Supreme Court No. _____
Court of Appeals No. 31272-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ETHAN D. YORK,

Defendant/Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner, Ethan D. York, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed December 9, 2014, affirming his convictions. A copy of the Court's unpublished opinion is attached as Appendix A. This petition for review is timely.

III. ISSUE PRESENTED FOR REVIEW.

Was Mr. York's confession to the police inadmissible because it was obtained as a result of custodial interrogation without *Miranda* warnings?

IV. STATEMENT OF THE CASE.

A police officer driving a patrol car responding to a late-night incident struck a log lying in the roadway causing his car to spin out of control and flip over. RP 33-34. Police noticed other branches of wood were also in the roadway. RP 22. A few days later, police received a Crime Check tip that Ethan York and Curtis Whittikind were responsible for the wood being in the roadway. RP 43.

Detective Welton spoke with Whittikind who showed him where he and Mr. York had obtained the wood they threw in the road. RP 47. Whittikind also directed the detective to a house where Mr. York had been staying. RP 50. Detective Welton went to that house accompanied by Deputy Moser. He spoke

with Erin Carlson, the mother of Mr. York's girlfriend. Ms. Carlson gave Detective Welton and Deputy Moser permission to enter the home and told them that her daughter and Mr. York were downstairs in the basement. RP 51-52.

Detective Welton asked Ms. Carlson to go get Mr. York from the basement while he and Moser waited in the living room. She returned shortly with Mr. York and her daughter, Bailey. RP 53-54. Detective Welton introduce himself to Mr. York. He was deliberately vague as to why he and Deputy Moser were there. Both men were in uniform and their guns were exposed. RP 55-57, 75. Detective Welton told Mr. York he had already talked to Whittikind. RP 58. In response to that statement, Mr. York became solemn. He sat on the couch in the living room and sort of hung his head. RP 59.

Detective Welton then told Mr. York things like, "It's okay, you can tell me," or "It's better to get this out," or "You need to get this off your chest." He also asked Mr. York questions that elicited responses. RP 62, 76. Mr. York told the detective that Whittikind put the log in the road and he put the branch in the road. RP 93. He also gave a written confession at the detective's direction. RP 70.

Mr. York had just recently turned 16 years old. RP 72-73. Detective Welton never told Mr. York he did not have to talk with him or that Mr. York was free to leave. RP 75. Detective Welton testified he knew he was going to arrest

Mr. York and would have arrested him if he tried to leave. RP 74, 76. During the entire interview, Deputy Moser stood in the foyer between the living room and the front door effectively blocking that exit. RP 74. No Miranda warnings were given until later after Mr. York had been arrested. RP 60.

The trial court admitted Mr. York's statements under CrR 3.5 concluding Mr. York was not in custody at the time of his contact with Detective Welton, and the entire contact between Detective Welton and Mr. York did not constitute an interrogation by the detective. CrR 3.5 Hearing Conclusions of Law Nos. 1 & 2, CP 18.

Testimony from other witnesses collaborated Mr. York's statement that he was not the one who caused the accident; that Whittikind put the log in the road and Mr. York only put the branch in the road. RP 170-73, 182. The prosecutor did not argue that Mr. York was an accomplice. The prosecutor insisted Mr. York participated directly in the crime, as evidenced by his written confession. RP 189-90.

Mr. York was convicted of first degree malicious mischief and second degree reckless endangerment. RP 205. The court found that Mr. York's confession was the evidence that elevated Mr. York from simply being present and aware of what Whittikind was doing, to being a participant in the crime. RP 204. In its written findings the Court stated:

> The contact with the log caused the Deputy to lose control of the vehicle . .
>
> The only evidence presented to this Court indicates that the log which Deputy Olson's vehicle struck was actually physically placed in or on the roadway by someone other than this defendant. That person was identified as the co-defendant, Curtis Whittikind. The real issue is, in considering the defendant's conduct, was he simply there and aware of what the other person was doing or did he, as the *Wilson*[1] case cited by counsel states, "participate in it as something he wishes to bring about and try to make it succeed through his actions."
>
> To answer the above issue, this Court considered the written confession of the defendant, which has been admitted as Exhibit 6. In that confession, Mr. York writes, "I was with my cousin, Curtis Whittekiend, putting things in the road." He did not write, nor did he ever state that "Curtis was putting things in the road", not that "I watched Curtis put things in the road," but "I was with him putting things in the road." This Court finds that from all the evidence that this is a joint action, it is participation and jointly wanting to bring about a result.

CP 20-21.

This appeal followed. CP 14-16.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and/or involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)).

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[1] *In re Wilson*, 91 Wn.2d 487, 588 P.2d 1161 (1979).

Mr. York's confession to the police was inadmissible because it was obtained as a result of custodial interrogation without *Miranda* warnings.

In order to protect a defendant's Fifth Amendment right against compelled self-incrimination, the United States Supreme Court determined in *Miranda v. Arizona*, that a suspect must be given the right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The Washington State Constitution provides the same protection as the Fifth Amendment. Article 1, § 9, *State v. Warness*, 77 Wn.App. 636, 893 P.2d 665 (1995) (citing *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979)).

Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). The *Miranda* rule applies when "the interview or examination is (1) custodial (2) interrogation (3) by a state agent." *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) (citing *State v. Sargent*, 111 Wn.2d 641, 649-53, 762 P.2d 1127 (1988)). Unless a defendant has been given the *Miranda* warnings, his statements during police interrogation are presumed to be involuntary. *Sargent*, 111 Wn.2d at 647-48, 762 P.2d 1127.

Interrogation. *Miranda* interrogation is not limited to express questioning. It includes words or conduct by the police "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Pejsa*, 75 Wn.App. 139, 147, 876 P.2d 963 (1994) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297 (1980)). Here, Detective Welton first told Mr. York he had already talked to Whittikind. RP 58. This statement by the detective was obviously intended to elicit an incriminating response, since it communicated to Mr. York something akin to, "Hey, we the police already know all about your involvement in this incident so you might as well come clean."

Similarly intended was Detective Welton telling Mr. York things like, "It's okay, you can tell me," or "It's better to get this out," or "You need to get this off your chest." He also asked Mr. York questions that elicited responses. RP 62, 76. Therefore, the trial court erred in concluding the entire contact between Detective Welton and Mr. York did not constitute an interrogation by the detective. CrR 3.5 Hearing Conclusion of Law No. 2, CP 18.

Custodial. The custody requirement to invoke *Miranda* is also at issue in this appeal. In *Miranda,* the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person

has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444, 86 S.Ct. 1602.

Miranda focuses on custodial interrogations because of their secrecy. When an interrogator is alone with a suspect, police may employ a number of subtle psychological pressures. A suspect's will is much more likely to be overcome in an atmosphere controlled by the police. *State v. Mahoney*, 80 Wn.App. 495, 497, 909 P.2d 949 (1996) (citing *Pejsa*, 75 Wn.App. at 147, 876 P.2d 963). Isolation is the key aspect of a custodial setting. *Pejsa*, 75 Wn.App. at 147, 876 P.2d 963 (police in interrogation setting can restrain a suspect and apply "whatever psychological techniques they think will be most effective") (quoting *United States v. Mesa*, 638 F.2d 582, 586 (3d Cir.1980)).

In *Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the United States Supreme Court refined the definition of "custody." The court developed an objective test—whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Id.* at 441–42, 104 S.Ct. 3138. Washington has adopted this test. See *State v. Short,* 113 Wash.2d 35, 40, 775 P.2d 458 (1988).

In the present case the Court of Appeals held, "Because Miranda "custody" is equated with a formal arrest, questioning that takes place in public or private environments outside of police control frequently is not considered 'custodial'."

Slip Op. p. 4. This erroneous 'custodial' definition enunciated by the Court of Appeals is contrary to the *Berkemer* test. "The existence of an arrest depends in each case upon an objective evaluation of all the surrounding circumstances." *State v. Patton,* 167 Wn.2d 379, 387, 219 P.3d 651 (2009) (quoting Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 3104, at 741 (3d ed.2004) (footnote omitted)). The relevant inquiry is whether a reasonable person in the detainee's circumstances would consider himself or herself to have been placed under full custodial arrest. *State v. Glenn,* 140 Wn.App. 627, 638–39, 166 P.3d 1235 (2007) (citing *State v. Radka,* 120 Wn.App. 43, 49, 83 P.3d 1038 (2004)). The officer's "subjective, unspoken perception" of whether an arrest has occurred is irrelevant. *Glenn,* 140 Wn.App. at 639. Nor is a formal announcement of arrest necessary for a custodial arrest to take place. *See, e.g., State v. McIntyre,* 92 Wn.2d 620, 621, 600 P.2d 1009 (1979); *Glenn,* 140 Wn.App. at 639. "Whether an officer informs the defendant he is under arrest is only one of all of the surrounding circumstances, albeit an important one." *Patton,* 167 Wn.2d at 387 n. 6.

Here, Mr. York had just recently turned 16 years old (RP 72-73) so his youthfulness and naivety should be taken into account in determining whether his perception of being under arrest was reasonable. Both Detective Welton and Deputy Moser were in uniform and their guns were exposed. RP 55-57, 75.

Detective Welton never told Mr. York he did not have to talk with him or that Mr. York was free to leave. RP 75. In fact, Detective Welton knew he was going to arrest Mr. York and would have arrested him if he tried to leave. RP 74, 76.

During the entire interview, Deputy Moser stood in the foyer between the living room and the front door effectively blocking that exit. RP 74. No Miranda warnings were given. RP 60. Considering all these factors, under the totality of the circumstances a reasonable person in Mr. York's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Therefore, the trial court, as well as the court of appeals, erred in concluding Mr. York was not in custody at the time of his contact with Detective Welton. CrR 3.5 Hearing Conclusion of Law No. 1, CP 18.

Harmless Error. A confession erroneously admitted in violation of the defendant's *Miranda* rights is harmless only when the remaining evidence overwhelmingly supports a guilty verdict. See *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177, rev. denied 118 Wn.2d 1006, 822 P.2d 288 (1991); *State v. Cervantes*, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991). Here, there is insufficient evidence to support the conviction without Mr. York's tainted confession.

Testimony from other witnesses collaborated Mr. York's statement that he was not the one who caused the accident; that Whittikind put the log in the road

and Mr. York only put the branch in the road. RP 170-73, 182. More importantly, the trial court found that Mr. York's confession was the evidence that elevated Mr. York from simply being present and aware of what Whittikind was doing, to being a participant in the crime. RP 204. The Court found in its written findings that without the confession, "The only evidence presented to this Court indicates that the log which Deputy Olson's vehicle struck was actually physically placed in or on the roadway by someone other than this defendant. That person was identified as the co-defendant, Curtis Whittikind." CP 20-21. Therefore, the erroneous admission of Mr. York's confession was not harmless error.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted, January 8, 2015,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on January 8, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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CASE # 312721
State of Washington v. Ethan D. York
SPOKANE COUNTY SUPERIOR COURT No. 128006462

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
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FILED
DEC. 9, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ETHAN D. YORK, Appellant.	)	No. 31272-1-III UNPUBLISHED OPINION

KORSMO, J. — Ethan York challenges his juvenile court adjudications for first degree malicious mischief and reckless endangerment on the basis that the trial court erroneously admitted into evidence his statements to the investigating detective. We conclude that the trial court correctly determined that the statements were not the subject of custodial interrogation and affirm the adjudications.

FACTS

Two Spokane County Sheriff's Deputies, working under the sheriff's contract with the City of Spokane Valley, responded at high speeds to a report of a large fight in progress in the city. The first deputy's vehicle hit some object but continued down the road, while the second deputy's vehicle hit a different object, went into a spin, and ultimately overturned, injuring the deputy. An investigation determined that tree branches and a log had been placed on the street. The log had caused the accident.

Detectives investigating the incident received a tip that Curtis Whittikind and his cousin, Ethan York, were responsible for the accident. The detectives spoke with Whittikind who told them how to find Mr. York. Detective Welton and Deputy Moser went to the home of Erin Carlson, the mother of Mr. York's girl friend. Ethan York was living at the Carlson home at the time. Ms. Carlson invited the two investigators into the home to speak with York about a criminal investigation.

Mr. York and his girl friend came up from the basement and sat on a couch in the living room with the detective. Ms. Carlson stood in the doorway to the living room while Deputy Moser stood in the foyer. Welton told York that he was investigating "a crime" and had spoken to Whittikind, who had "spilled it to me." Mr. York became glum. Detective Welton encouraged York to speak, but did not question him. Mr. York admitted his involvement with "putting things in the road" and wrote a statement to that effect.

The statement was admitted at the adjudication after the juvenile court concluded it was not the product of a custodial interrogation. The statement was the sole evidence connecting Mr. York to the incident. The court concluded that Mr. York had committed both of the charged offenses.

Mr. York then timely appealed to this court.

ANALYSIS

The sole issue presented in this appeal is a contention that the court erred by concluding Mr. York's statements were not the products of a custodial interrogation. Well settled law confirms that the trial judge correctly assessed the situation.

Prior to conducting a custodial interrogation, an officer must first advise the suspect of his rights regarding the interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A defendant is in custody for purposes of *Miranda* when his freedom of action is curtailed to the degree associated with a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).[1] Interrogation is "express questioning or its functional equivalent" by police. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The "functional equivalent" of questioning involves behavior that police should know is "reasonably likely to elicit an incriminating response." *Id.* at 302.

The United States Supreme Court extended the protections of *Miranda* to juveniles in *In re Gault*, 387 U.S. 1, 42-57, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). However, juveniles are not extended additional *Miranda*-type protections. *Id.* at 55; *State v. Miller*, 165 Wn. App. 385, 389, 267 P.3d 524 (2011), *review denied*, 173 Wn.2d 1035 (2012).

[1] In *Berkemer*, the court concluded that routine roadside seizure and questioning did not amount to custodial interrogation. 468 U.S. at 440.

Here, the juvenile court determined that Mr. York was not in custody and was not subject to interrogation since he was simply encouraged to tell his story. We agree with the determination that Mr. York was not in custody and, therefore, need not address his argument that the interview was the functional equivalent of interrogation.

Because *Miranda* "custody" is equated with a formal arrest, questioning that takes place in public or private environments outside of police control frequently is not considered "custodial." For example, juveniles questioned in Spokane's Riverfront Park were not "in custody." *State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004). An adult questioned in the course of a search of her apartment was not in custody in *State v. Rosas-Miranda*, 176 Wn. App. 773, 309 P.3d 728 (2013). A juvenile rape suspect questioned in his own home in his mother's presence was not found to be "in custody" in *State v. S.J.W.*, 149 Wn. App. 912, 206 P.3d 355 (2009).

Similarly here, Mr. York was not in custody while he sat with his girl friend on the couch in the living room of the house where he was residing. There were no hallmarks of a formal arrest that could have turned this conversation into a custodial setting.[2] The juvenile court correctly concluded that Mr. York was not in custody.

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[2] This court has even concluded that advising a suspect that he was under arrest and placing him in a patrol car did not constitute an arrest because he was not deprived of his telephone. *See State v. Radka*, 120 Wn. App. 43, 83 P.3d 1038 (2004).

The adjudications are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

FEARING, J. (concurring) — I concur in the affirmation of Ethan York's conviction, although I disagree that the same standard applied to an adult necessarily applies to whether a minor has undergone a custodial interrogation. That question should await another day.

In *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), the United States Supreme Court established the test for what constitutes a seizure, which test Washington courts employ today. *See State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). A seizure occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554; *accord Harrington*, 167 Wn.2d at 663; *State v. Rankin,* 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Stated differently, a police contact constitutes a seizure only if, under the totality of the circumstances, a reasonable person would not have felt free to leave, "terminate the encounter, refuse to answer the officer's question, or otherwise go about his business." *State v. Thorn*, 129 Wn.2d 347, 353, 917 P.2d 108, *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). Whether a reasonable person would believe he was

detained depends on the particular, objective facts surrounding the encounter. *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988).

Since the courts use a reasonable person standard, the test of whether a person considers himself or herself detained is the same no matter the citizen's race, sex, mental acuity, and social background. Nevertheless, neither the United States Supreme Court nor the Washington Supreme Court has analyzed whether the reasonable person standard changes when the police contact is with a minor. In *State v. Heritage*, our high court expressly declined "to decide whether the age of the suspect can ever be taken into account for purposes of the *Miranda* custody requirement." 152 Wn.2d 210, 219, 95 P.3d 345 (2004).

Psychological literature teaches that people feel compelled to comply with authority figures, particularly law enforcement. This compulsion may be stronger with youth. Because of limited experience and judgment, children cannot sign legally binding contracts or bring lawsuits. RCW 26.28.015; *Bellevue Sch. Dist. v. E.S.*, 148 Wn. App. 205, 214, 199 P.3d 1010 (2009), *reversed on other grounds*, *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011). Washington law tolls the statute of limitations for personal injury to minors, since they generally lack the understanding, knowledge and resources to effectively assert their rights. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998). The capacity of a minor, including a 16-year-old boy, for

negligence or fault in torts is a question of fact based on the child's age, intelligence, and maturity. *Brown v. Derry*, 10 Wn. App. 459, 463, 518 P.2d 251 (1974).

In his appellate brief, Ethan York observed that he recently turned 16 years old when the officers spoke to him, "so his youthfulness and naivety must be taken into account." Br. Appellant at 11. York provided no authority for this argument. This court does not review errors alleged but not argued, briefed, or supported with citation to authority. RAP 10.3(a)(6); *Avellaneda v. State*, 167 Wn. App. 474, 485 n.5, 273 P.3d 477 (2012).

Fearing, J.

Fearing, J.