No. 31224-1

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

EULOGIO CASTRO ROMERO, Appellant

APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

THE HONORABLE JOHN ANTOSZ

BRIEF OF APPELLANT

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C. The evidence was insufficient to sustain the conviction for alien in possession of a firearm without a license.

Issues Related to Assignments of Error

1. Was the defendant's Fifth Amendment constitutional right and Washington State Article I, § 9 constitutional right to not be compelled to incriminate himself violated when an agent of ICE interrogated him to acquire information directly related to the State's case, without the advisement of his *Miranda* rights?

2. Was the evidence insufficient to sustain the conviction for alien in possession of a firearm?

II. STATEMENT OF FACTS

Eulogio Castro Romero shared a mobile home with his teen-age son. (Vol. 5RP 330). He worked full time, had a driver's license, papers to work, and a social security card. He had lived in the United States for 23 years and had been dealing with immigration issues for the last16 years. (Vol. 5RP 315;334). He was charged by amended information with possession of a controlled substance, alien in possession of a firearm without alien firearm license, and alteration of identifying marks on a firearm. CP 40-41.

On July 14, 2012, Mr. Romero's estranged wife contacted Officer Bernard of the Moses Lake police department. She reported that she had seen methamphetamine and a gun in Mr. Romero's home. CP 5-6. Officer Bernard contacted Immigration and Customs Enforcement (ICE), and also obtained a search warrant. CP 6. (Vol. 3RP 141-42).2

Armed with the warrant, a tactical response team entered Mr. Romero's mobile home on July 15, 2012. CP 6. According to officers, the search warrant was read aloud to Mr. Romero and he was advised of

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2 For purposes of this brief, the hearing dates of 8/21/12, 9/18-19/12, 9/25/12. 10/1-2/2012 will be referenced as Vol.1 RP page no; hearing dates of 7/16/12, 7/24/12, 9/17/12 will be referenced as Vol. 2 RP page no.; jury trial date 10/3/12 will be referenced as Vol. 3 RP page no; jury trial date 10/4/12 will be referenced as Vol. 4 RP page no; jury trial date 10/5/12 will be referenced as Vol. 5 RP page no.; and hearing date 12/12/12 will be referenced as Vol. 6 RP page no.

his *Miranda* rights. (Vol. 1RP 24). The officer noted that Mr. Romero spoke in "broken" English, and he did not have Mr. Romero sign a paper indicating he had been read his rights and understood them. (Vol. 1RP 27-28). Mr. Romero stated, "What you find in my house is not mine; you or someone planted it." He said he lived in the home with his son, and pointed out which room belonged to him. CP 7; (Vol. 1RP 25-26). After the warrant was executed Officer Bernard again contacted ICE and was told "they would be sending a 'detrainer' to the jail for Romero." CP 8.

On the afternoon of July 16, at the first appearance, the court appointed counsel for Mr. Romero. CP 121; (Vol. 2RP 4). That same day ICE agent Jamie Waite went to the Grant County jail and spoke with Mr. Romero. Mr. Romero did not have an attorney with him during the interrogation. The record is unclear whether the ICE agent interrogated Mr. Romero before or after an attorney had been assigned to him. (Vol. 1RP 46).

On July 24, defense counsel filed a demand for discovery, including any "…any papers, documents, ... which the State intends to use at the hearing or trial, or which are in any way related to the defendant…or this case" and "to the extent request materials or information are not within the knowledge, possession or control of the prosecuting attorney, the defendant requests the assistance of the

prosecuting attorney in obtaining the information or materials pursuant to CrR 4.7(d)…" CP 124-125. At the August 21 omnibus hearing, the State averred it had provided the discovery required by CrR 4.7 to the defense. CP 13.

At a readiness hearing on September 17, the State informed the court the ICE agent had prepared two reports on Mr. Romero's immigration status that were discoverable under CrR 4.7. It did not, however, have copies of the reports. (Vol. 2RP 13,15). Defense counsel requested a dismissal of the charges because of the late discovery, pointing out for the court that the forms were not going to be given out without a subpoena approved by a federal court. (Vol. 2RP 16). The court declined to dismiss the charges and denied the State's motion for a continuance. (Vol. 2RP 16;20).

1. CrR 3.5 Hearing

On September 19, at a CrR 3.5 hearing, Agent Waite testified he was assigned to conduct interviews in state and local jails. Once he established alienage, he would apprehend the individual and move the immigration enforcement process forward. (Vol. 1RP 36). He met Mr. Romero at the Grant County jail, asked him a series of questions about his citizenship, and recorded the answers on two agency forms, I-.213, I-826. (Vol. 1RP 37, 40).

At the 3.5 hearing, Agent Waite reported that under the rules of the Department of Homeland Security, the documents he filled out were only to be used for immigration matters. For the documents to be released, a separate request must be submitted for each form. (Vol. 1RP 39). It is unclear in the record exactly what steps were taken, but Agent Waite stated, "So, we made an effort, actually, to already get that released. And what was agreed to by the legal staff was that I could be here present and I could testify as questions pertaining to those documents here --" (Vol. 1RP 39.) As a result, the defense was not allowed to have a copy of the documents, but could only view them in court in the presence of Agent Waite. (Vol. 1RP 39;41). Defense counsel did not receive any disclosure regarding permission for Agent Waite to testify as to the contents of the documents, but not produce the documents for inspection. (Vol. 1RP 43).

Asked under direct examination "How were you intending to use the statements elicited from the defendant" Agent Waite answered as follows:

> "during the interview on July 16th – there are a few sheets of paper we fill out. One of them is called the Form I-826, and it is a notice of rights. It is offered in both English and Spanish. The subject chose to read it in English, which he did, and then after he read it he initialed that he understood his rights and that he chose to go on to Immigration Court again, and he signed that document and we dated it." (Vol. 1RP 37).

The State conceded that Agent Waite had not advised Mr. Romero of his *Miranda* rights, prior to interrogation (Vol. 1RP 62); but nevertheless, argued "*Miranda's* not needed in this situation because of the purpose of the interrogation is not – it's not a criminal ---it's not to elicit an incriminatory response; it's for an administrative proceeding." (Vol. 1RP 45).

Defense counsel objected on two bases: first, the interrogation elicited incriminating responses from Mr. Romero without the benefit of *Miranda* warnings; and secondly, the State had not gone through the process to obtain the documents from ICE to provide them in discovery, making the Agent's testimony hearsay. (9/19/13 RP 40, 60,64). In a memo dated September 28, the trial court ruled in pertinent part as follows:

> "…[T]he Defendant made the statement while he was in custody in response to questions Agent Waite put to him. The evidence establishes the statement was not the product of coercion and was made voluntarily. The evidence does not establish that Mr. Waite advised the Defendant of his Miranda rights. However, Officer [sic] read the Defendant his rights earlier that day. The authorities submitted by the State support the conclusion that this was sufficient. The State's motion to admit the second statement to Mr. Waite is therefore granted." CP 32.

That ruling was later memorialized in the court's findings of facts and conclusions of law. CP 84-85.

2. TRIAL

Agent Waite testified that Mr. Romero told him he had been born in Mexico, did not have papers to be in the United States, and did not currently possess a "green" card. (Vol. 3RP 135). Officer Bernard testified that officers found traces of methamphetamine on several items, 9.5 grams of methamphetamine in a baggie, a gun rolled up in a shirt under the mattress, Mr. Romero's social security card and a bill addressed to Mr. Romero at the home. (Vol. 4RP 208; 225; 226;229;232).

Because no foundation had been laid, the court did not allow the State to introduce evidence of whether the Sheriff's department either had a record or there was an absence of a record of Mr. Romero applying for an alien firearm license. (Vol. 4RP 279). However, despite no evidence having been presented on the matter, the court denied a motion to dismiss, reasoning that unless Mr. Romero had a valid passport or visa, he would not have been issued a firearm permit. (Vol. 4RP 288-89).

Over defense objection, the court gave jury instructions number 7 and 8:

> INSTRUCTION NO. 7: To convict the defendant of the crime of alien in possession of a firearm, each of the following elements of the crime must be proved beyond a reasonable doubt:
> One, that on or about July 15th, 2012, the defendant knowingly possessed a firearm;
> Two, that the defendant was not a citizen of the United States;
> Three, that the defendant was not a lawful permanent resident of

the United States;
Four, that the defendant did not obtain a valid alien firearm license;
Five, that the acts occur in the state of Washington; and
Six, that the defendant does not meet at least one of the following requirements;

A-Is a nonimmigrant alien who is not a citizen of Washington or a citizen of Canada;
B-possesses a valid passport and visa showing he is in the country legally;
C-possesses an approved U.S. Department of Justice ATF-6 NIA application and permit for temporary importation of firearms and ammunition by nonimmigrant aliens; or
D-possesses a valid hunting license issued by a state or territory of the United States or an invitation to participate in a trade show or sport shooting event being conducted in this state, another state, or another country that is contiguous with this state.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8: An application for an alien firearm license will include a copy of the applicant's passport and visa showing the applicant is in the country legally.

(Vol. 5RP 346-47).

After a jury trial, Mr. Romero was found guilty of possession of methamphetamine, and alien in possession of a firearm without firearm license, and not guilty of the crime of alteration of identifying marks on a firearm. (Vol. 5RP 373). He makes this timely appeal. CP 109.

III. ARGUMENT

A. Mr. Romero's Fifth Amendment To Not Incriminate Himself Was Violated When An ICE Agent Conducted A Custodial Interrogation Without The Advisement Of His Miranda Rights.

A defendant may not be compelled to be a witness against himself in any respect. *Colorado v. Spring,* 479 U.S. 564, 574, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987)(internal citations omitted.). It is well established that *Miranda* warnings must be given when a suspect endures (1) custodial (2) interrogation, (3) by an agent of the state. *State v. Sargent,* 111 Wn.2d 641,648, 762 P.2d 1127 (1988).

In this case, Mr. Romero had been arrested and was in custody at the Grant County Jail. The law presumes that statements made by a suspect while in custody were compelled in violation of the privilege against self-incrimination. *State v. Corn,* 95 Wn.App. 41, 57, 975 P.2d 520 (1999).

The test as to whether questioning is interrogation within the meaning of *Miranda* is whether, under all of the circumstances involved, the questions 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). "The latter portion of this definition focuses

primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.*

Agent Waite's questions amounted to interrogation under the *Innis* standard. Waite's testimony was that the agent was involved in a purely administrative immigration matter. However, the nature of the procedure during which the question is asked is not decisive; the nature of the question is. *In re Gault,* 387 U.S. 1, 47, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The Court noted in *Wheeler,* "We recognize the potential for abuse by law enforcement officers under the guise of seeking "objective" or "neutral" information, deliberately elicit an incriminating statement from a suspect." *State v. Wheeler,* 108 Wn.2d 230, 239, 737 P.2d 1005 (1987).

That is exactly the case here. Despite the Agent's testimony that the information was for an administrative immigration matter, the questions about Mr. Romero's identity, place of birth, and papers regarding his authorization to be in the United States were not only reasonably likely to elicit incriminating responses on the criminal charges, but the answers were promptly reported to the police.

This court pointed out that United States Supreme Court cases have held that the *Miranda* rule applies to questioning by non-police officials in custodial circumstances. *State v. Willis,* 64 Wn.App. 634, 638,

825 P.2d 357 (1992). Custodial interviews by probation officers, a court-appointed psychiatrist, and an IRS investigator, all qualified as custodial interrogations by an agent of the State. Similarly, Agent Waite's allegiance was to the State, not Mr. Romero.

To be voluntary under *Miranda,* a confession must be made after the suspect is fully advised of his rights and knowingly and intelligently waives them. *State v. Davis,* 73 Wn.2d 271, 282, 438 P.2d 185 (1968). The test is whether the suspect knew that he had the right to remain silent. *State v. McDonald,* 89 Wn.2d 256, 264, 571 P.2d 930 (1977), *overruled on other grounds, State v. Sommerville,* 111 Wn.2d 524, 530-31, 760 P.2d 932 (1988). Failure to provide the required warnings and obtain a waiver requires exclusion of any statements obtained. *Missouri v. Seibert,* 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004).

At trial, Mr. Romero testified that he had been dealing with immigration officials for the previous 16 years. At the time he was arrested, he was on bond from ICE. (Vol. 3RP 136-37); CP 5-6. The question here is not whether Mr. Romero received *Miranda* advisements when he was arrested on a criminal matter, rather, the question is whether he knew he had the right to remain silent when he was questioned by Agent Waite the next day.

Mr. Romero did not know he had the right to remain silent rather than to answer Agent Waite's questions. As this court noted, "It seems to us that an accused, whose essential obligation it is to "report to" and "answer questions posed by a probation officer," is under even heavier psychological pressure to answer questions put by his probation officer, a figure of both authority and trust." *Willis,* 64 Wn.App. at 639 (internal citation omitted). Further, the series of questions posed by Agent Waite also required Mr. Romero to acknowledge his rights with respect to immigration rules and rights, and he was not informed that any answers he gave could be used against him in a criminal matter, or that he had the right to remain silent. He was compelled to incriminate himself.

The trial court's finding of fact, " Agent Waite asked the Defendant some questions relating to his immigration status for the purpose of an upcoming immigration hearing" is not fully accurate. The Agent testified that his assignment is to interview suspected criminals at the jail regarding their alienage. He was called twice by the police, and promptly reported the interrogation information to authorities working on the criminal case. The evidence does not support the finding's inference that the questions relating to immigration status were asked solely for the purpose of the upcoming immigration hearing. It is clear that the police department and Agent Waite were working cooperatively. In the context

of the prosecution in this case, the questions were asked not only for the immigration issues, but clearly also for the purpose of shoring up the criminal case.

The court also erred in making it's conclusions of law :

> "The Defendant's statements to Officer Bernard and Jaime Waite were admissible because they were made freely and voluntarily; furthermore the statements were custodial statements in response to interrogation but made after the Defendant was informed of his Constitutional rights pursuant to *Miranda*, understood those rights and waived them."

This Court reviews conclusions of law *de novo. Spokane County v. City of Spokane,* 148 Wn.App. 120, 124, 197 P.3d 1228 (2009). As argued above, statements made by a suspect who does not have the option, or know of the option to remain silent are not voluntarily given.

For all these reasons, the trial court should have suppressed Mr. Romero's custodial statement: he answered the immigration matter questions under the belief he had no right to remain silent. The trial judge's decision to admit Mr. Romero's statements to Agent Waite cannot stand. His conviction must be reversed, the statements suppressed, and the case remanded to the trial court.

B. The Evidence Was Insufficient To Sustain The Conviction For Alien In Possession Of A Firearm Without An Alien Firearm License.

The Due Process Clause of the Fourteenth Amendment and Article 1, § 3 of the Washington State Constitution require the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. Art. 1, §3; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-21, 615 P.2d 628 (1980).

To convict Mr. Romero of the offense, the State was required to prove he knowingly possessed a firearm, was not a lawful permanent resident, and had not obtained a valid alien firearm license. RCW 9.41.171.

The State presented no evidence that Mr. Romero did not have an alien firearm license. The combination of jury instructions No. 7 and No. 8 given over defense objection allowed the jury to wrongly infer guilt. Jury instruction number 8 refers only to an *application* for an alien firearm

license. [3] Furthermore, the only evidence to establish that he was not a lawful permanent resident was obtained in violation of his constitutional right to not incriminate himself.

The existence of facts cannot be based on guess, speculation or conjecture by the jury. *State v. Hutton,* 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). The State did not meet the heavy burden of establishing beyond a reasonable doubt that Mr. Romero was guilty of possession of a firearm by an alien without a valid alien firearm license. The appropriate remedy is reversal and dismissal with prejudice.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Romero respectfully asks this Court to reverse his conviction and dismiss the charge with prejudice.

Dated this 14th day of July 2013.

Respectfully submitted,
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[3] An application for an alien firearm license will include a copy of the applicant's passport and visa showing the applicant is in the country legally.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Eulogio Castro Romero, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on July 14th that a true and correct copy of the Brief of Appellant was emailed per agreement between the parties to :

Email:kburns@co.grant.wa.us

D. Angus Lee
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And by first class, postage prepaid, USPS mail to:

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