

70564-4

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NO. 70564-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN C. STUM,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1 Did the trial court error in determining the defendant was not in custody for purposes of Miranda warnings when he was contacted and questioned by law enforcement?

2. Formal findings and conclusions as to admissibility of the defendant's out of court statements were filed after appellant's brief, is this issue moot?

## **II. STATEMENT OF THE CASE**

On April 3, 2013, the defendant was homeless and had been staying in the residence of Jodi Ferguson in Everett, Washington. The defendant was staying there without anyone's permission.<sup>1</sup> The defendant had begun stripping the house of its copper pipes to sell for money. On April 3, 2013, the defendant cut into a pipe that emitted a strange odor or noise. Despite thinking it might be a gas pipe, the defendant lit a cigarette, causing an immediate explosion that destroyed the residence. 1RP 93-127.

Jodi Ferguson moved out of her home in Everett, Washington in September of 2010. The bank that had her

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<sup>1</sup> Appellant's brief indicates "Ferguson's son told Stum he could use it [Ms. Ferguson's house] since they no longer lived there." (Appellant's brief pg 3) This statement is not supported by the record cited by appellant; and, respondent could not find reference to Ms. Ferguson having a son anywhere else in the record.

mortgage had begun foreclosure proceedings and she no longer felt comfortable living there. She had begun negotiating with the bank in August of 2010, but had a number of personal issues come up. Ms. Ferguson indicated the decision to move out was not related to the negotiations. Ms. Ferguson kept the blinds closed and maintained the yard and kept the utilities active until May of 2011. Ms. Ferguson was still trying to negotiate with the bank regarding the foreclosure. In May of 2011 Ms. Ferguson had the water and sewer and the electricity turned off.<sup>2</sup> To Ms. Ferguson's knowledge, no one was living in her residence. She was still responsible for the residence. 1RP 162-172.

According to the statements the defendant made to Det. Atwood, he began staying in the residence for a few months before the incident. The defendant was not making any money handling at Safeway, so he came up with the idea of removing the copper pipe from the house and selling it. On the day in question, the defendant indicated he went downstairs and cut the pipe. He smelled an odd odor and heard a strange sound coming from the

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<sup>2</sup> In appellant's brief they indicate the water and gas were turned off. (Appellant's brief pg 3). This appears to be a scrivener's error as the record indicates the water and electricity were turned off. RP 1 pg 166.

pipe. The defendant initially indicated he could smell gas so he decided to test the room for the quantity of gas by sparking his lighter. The defendant changed his story to say he went upstairs to take a break and when he went back downstairs, he could smell gas, but decided to light a cigarette and that was when the explosion happened. Once the defendant admitted he had caused the explosion, Det. Atwood decided to advise him of his constitutional rights pursuant to Miranda. The defendant indicated he understood his rights and continued speaking with Det. Atwood. The defendant then provided a written statement. The defendant was then identified by an eye witness as having been in the house at the time of the explosion. Det. Atwood then spoke with Ms. Ferguson for a short time. When Det. Atwood returned, the defendant indicated he wanted to get some of his belongings out of the residence. Det. Atwood told the defendant he could not go back into the house; that it was way too unsafe. While at the scene, the defendant was told numerous times by law enforcement not to go back into the house. The defendant was free to leave.

1RP 123-126.

## **A. FACTS RELEVANT TO THE CrR 3.5 ISSUE.**

The defendant was initially contacted on April 3, 2013, by Detective Atwood of the Everett Police Department as a social contact. The defendant matched the description Det. Atwood had received of a person who had been in the residence at the time of the explosion. The defendant approached Det. Atwood's location on foot. Det. Atwood walked out to meet the defendant. The defendant was carrying an open can of beer in one hand and a large knife in a sheath in the other. Det. Atwood asked the defendant if he would put down the open container of beer and let him put the knife in his van while they spoke for officer safety reasons. The defendant agreed. Det. Atwood asked the defendant for identification but did not take or keep the identification card he produced. 3.5 RP 7-9, 20-21, CP 126-130.

The defendant and Det. Atwood carried on a conversation about what had taken place at the location. The conversation took place in the alley behind the residence in a one on one type situation with Det. Atwood. There were no other police officers present for the defendant's initial statement. Det. Atwood was not in uniform. Det. Atwood did not pat down the defendant for weapons. The defendant was never handcuffed or told he was

under arrest during the time he was speaking with Det. Atwood. At some point in the conversation, Det. Atwood told the defendant it was time to be honest, the defendant teared up and admitted causing the explosion at the residence. At no point did the defendant indicate he wanted to leave. 3.5 RP 9-10, 15-18, 21, 23.

After about 5 minutes of speaking with the defendant, Det. Atwood realized the defendant was admitting he had caused the explosion. Det. Atwood stopped the defendant and advised him of his constitutional rights per Miranda by reading him verbatim from his standard issued Miranda card. Det. Atwood advised the defendant of his constitutional rights even though he had no intention of arresting him. The defendant indicated he understood his rights and still wished to speak with Det. Atwood. At no time did the defendant indicate he wanted an attorney or that he did not wish to speak with Det. Atwood or law enforcement. The defendant provided a written statement at the scene. The defendant was not arrested, but was allowed to leave. 3.5 RP 10-11; 18-19, 23.

Several hours after his conversation with Det. Atwood, Stum was caught trying to get back into the residence. Since Det. Atwood had told the defendant many times that he could not enter the residence for any reason, Officer Fletcher arrested him. The arrest



took place several hours after the defendant had left the scene. 3.5  
RP 22-23.

**B. FACTS RELEVANT TO WRITTEN FINDINGS CONCLUSIONS  
OF LAW ISSUE.**

A CrR 3.5 hearing was held on June 14, 2013. On June 17, 2013, a certification was signed by the court and filed with court clerk. CP 130. That certification does not appear in the record. Appellant's brief was filed on December 16, 2013. The written findings were promptly filed once the State was notified of the error and find the delay was not intentional. CP 126. The new certification was signed by the judge and appellant's trial counsel. CP 130-131. The final paragraph of the new certification indicates "The above certification is consistent with a previous 3.5 certification which was presented to the court on June 17, 2013 and filed with the court clerk on the same day. CP 130.

**III. ARGUMENT**

**A. THE TRIAL COURT CORRECTLY DETERMINED THE DEFENDANT WAS NOT IN CUSTODY AT THE TIME HE PROVIDED VERBAL AND WRITTEN STATEMENTS TO LAW ENFORCEMENT AND THE STATEMENTS WERE PROPERLY ADMITTED PURSUANT TO CrR 3.5.**

The standard of review of a trial court's determination of the defendant's custodial status is reviewed de novo. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). The court applies and

objective standard as to whether a reasonable person in the same situation would perceive that he was free to leave.

Miranda rights are required to be given as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), Berkemer v. McCarty, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138, 3151 (1984). "But outside the context of custodial interrogation, Miranda does not apply." State v. S.J.W., 149 Wn. App. 912, 927-28, 206 P.3d 355, 363 (2009) aff'd on other grounds, 170 Wn.2d 92, 239 P.3d 568 (2010). "Our courts determine whether an interrogation is custodial using an objective standard, which is "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." Id. "The fact that a suspect is not "free to leave" during the course of a Terry<sup>3</sup> stop does not make the stop comparable to a formal arrest for purposes of Miranda." State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624, 625 (1992).

The Fifth Amendment right to Miranda warnings attaches only when a custodial interrogation begins. State v. Templeton, 148

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<sup>3</sup> Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Wn.2d 193, 208, 59 P.3d 632 (2002). The circumstances to establish a reasonable belief the person was in police custody must be more than the police indicating a desire to speak with the person. The court has held that a potential suspect who was handcuffed for 45 minutes prior to a police show up was not in custody for purposes of Miranda. See State v. Cunningham, 116 Wn. App. 219, 229, 65 P.3d 325, 329 (2003) (Mr. Cunningham asserts Officer Meyer should not have left him in handcuffs for approximately 45 minutes. He claims this action proves the investigation was more than a limited Terry stop. We disagree.)

In the case at bar, Det. Atwood clearly had reason to believe criminal conduct had occurred as he had a residence that had blown up, the defendant was carrying an open container and a long fixed blade sheathed knife. However, the facts also clearly indicate a reasonable person in the defendant's position would not believe he was in police custody to a degree associated with formal arrest. The defendant was not handcuffed, was not told he could not leave, was not patted down for weapons. There was not an overwhelming police presence and the defendant left the scene. It is clear the defendant was aware he was not under arrest. Even if the defendant had not been free to leave, the encounter could not be

characterized as more than a Terry investigative encounter and Miranda warnings were not required. An investigative encounter with a suspect based on reasonable suspicion not amounting to probable cause does not require Miranda warnings. State v. Huynh, 49 Wn. App. 192, 201, 742 P.2d 160 (1987), review denied, 109 Wn.2d 1024 (1988); State v. Hilliard, 89 Wn.2d 430, 573 P.2d 22 (1977). For Miranda purposes, the fact that a suspect is not free to leave during the course of an investigative stop does not make the encounter comparable to a formal arrest. State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992).

**B. THE CrR 3.5 WRITTEN FINDINGS WERE PROMPTLY FILED ONCE THE STATE WAS NOTIFIED OF THE ERROR AND THE DELAY WAS NOT INTENTIONAL. THIS ISSUE IS MOOT.**

It is clear from the record that written findings were promptly filed once the State was notified of the error. Those findings reflect they are consistent with the original findings signed by the court and filed with the court clerk on June 17, 2013.

Appellant was notified of the written findings by the State on January 9, 2014. "It is true the findings were not entered until after the appellant's brief was filed. However, failure to enter findings required by CrR 3.5 is considered harmless error if the court's oral findings are sufficient to permit appellate review." State v.

Cunningham, 116 Wn. App. 219, 226, 65 P.3d 325, 328 (2003);  
State v. Smith, 67 Wn. App. 81, 87, 834 P.2d 26 (1992), aff'd, 123  
Wn.2d 51, 864 P.2d 1371 (1993). In the case at bar, the oral  
findings are sufficient. Appellant also has the option of  
supplemental briefing available with regard to the written findings  
now of record in this case.


#### **IV. CONCLUSION**

Based on the reasons set forth above, the defendant's  
appeal should be denied.

Respectfully submitted on February 18, 2014.

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