volunteer his incriminating statement. He gave it in direct response to police questioning.

As set forth above, police questioning of Anaya's identity constituted interrogation because an objective officer could reasonably foresee Anaya would give a false name. The trial court therefore erred in concluding Anaya was not interrogated. CP 20 (CL 2(a)(1) and 2(a)(2)).

The court also erred in "finding" that "these statements were made voluntarily[.]" CP 19 (FF 11); see State v. Gaines, 122 Wn.2d 502, 508, 859 P.2d 36 (1993) ("A conclusion of law that is erroneously denominated a finding of fact is reviewed as a conclusion of law."). Incriminating statements obtained in violation of Miranda are deemed involuntary as a matter of law. Sargent, 111 Wn.2d at 648.

5. The Error In Admitting Anaya's Incriminating Statement Was Not Harmless Beyond A Reasonable Doubt

Admission of statements in violation of Miranda is an error of constitutional magnitude. State v. Wilson, 144 Wn. App. 166, 185, 181 P.3d 887 (2008). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The presumption of prejudice "may be overcome if and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained." State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

To convict under count I, the State needed to prove beyond a reasonable doubt that Anaya delivered a controlled substance, knowing the substance was controlled. RCW 69.50.401(1); 2RP 88 (Instruction 7). Officer Rodriguez gave pre-recorded buy money to Little. 1RP 105, 122. Then, according to police, Little and Anaya engaged in a hand to hand transaction. 1RP 105, 107. Little then gave cocaine to Rodriguez. 1RP 108, 114.

The State's case, however, suffered from a perplexing logical flaw.

No pre-recorded buy money was found on Anaya when he was thoroughly searched by the contact team. 2RP 40-41, 49. No officer saw Anaya slough anything at any time, even though he was continually observed. 2RP 25-26, 47. If Anaya engaged in a hand-to-hand transaction with Little by exchanging the cocaine for money, a reasonable juror would expect police to locate the marked money on Anaya's person. Officer Pasquan certainly did. 2RP 26. In fact, police found nothing on Anaya to indicate he had just engaged in a drug deal. 2RP 40-41, 49, 51-54. There were grounds for a rational juror to believe the State had failed to prove its case beyond a reasonable doubt.

Admission of Anaya's false statement may have inclined jurors to discount Anaya's "wrong place wrong time" defense and otherwise tipped the scales in favor of conviction on the delivery charge. The State used Anaya's incriminating statement to show consciousness of guilt. The prosecutor, drawing reasonable inferences from the evidence, argued to the jury that Anaya gave a false name "for a really good reason" — he had sold drugs just minutes before. 2RP 93. The prosecutor maintained "he gets caught and he gives a false statement, he's told by the officers that they are going to let him go and just give me your name, and then he gives a false name. Why would he do that? He does that to avoid being identified and

being tracked down later if it turned out that they were beginning to investigate him for other things." 2RP 96.

According to the prosecutor, the "whole reason" why Anaya gave a false name was because he had just completed a drug deal: "he wants to continue walking away and going about his business, he doesn't want to go to jail, so that's why he gave a false name." 2RP 99, 101. The prosecutor hammered the theme home so that the jury was left with no doubt about the importance of Anaya's false statement: "Officer Lednicky said yeah people give false names all the time, but again what was fresh in Mr. Anaya's mind? He had just been there dealing drugs in between people, because that's the way it works on the street." 2RP 116.

Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The reviewing court decides whether the actual verdict "was surely unattributable to the error; it does not decide whether a guilty verdict would have been rendered by a hypothetical [trier of fact] faced with the same record, except for the error." State v. Jackson, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), aff'd, 137 Wn.2d 712, 976 P.2d 1229 (1999).

Prejudice is presumed from the trial court's wrongful admission of Anaya's incriminating statement. Reversal is required because the State cannot show beyond a reasonable doubt that error in admitting Anaya's statement could not have possibly influenced the jury and contributed to the guilty verdict. Ashcraft, 71 Wn. App. at 465; Jackson, 87 Wn. App. at 813.

Had the trial court properly suppressed Anaya's statement of a false name, then the charge of making a false statement a public servant would necessarily have been dismissed before trial. There would have been no evidentiary basis for the charge because the false statement itself would have been suppressed. See State v. Knapstad, 107 Wn.2d 346, 349, 729 P.2d 48 (1986) (trial court has power to dismiss case prior to trial based on insufficiency of evidence).

At trial, Anaya admitted to giving a false name to police. 2RP 56, 60. He did so in an attempt to mitigate the impact of this evidence on the delivery charge, explaining he gave a false name because he had a warrant out for his arrest and thought he could possibly avoid going to jail by giving a false name. 2RP 56, 60, 63, 70.

"A defense lawyer who introduces preemptive testimony only after losing a battle to exclude it cannot be said to introduce the evidence voluntarily." State v. Thang, 145 Wn.2d 630, 648, 41 P.3d 1159 (2002).

The record clearly shows defense counsel altered his trial strategy in response to the trial court's CrR 3.5 ruling. When the only pending charge was delivery of a controlled substance, defense counsel moved to exclude Anaya's false statement to police as irrelevant. 1RP 3-4. The State subsequently amended the information to include a charge of making a false statement to an officer. 1RP 3-5.

After the court ruled the statement was not excluded under Miranda, defense counsel stated his client's intention of pleading guilty to the false statement charge, a gross misdemeanor. 1RP 57-58. Counsel argued the false statement evidence, following a plea of guilty to the false statement charge, would be irrelevant and prejudicial in the trial for the delivery charge under ER 403. 1RP 58-59, 61-62. The prosecutor argued the false statement showed consciousness of guilt on the delivery charge and was therefore admissible. 1RP 58-59, 62-63. Defense counsel indicated his client would proceed to trial on both counts if the court ruled the statement was admissible. 1RP 60-61. If the court ruled the statement was inadmissible, then his client would probably plead guilty to the false statement charge. 1RP 60-61. The court ruled the false statement was admissible under ER 403 because its probative value outweighed its prejudicial effect. 1RP 61-63. After discussing the matter with his client, defense counsel informed the court Anaya would proceed with not guilty pleas on both counts. 1RP 65.

Under these circumstances, it is clear Anaya would not have admitted making a false statement and the jury would not have otherwise heard evidence of one had the trial court properly suppressed the false statement as part of its CrR 3.5 ruling. Reversal of both counts is required.

D. CONCLUSION

For the reasons stated, this Court should reverse the convictions.

DATED this 31<sup>st</sup> day of January 2011.

Respectfully Submitted,

NIELSEN, BRÖMAN & KOCH, PLLC

  
\_\_\_\_\_  
CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant

# APPENDIX A

**FILED**  
KING COUNTY, WASHINGTON

**SEP 9 2010**

**SUPERIOR COURT CLERK  
JON SCHROEDER  
DEPUTY**

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSE GUILLARTE ANAYA,

Defendant.

No. 10-1-03722-1 SEA

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5  
MOTION TO ADMIT THE  
DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on Thursday, August 26, 2010 before the Honorable Judge Beth Andrus of the King County Superior Court. The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

**Daniel T. Satterberg, Prosecuting Attorney**  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

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1 After considering the evidence submitted by the parties and hearing argument, to wit:  
2 testimony from Seattle Police Department Officer Forrest Lednicky,  
3 the court enters the following findings of fact and conclusions of law as required by CrR 3.5.

4 1. THE UNDISPUTED FACTS:

- 5 1) That on March 29, 2010 in the City of Seattle, County of King, State of  
6 Washington, Officer Forrest Lednicky was in uniform identifying himself as a  
7 Seattle Police Officer, and that he was assigned to contact individuals suspected  
8 of delivering narcotics in a Seattle Police operation in and around Pioneer Square.
- 9 2) That Officer Lednicky was driving an unmarked patrol car, along with Sergeant  
10 Yoon and contacted JOSE GUILLARTE ANAYA (hereinafter Defendant) near  
11 the intersection of Third Avenue and Main Street.
- 12 3) Sergeant Yoon was also in a Seattle Police uniform identifying him as a law  
13 enforcement officer.
- 14 4) The two (2) officers exited their police car and contacted the Defendant as he  
15 walked along the sidewalk, and ordered him to "stop" so as to speak with him.  
16 The officers told the Defendant that they wished to speak with him and they told  
17 him to come closer to their police car.
- 18 5) During the contact the Defendant was not in handcuffs, and was acting in a  
19 cooperative manner during the contact.
- 20 6) Officer Lednicky approached the Defendant, placed his hand on the Defendant's  
21 elbow, and walked the Defendant from the sidewalk to the police car. The officer  
22 did not have to use force to gain the Defendant's cooperation in walking toward  
23 the police car.

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- 7) Officer Lednicky told the Defendant that he was not under arrest, and would be released once the police were able to confirm his identity.
- 8) The Defendant was unable to provide a driver's license, or any other form of identification upon request by the officers.
- 9) Both officers stood beside the Defendant outside the police car when Officer Lednicky asked the Defendant for his "name" and "date of birth."
- 10) The Defendant provided a name and date of birth.
- 11) These statements were made voluntarily, and not in response to any threats or promises.
- 12) No other questions were asked of the Defendant concerning the suspected drug transaction.
- 13) At the time the Defendant was asked these questions he was "in custody to the degree of a formal arrest," as his movement was restricted by Officer Lednicky's order for him to stop, and to remain near the police car for several minutes. Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984); *See also* State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), *cert. denied*, Harris v. Washington, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987); State v. Lorenz, 152 Wn.2d 22, 37, 93 P.3d 133 (2004).
- 14) Officer Lednicky then got into the front passenger seat of the patrol car to check the name and date of birth provided by the Defendant using his in-car laptop computer; Sgt. Yoon remained outside the car with the Defendant during this time.

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15) The officers, through use of their in-car laptop computer and Seattle Police records, could not confirm the identity provided by the Defendant.

16) The Defendant was then handcuffed, searched, and transported to the West Precinct for fingerprinting.

2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S STATEMENT(S):

a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

The following statement(s) of the defendant is/are admissible in the State's case-in-chief:

1) The name and date of birth provided by the Defendant.

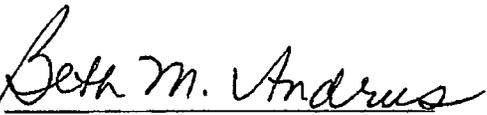
These statements are admissible because Miranda was not applicable. The questions asked and the answers given regarding the Defendant's identity do not amount to "interrogation," or its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682 (1980). The questions posed to the Defendant were not reasonably likely to elicit an incriminating response. State v. Johnson, 48 Wn. App. 681, 739 P.2d 1209 (1987).

2) The actions taken by the officers here, a request for the Defendant's name and date of birth for the purposes of identifying him, constitute those normally "attendant to arrest," thus are not considered "interrogation" for the purposes of Miranda. State v. McIntyre, 39 Wn. App. 1, 6, 691 P.2d 587 (1984).

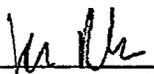
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In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this ~~8<sup>th</sup>~~ <sup>9<sup>th</sup></sup> day of September, 2010.

  
BETH ANDRUS  
The Honorable Judge  
King County Superior Court

Presented by   
PETER D. LEWICKI, WSBA # 39273  
Deputy Prosecuting Attorney

  
JESSE M. DUBOW, WSBA # 39999  
Northwest Defenders Association  
Attorney for Defendant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66017-9-I
	)	
JOSE ANAYA,	)	
	)	
Appellant.	)	

---

**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 1<sup>ST</sup> DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSE ANAYA  
DOC NO. 893200  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF JANUARY, 2011.

x *Patrick Mayovsky*