

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

LEVI STACY JONES,
Appellant.

No. 42475-4-II

UNPUBLISHED OPINION

Van Deren, J. — Levi Jones appeals his conviction for second degree burglary, arguing that the evidence does not support the findings of fact made by the trial court in denying his CrR 3.5 motion to suppress his statements. Concluding that the errors in the findings of fact are harmless, we affirm.¹

Jones was arrested regarding a burglary at a transfer station. After Pierce County Deputy Sheriff Todd Donato advised Jones of his constitutional rights, Jones agreed to answer the deputy's questions. Jones said he was in the transfer station helping another man take scrap metal. Jones acknowledged that he did not have permission to be on the premises of the transfer station or to take scrap metal from the transfer station.

The State charged Jones with second degree burglary. He moved under CrR 3.5 to suppress his statements to Donato. In denying the motion, the trial court made the following

¹ A commissioner of this court initially considered Jones's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

findings of fact:

1. Undisputed Facts. On July 19, 2010, at approximately 3:30 a.m., officers responded to a report of a burglary in progress at the Purdy Transfer Station located at 14515 54th Avenue Northwest in Gig Harbor. Jason Hammelman was working as an unarmed night security guard when he observed two men inside the fenced area of the Transfer Station removing non-ferrous metals from bins. Hammelman called 911 to report the burglary.

Two Gig Harbor officers arrived and stationed themselves at the north corners of the property to contain the scene. Deputy Donato and [Pierce County] Deputy [Sheriff David] Plummer responded to the south end of the property and positioned themselves near the Transfer Station. The deputies observed two white male individuals inside the fenced area of the Transfer Station. The two men appeared to be pulling metal items out of bins and running those items to the fence. [Pierce County] Deputy [Sheriff Theron] Hardesty arrived with his K9 partner, Cliff. The two men saw the officers and attempted to flee. One of the suspects was apprehended immediately within the fenced area by K9 Cliff and he was identified as Richard McCord. Deputy Hardesty observed the other suspect jump the fence and run down a paved road on the property. Hardesty commanded K9 Cliff to begin tracking from the point at which the suspect had jumped the fence. K9 Cliff tracked in the direction the suspect had fled and signaled to Hardesty when he came across a bundle of metal along the way. The defendant, Levi Jones, was located hiding near a tree a short distance from the fenced area. Deputy Hardesty recognized the defendant as the suspect who had jumped the fence and fled. The defendant was placed under arrest by Deputy Plummer and transported in a police car back to the Transfer Station to the custody of the primary investigating officer, Deputy Donato.

2. Defendant was informed of his rights. Deputy Donato contacted the defendant in the police car a couple of minutes after he had been arrested and advised him of his *Miranda*^[2] Warnings in a timely manner from a department issued card. During his testimony, Deputy Donato recited the *Miranda* warnings as he advised the defendant on July 19, 2010.
3. Defendant voluntarily waived his rights. The defendant orally acknowledged that he understood his constitutional rights. The defendant did not express any confusion regarding his rights.
4. The statements were given freely. Deputy Donato did not threaten or use any duress to coerce the defendant to waive his right to remain silent and make statements. The defendant did not invoke his right to remain silent nor did he request an attorney at any time.

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

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Clerk's Papers at 103-05 (underline omitted).

A jury convicted Jones as charged.

Jones argues that finding of fact 1 is not supported by the evidence because neither Hammelman nor Hardesty testified during the CrR 3.5 hearing. Thus, he contends that this court must remand to strike the portions of the findings referring to Hammelman and Hardesty. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The State responds that Donato and Plummer testified during the CrR 3.5 hearing regarding some of Hardesty's actions. It concedes that there was no testimony during the CrR 3.5 hearing as to (1) Hammelman's actions, (2) the identity of the K9 unit, (3) Hardesty's command to the K9, (4) the K9's signal to Hardesty, and (5) Hardesty's recognition of Jones as the suspect. But it contends any errors in making those findings are harmless because none are material to whether Jones's statements to Donato were voluntary. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

We agree with the State. Neither Hammelman's nor Hardesty's actions were relevant to whether Jones's statements to Donato, made after having been advised of his constitutional rights, were voluntary and therefore admissible. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

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Penoyar, J.

Johanson, A.C.J.