No. 44840-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW M. STEELE,

Appellant.

---

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

The Honorable James R. Orlando

---

# BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Andrew Steele's Fifth Amendment right against self-incrimination when it admitted his statements elicited by police officers during a custodial interrogation prior to advisement of his *Miranda*[1] rights, as well as his tainted post-warning statement.

2. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 9.

3. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 11.

4. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 13.

5. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact 14.

6. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the trial court erred in entering Conclusion of Law 1.

7. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the trial court erred in entering Conclusion of Law 2.

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[1] *Miranda v. Arizona*, 364 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

8. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the trial court erred in entering Conclusion of Law 3.

9. The trial court abused its discretion when it categorically refused to consider Mr. Steele's request for a Drug Offender Sentencing Alternative (DOSA).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fifth Amendment right against self-incrimination prohibits admission of a suspect's statements elicited during a custodial interrogation, in the absence of evidence the suspect was advised of his *Miranda* rights, and he knowingly, intelligently, and voluntarily waived those rights. A suspect is subject to custodial interrogation when his freedom of action is curtailed in any significant way and he is subject to express or implicit questioning by a state agent. Here, Mr. Steele agreed to meet a detective in a store parking lot, but the detective arrived with a second officer, he arranged for several marked patrol cars to be in the parking lot, and he informed Mr. Steele that finding a police officer's stolen firearm was a priority. Mr. Steele was searched for weapons prior to getting into an unmarked patrol car and driven to a location where he stated he had last seen the firearm, during which time the detective questioned him, and he remained in the patrol car accompanied by one

officer "at all times" while the other officer unsuccessfully searched for the firearm. Mr. Steele was then taken to the police station, advised of his *Miranda* rights for the first time, whereupon he gave a formal statement. Under these circumstances, did the trial court err in admitting Mr. Steele's pre-warning statements and post-warning formal statement against him at trial? (Assignments of Error 1-8)

2. A sentencing court abuses its discretion when it categorically refuses to consider a DOSA for an eligible offender. Did the court here abuse its discretion when it denied Mr. Steele's request for a DOSA, on the grounds it categorically refused to consider a DOSA for any defendant with an offender score above '9'? (Assignment of Error 9)

C. STATEMENT OF THE CASE

On the evening of December 28, 2011, Officer Joshua Deroche's truck was broken into and a backpack containing his uniform, badge, ammunition, and a personal firearm was taken. RP 106, 107, 108-09, 113. The following day, Detective Stuart Hoisington received a telephone call from James Baldwin who reported that Andrew Steele had been at his house the previous evening and showed him a backpack containing a police uniform, a police badge, a holster, and a firearm. RP 135, 138, 147, 149-59, 176.

Detective Hoisington went to Mr. Steele's house, spoke on the telephone with his wife, and twice spoke on the telephone with Mr. Steele, after which Mr. Steele agreed to meet in front of a grocery store. RP 30-32, 154-55. Detective Hoisington went to the store with Detective Erik Timothy and he arranged for several marked patrol cars to be in the parking lot. RP 155. Detective Hoisington informed Mr. Steele that locating the stolen items was a "priority" and he asked whether Mr. Steele could show him where to find the items. RP 34-35. Mr. Steele stated he was at a truck stop when he saw an unknown man drop a backpack in a brushy area behind the service station, his curiosity was piqued, he retrieved the backpack, and then returned it to the bushes. RP 54. He then "agreed to accompany" the detectives to the truck stop, and he was searched prior to getting into the back of Detective Timothy's unmarked patrol car. RP 36, 157-58.

During the 10-15 minute drive to the truck stop, Detective Hoisington and Mr. Steele "continu[ed] to have a conversation" about the stolen items. RP 37. At the truck stop, Mr. Steele remained in the car while the detectives took turns searching the brushy area indicated by Mr. Steele, without success. RP 160-61. One of the detectives stayed with Mr. Steele in the car "at all times, and Mr. Steele was not out of the car. RP 38-40, 55.

Following the unsuccessful search, Ms. Steele acquiesced to Detective Hoisington's request that he go to the police station and give a formal statement. RP 161. Mr. Steele was placed in an interview room and, for the first time, he was advised of his Miranda rights, approximately one hour and twenty-five minutes after the meeting in front of the store. RP 45. Mr. Steele gave a formal statement in which he stated that he and Brian Matter went to the truck stop where he saw an unknown man drop a backpack into bushes behind the service station. Ex. 3 at 3-9. Mr. Steele retrieved the backpack, looked in it, and saw a firearm. Ex. 3 at 4, 10. He put the backpack in the car trunk and they drove to James Baldwin's house. Ex. 3 at 11, 14. Mr. Steele showed Mr. Baldwin the backpack and gave him a pair of gloves. Ex. 3 at 12. Mr. Baldwin looked through the backpack and found the officer's badge. Ex. 3 at 12. According to Mr. Steele, Mr. Baldwin and Mr. Matter "started flipping out on me," he and Mr. Matter drove back to the truck stop, and Mr. Steele put the backpack back into the bushes. Ex. 3 at 12, 14.

Mr. Steele was charged with first degree unlawful possession of a firearm, possession of a stolen firearm, and third degree possession of stolen property.

Prior to trial, the court held a CrR 3.5 hearing on Mr. Steele's motion to suppress his pre-warning and post-warning statements to the

police. RP 28-87; CP 10-18. After hearing testimony from Detective Hoisington and Mr. Steele, the court concluded the statements were admissible, on the grounds Mr. Steele was not in custody until after he gave a formal statement, was handcuffed, and placed in a holding cell. CP 72 (Conclusion of Law 1). The court further concluded, "Prior to that point, the defendant's interaction with law enforcement was a voluntary, consensual, and cordial social contact that was free of coercion. CP 72 (Conclusion of Law 2). Finally, the court concluded, "Once advised of his Miranda rights, the defendant knowingly, voluntarily, and intelligently waived those rights and spoke with law enforcement." CP 72 (Conclusion of Law 3).

Mr. Steele was convicted as charged. CP 28-30. At sentencing, Mr. Steele requested a DOSA. RP 394-86. The court refused to consider the request, on the grounds that "I ... believe that people who have offenders [sic] that exceed nine shouldn't get the benefits of leniency." RP 391. Accordingly, the court imposed a standard range sentence on each count, to be served consecutively, as required by statute. CP 55-59, 67-68.

D. ARGUMENT

**1. The trial court erroneously admitted Mr. Steele's statements elicited during a custodial interrogation without the benefit of *Miranda* warnings, as well his tainted post-warning statement, in violation of the constitutional right against self-incrimination.**

a. Police officers must advise a suspect of his *Miranda* rights prior to subjecting the suspect to a custodial interrogation.

The Fifth Amendment to the United States Constitution[2] and Article I, section 9 of the Washington Constitution[3] guarantee a suspect the right against self-incrimination. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). The federal and state provisions are given the same interpretation. *Id.* The right against self-incrimination is liberally construed in favor of the suspect. *Id.* at 236 (citing *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed.2d 1118 (1951).

A suspect must be advised of his right to remain silent prior to any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *Miranda* warnings must be given when an interview is a (1) custodial (2) interrogation (3) by a state agent.

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[2] "No person ... shall be compelled in any criminal case to be a witness against himself...."

[3] "No person shall be compelled in any criminal case to give evidence against himself...."

*State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). The warnings serve to eliminate both coercion and deception.

> The overall concern of our prior cases is with the dual purposes of (1) protecting the individual from the potentiality of compulsion or coercion inherent in in-custody interrogation, and (2) protecting the individual from deceptive practices of interrogation.

*State v. Hensler*, 109 Wn.2d 357, 362, 745 P.2d 34 (1987) (citing *Heinemann v. Whitman County*, 105 Wn.2d 796, 806, 718 P.2d 789 (1986)).

Whether the interview was a custodial interrogation that required *Miranda* warnings is a question of law that is reviewed *de novo*. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

b. Mr. Steele was in custody from the time he met the detectives in front of the store because a reasonable person in his position would not have felt free to terminate the interview.

For purposes of *Miranda*, a suspect is considered "in custody" when he is formally arrested as well as at any time "the defendant's movement was restricted at the time of questioning." *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004); *accord California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983); *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). *Miranda* warnings are required whenever the suspect is "in custody *or*

*otherwise deprived of his freedom of action in any significant way.*" *Orozco v. Texas*, 394 U.S. 324, 327, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) (quoting *Miranda*, 384 U.S. at 477) (emphasis in original); *accord Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). Whether a suspect is "in custody" is determined by the totality of the circumstances, including whether the suspect was informed that he was free to leave. *United States v. Craighead*, 539 F.3d 1073, 1082, 1087 (9th Cir. 2008).

Under the totality of circumstances here, Mr. Steele was in custody and not free to leave the parking lot of his own volition. Prior to the meeting, Detective Hoisington had reason to believe that Mr. Steele, a known felon, had been or was in possession of the officer's stolen firearm. RP 30. Mr. Steele agreed to meet in the parking lot only after Detective Hoisington went to his house, spoke on the telephone with his wife, and twice spoke on the telephone with Mr. Steele, all in a single day. RP 30-32. Detective Hoisington arrived at the parking lot accompanied by Detective Erik Timothy, both of whom were in plain clothes with badges and weapons visible. RP 32-33, 48. In addition to arriving with a second officer, Detective Hoisington arranged for several marked patrol cars to "position[] themselves in the neighborhood based on the fact that there was a firearm involved in the incident." RP 33, 49-50.

In response to questions by Detective Hoisington, Mr. Steele indicated he would show the detectives where he found the backpack. RP 35, 52. He was then frisked and put in the back of Detective Timothy's unmarked patrol car and driven to the truck stop. RP 36-37, 53. He remained in the back of the patrol car under watch "at all times" as the detectives took turns searching the brushy area indicated by Mr. Steele as the last place he saw the backpack. RP 38-40, 55. When the search proved unsuccessful, Detective Hoisington "asked Mr. Steele if he would be willing to accompany us to Tacoma Police Headquarters and make a formal statement." RP 40. At the police station, Mr. Steele was placed in an interview room and, for the first time, advised of his *Miranda* rights. RP 40-42. Mr. Steele signed a waiver of his rights and gave a formal statement. RP 43-44.

Approximately one hour and twenty-five minutes elapsed from the initial contact in the parking lot until the formal interview. RP 45. He had been met at the store by not just one detective, but two detectives, and he saw the patrol cars positioned in the area. He was frisked prior to getting into Detective Timothy's car and he was watched by a detective at all times during the search of the truck stop. Throughout this time, Mr. Steele was never informed that he did not have to respond to the questioning or that he was free to terminate the interview. RP 56-57, 59-60. "[T]he

absence of police advisement that the suspect is not under formal arrest, or that the suspect is at liberty to decline to answer questions, has been identified as an important indicium of the existence of a custodial setting." *United States v. Griffin*, 922 F.2d 1343, 1350 (8th Cir. 1990).

Given the officer's urgency in investigating the stolen firearm and badge and his tip that Mr. Steele had been in possession of the items, it is unreasonable to conclude Detective Hoisington would have allowed Mr. Steele to freely leave the parking lot or refuse to go to the police station. Under these circumstances, Mr. Steele's freedom of movement was restricted and he was "in custody" for purposes of *Miranda*. The court's findings and conclusion to the contrary are unsupported by the record.

c. Mr. Steele was subject to interrogation prior to being advised of his rights, because the detective's questions were reasonably likely to elicit an incriminating response.

Interrogation 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." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *accord Sargent*, 111 Wn.2d at 650. Whenever questions are asked that are likely to elicit an incriminating response and are not necessary to serve an

independent purpose, such as booking questions, *Miranda* warnings must be given. *Sargent*, 111 Wn.2d at 652.

The analysis focuses primarily on the suspect's perceptions rather than on the officer's intent. *Innis*, 446 U.S. at 301. The officer's intent, however, is not entirely irrelevant as it may have a bearing on whether the officer should have known his words or actions were reasonably likely to elicit an incriminating response. *Id.* at 301-02. For example, in *State v. Collins*, the court found the suspect was subject to interrogation when an officer suggested it would be helpful if they had the weapon used in a shooting. 30 Wn. App. 1, 11, 632 P.2d 68 (1981).

Here, Detective Hoisington admitted he questioned Mr. Steele about the stolen firearm and related items, even before they met in the parking lot. "[W]e had established over the phone, you know, that I thought he knew what we were discussing, and I asked him, you know, it's a priority that we find these things. Can you show us where these things are?" RP 35-36. At the parking lot, he continued to ask about the missing items. RP 35. During the drive to the truck stop, "[w]e were continuing to have a conversation about, you know, where these items were located. Okay. More specifically, you know, where at the truck stop are they?" RP 37. This "conversation" was overt questioning.

Moreover, Detective Hoisington was asking Mr. Steele to help locate a stolen firearm, the very possession of which was a felony, compounded by the fact that Mr. Steele, as a known felon, was prohibited from possession any firearm. "The relationship of the question asked to the crime suspected is highly relevant." *State v. Shuffelen*, 150 Wn. App. 244, 257, 208 P.3d 1167 (2009). Detective Hoisington's questions were clearly intended to elicit incriminating statements without the benefit of *Miranda* warnings.

The post-warning statement was equally inadmissible, as tainted by the pre-warning custodial interrogation. The two-stage "question first, warn second" strategy of police interrogation was expressly denounced in *Missouri v. Seibert*, in which the United States Supreme Court suppressed a post-warning confession obtained after officers elicited an unwarned confession. 542 U.S. 600, 617, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). The Court reasoned, "The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." 542 U.S. at 611. The Court continued:

> By any objective measure ... it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing

> the suspect for successive interrogation, close in time and similar in content.

*Id.* at 613. Similarly here, Detective Hoisington questioned Mr. Steele, without warnings, about the stolen items over a one and one-half hour period of time and then immediately drove him to the police station, at which time he advised Mr. Steele of his rights and then repeated his questions about the stolen items.

Under these circumstances, both Mr. Steele's pre-warning statements and his post-warning formal statement were obtained without meaningful benefit of *Miranda*, and, therefore, inadmissible. The court's findings and conclusion to the contrary are unsupported by the record.

d. The error in admitting Mr. Steele's statements was not harmless beyond a reasonable doubt.

*Miranda* warnings are a constitutional requirement. *Dickerson v. United States*, 530 U.S. 428, 438, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). As such, the State bears the burden of proving that admission of statements obtained in violation of *Miranda* was harmless beyond a reasonable doubt. *See Arizona v. Fulminante*, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). That is, the State must show that admission of Mr. Steele's statements did not contribute to his convictions. *Fulminante*, 499 U.S. at 296. An error is not harmless if there is a

reasonable possibility that the outcome of the trial would have been different if the error had not occurred. *Id.* In *Fulminante*, the Court noted that a confession has a profound impact on a jury, and that the "defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Id.* at 296 (quoting *Bruton v. United States*, 391 U.S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)).

One of the primary defense theories was that the lack of evidence to establish Mr. Steele actually possessed the stolen firearm. RP 345-54. Therefore, the State cannot show that Mr. Steele's incriminating statements did not contribute to his convictions. The admission of Mr. Steele's statements, obtained in violation his right against self-incrimination was not harmless. Mr. Steele's convictions for unlawful possession of a firearm and possession of a stolen firearm must be reversed.

**2. The trial court abused its discretion in categorically refusing to consider a DOSA sentence.**

a. A sentencing court may not categorically refuse to consider a DOSA sentence for an eligible offender.

The DOSA program, RCW 9.94A.660, authorizes a sentencing judge to give eligible non-violent offenders a reduced term of incarceration, substance abuse treatment, and increased supervision, in an

effort to assist those offenders recover from their addictions. *State v. Grayson*, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). The purpose of DOSA is to provide meaningful "treatment-oriented services" and rehabilitation incentives as an alternative to a standard range term of confinement. Laws of 1995, ch. 108; *State v. Kane*, 101 Wn. App. 607, 609, 5 P.3d 741 (2000).

Every defendant is entitled to ask the sentencing court for meaningful consideration of his or her request for a DOSA. *Grayson*, 154 Wn.2d at 342. In general, a court's decision to grant or deny a DOSA is not subject to appeal, on the grounds that the court has discretion to impose a sentence within the standard range set by the Legislature and a DOSA sentence falls within the standard range. *State v. Williams*, 141 Wn.2d 143, 147, 65 P.3d 1214 (2003); *State v. Harkness*, 145 Wn. App. 678, 684, 186 P.3d 1182 (2008). A defendant may, however, challenge the procedure by which a standard range sentence is imposed. *Williams*, 141 Wn.2d at 147. Thus, a trial court's denial of a DOSA is reviewable for abuse of discretion, which occurs when the court failed to exercise its discretion and categorically denied a DOSA request, or when the court based its decision on manifestly unreasonable or untenable grounds. *Id.*; *State v. White*, 123 Wn. App. 106, 114, 97 P.3d 34 (2004) and cases cited therein.

b. The court abused its discretion when it categorically refused to consider imposition of a DOSA for any defendant with an offender score above '9,' regardless of eligibility.

In *Grayson*, the trial court refused the defendant's request for a DOSA on the ground:

> *the State no longer has money available to treat people who go through the DOSA program.* So I think in this case if I granted him a DOSA it would be merely to the effect of it cutting his sentence in half. I'm unwilling to do that for this purpose alone. There's no money available. He's not going to get any treatment; it's denied.

154 Wn.2d at 337 (emphasis in original). On appeal, the Supreme Court acknowledged that Mr. Grayson was not a good candidate for a DOSA and likely would not receive a DOSA on remand. *Id.* at 343. Nonetheless, the Court reversed the sentencing court, and ruled, "Considering all of the circumstances, the trial court categorically refused to consider a statutorily authorized sentencing alternative, and that is reversible error." *Id.* at 342.

Similarly here, the sentencing court did not contest Mr. Steele's eligibility for a DOSA, but, rather, categorically refused to consider his request, stating it never granted a DOSA for a defendant with an offender score above '9'. The court stated:

> Well, everyone has a sort of personal creed that they need to follow. I have a creed that I believe people can change you, but I also believe that people who have offenders [sic] that exceed nine shouldn't get the benefits of leniency. Mr. Steele knew what his issues were. He

> knew when he asked for the last DOSA that if he didn't change his ways, and specifically the examiner said if he doesn't stop hanging with people that get him to use once again and cause him to relapse, he'll be right back in the system. Those were prophetic words in 2007 when they were spoken.
>
> With an offender score nine plus [sic], if you want to be an addict and you want to use, then you need to find a way to do that without stealing from other people or victimizing other people. You haven't done that. I don't feel an urge to give you a DOSA sentence to avoid a lengthy prison term. The prison term is caused by your offender score, and those are items that you created for yourself.

RP 391-92.

However, the Legislature did not tie eligibility for a DOSA to a defendant's offender score. Therefore, the court's blanket refusal to entertain Mr. Steele's request based entirely on his offender score was a categorical rejection and contrary to the purpose of the DOSA program.

c. The proper remedy is remand for re-sentencing.

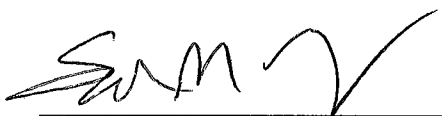
Where a trial court abuses its discretion in categorically refusing to impose a DOSA, the proper remedy is reversal of the sentence and remand for resentencing. *Grayson*, 154 Wn.2d at 343 ("We reverse on the limited grounds that the trial judge did not appear to meaningfully consider whether a sentencing alternative was appropriate."). Here, the court's complete disregard of Mr. Steele's request requires reversal and remand for a new sentencing hearing.

E. CONCLUSION

Mr. Steele's unwarned statements elicited during custodial interrogation were admitted in violation of his constitutional right against self-incrimination. The trial court abused its discretion in categorically denying Mr. Steele's request for a DOSA. For the foregoing reasons, Mr. Steele requests this Court reverse his convictions and remand for a new trial or, alternatively, reverse his sentence and remand for a new sentencing hearing.

DATED this 23rd day of October 2013.

Respectfully submitted,



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

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|---|---|---|
| STATE OF WASHINGTON, | ) | |
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| RESPONDENT, | ) | |
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| | ) | |
| ANDREW STEELE, | ) | |
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| APPELLANT. | ) | |

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