91163-1

SUPREME COURT NO. _____

NO. 70666-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KIEL DENT,

Petitioner.

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

The Honorable John P. Erlick, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Kiel Noel Dent, the appellant below, asks this court to review the Court of Appeals decision referenced in section B.

B. COURT OF APPEALS DECISION

Dent requests review of the Court of Appeals decision in State v. Dent, No. 70666-7-I, filed November 24, 2014.

C. ISSUES PRESENTED FOR REVIEW

1. Dent was approached by a uniformed, armed police officer who told him she was investigating Dent for a crime. She requested that Dent follow her, seated Dent on bench, and stood over him. She requested Dent's identification and retained the ID while she questioned Dent about the crime she was investigating. She never told Dent he was free to go. Would a reasonable person in Dent's position have felt that his freedom of action was curtailed to a degree associated with formal arrest such that he was in custody and entitled to Miranda[1] warnings?

2. Should the totality of circumstances analysis that courts conduct to determine whether a reasonable person would feel in custody take into account the increasing militarization of police forces and the issue of race?

[1] Miranda v. Arizona, 84 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

3. Is review appropriate under RAP 13.4(b)(3) and (4) because the case involves significant constitutional questions and issues of substantial public interest that should be decided by this court?

D. STATEMENT OF THE CASE

1. Charges and motion to suppress

The State charged Dent with one count of attempting to obtain Oxycodone by means of a false or forged prescription under RCW 69.50.403. CP 1. The State amended its charges to include a count for second degree identity theft. CP 6-7.

Dent moved to suppress statements made to Redmond officer Natalie D'Amico, arguing they were obtained in violation of the Fifth Amendment to the United States Constitution and Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

2. Suppression hearing

D'Amico was the only witness who testified at the suppression hearing. 1RP[2] 9-31.

On May 11, 2012, D'Amico responded to a possible forgery in progress at a Rite Aid. 1RP 12. When she arrived, a Rite Aid employee pointed to Dent, prompting D'Amico to make contact. 1RP 13. Dent got off the phone call he was on, exited the Rite Aid at D'Amico's request, and sat

[2] This brief refers to the verbatim reports of proceedings as follows: 1RP—June 26 and 27 and July 1, 2, and 3, 2013; 2RP—July 19, 2013.

on a bench outside at D'Amico's direction. 1RP 13. D'Amico's marked patrol car was parked 15 feet from the bench. 1RP 14. D'Amico stood directly in front of Dent. 1RP 14-15.

D'Amico asked for identification and Dent handed over a Washington Identification Card. 1RP 15. D'Amico held the identification card until another officer arrived on the scene, an unspecified amount of time later. 1RP 19-20.

D'Amico interrogated Dent about why he was there; Dent responded that he was picking up a prescription for Oxycodone. 1RP 15-16. Dent said he needed the medication due to recent injuries sustained in a car collision. 1RP 16. Dent did not provide any details regarding the collision or his injuries. 1RP 16. D'Amico also questioned Dent about where he obtained the prescription; Dent responded he got the prescription from a family friend whom he believed was a physician. 1RP 17, 27. Dent explained he obtained the prescription from a house between Burien and White Center, but did not or could not provide the name of the prescribing doctor. 1RP 17-19.

After interrogating Dent, D'Amico waited for another officer to arrive so she could interview Rite Aid witnesses. 1RP 19. D'Amico had Dent's identification card the whole time they waited for another officer and did not return it to Dent until the other officer arrived. 1RP 20.

D'Amico entered the Rite Aid to speak to the 911 caller and also phoned the doctor whose name appeared on the prescription Dent presented. 1RP 20-21.

D'Amico went back outside, handcuffed Dent, and told Dent he was under arrest. 1RP 21. D'Amico informed Dent of his CrR 3.1 rights, which did not include his right to remain silent.[3] 1RP 21-22. D'Amico did not interrogate Dent further, and Dent made no further statements. 1RP 23.

3. Admission and use of statements

The trial court concluded the following statements were admissible:

> i. The defendant stated that he went to the Rite Aid pharmacy to fill his prescription for Oxycodone.
>
> ii. The defendant stated that he was in a car collision and needed the medication for pain.
>
> iii. The defendant stated that he could not provide a description of the injuries he sustained in the car collision.
>
> iv. The defendant stated that he could not describe where his pain was located.
>
> v. The defendant stated that he received the prescription from "a friend of the family."
>
> vi. When asked whether the friend was a doctor, the defendant stated "I thought so."

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[3] Bafflingly, CrR 3.1, which addresses the right to counsel, does not require advisement of the right to remain silent. See State v. Dent, noted at ___ Wn. App. ___, 2014 WL 6657489, No. 70666-7-I, slip op. at 3 n.4 (Wash. Ct. App. Nov. 24, 2014); Br. of Appellant at 5 n.4.

vii. The defendant stated that he did not know the name of the person he received the prescription from.

viii. The defendant stated that he did not know the name of his current doctor.

ix. The defendant stated that he received the prescription from someone at the house between "Burien and White Center."

CP 90-91. The court also concluded the "pre-arrest statements are admissible because Miranda was not applicable as the defendant was not in custody to a degree associated with formal arrest. These statements were voluntary." CP 91.

The State relied primarily on these statements during closing to assert they proved that Dent acted knowingly or intentionally, the mens rea element of RCW 69.50.403. 1RP 276 (arguing defense's evidence of multiple prescriptions written on the same doctor's prescription pad was meant "to distract you from what the Defendant did that day and what the Defendant told the Detective that day"); 1RP 281 ("And in this particular case, you know the Defendant knew that the prescription was false or forged, because of what he said or didn't say."); 1RP 301-02 ("This case boils down to . . . what he said or didn't say on that date."); 1RP 305 ("What matters is his behavior on that day, and what he said or didn't say."); 1RP 305 (arguing it was not reasonable that Dent attempted to obtain Oxycodone "when he

couldn't articulate that pain, when he couldn't articulate the details of the accident, when he couldn't articulate any of that information").

4. Convictions, sentence, and arrest of judgment

The jury returned guilty verdicts on the forged prescription and second degree identity theft charges. CP 31-32; 1RP 314-17. The trial court later granted the State's motion to vacate the identity theft charge. CP 60, 86, 2RP 2.

The trial court sentenced Dent to 120 days of confinement. CP 62. Dent appealed. CP 92.

5. Court of Appeals decision

The Court of Appeals concluded that "neither Dent, nor a reasonable person in the same situation, would have felt that his or her freedom was curtailed to a degree associated with formal arrest prior to and during the questioning." State v. Dent, noted at ___ Wn. App. ___, 2014 WL 6657489, No. 70666-7-I, slip op. at 5 (Wash. Ct. App. Nov. 24, 2014). The Court of Appeals indicated that because D'Amico did not command Dent to speak with her or to sit on a bench, did not touch Dent, did not place Dent into a confined place, did not handcuff Dent, and did not tell Dent he was required to stay and answer questions, Dent was not in custody. Id. at 5-6. The Court of Appeals was unconcerned that D'Amico took Dent's identification card because "she returned it to Dent after asking him questions but before going

into Rite Aid" and noted "[i]t is unclear from the record exactly when Officer D'Amico returned the ID to Dent." Id. at 3 n.3, 6. According to the Court of Appeals, Dent would not have felt his freedom was restrained until D'Amico "purposely waited for the other officer to arrive before going back into Rite Aid" which "would signal to Dent that Officer D'Amico did not feel comfortable leaving him alone outside for fear that he might leave . . . ." Id. at 6.

Despite the State's overwhelming reliance on Dent's statements to prove Dent acted intentionally or knowingly, the Court of Appeals also ruled that the admission of the statements, if error, would have been harmless. The Court of Appeals focused on the prescription itself, noting that jurors could conclude Dent knew the prescription was forged "in light of the fact that his name was on [it] yet he had never met or been treated by the doctor who allegedly wrote it." Id. at 7-8 & n.7.

E. ARGUMENT

WHETHER A REASONABLE PERSON IN DENT'S POSITION WOULD HAVE FELT HIS OR HER FREEDOM CURTAILED TO A DEGREE ASSOCIATED WITH FORMAL ARREST PRESENTS SIGNIFICANT CONSTITUTIONAL QUESTIONS AND ISSUES OF SUBSTANTIAL PUBLIC INTEREST

In criminal prosecutions, persons shall not be compelled to be witnesses or to give evidence against themselves. U.S. CONST. amend. V; CONST. art. I, § 9. To honor this right, police must inform suspects of their

rights before subjecting them to custodial interrogation. Miranda v. Arizona, 384 U.S. at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."). When the government fails to comply with this rule, a suspect's statements are not admissible as evidence at trial. Id. at 444, 476-77.

"It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983 (per curiam)). This is an objective standard of a reasonable person that considers a totality of the circumstances. Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995); State v. Heritage, 152 Wn.2d 210, 217, 95 P.3d 345 (2004).

1. D'Amico's statement to Dent that she was investigating him for a crime and her control over his ID during questioning would signal to any reasonable person that his freedom of action was curtailed to a degree associated with formal arrest

D'Amico, a uniformed, armed police officer, told Dent she was investigating the crime of prescription forgery and asked Dent to follow her

so she "could speak with him as to why he was there." 1RP 13, 28. D'Amico seated Dent on a bench outside the Rite Aid, stood in front of him, and questioned him. 1RP 14-15. D'Amico took Dent's identification card and retained it during her questioning. 1RP 15, 20. D'Amico testified Dent was not free to go, and she certainly never told Dent he could leave. 1RP 18. The lower courts' conclusion that this was somehow a consensual encounter defies reason and reality.

The United States Supreme Court's opinion in Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), is instructive. Narcotics officers stopped Royer at an airport for fitting a "'drug courier profile.'" Id. at 493. "Upon request, but without oral consent, Royer produced . . . his airline ticket and his driver's license." Id. at 494. The officers "informed Royer that they were . . . narcotics investigators and that they had reason to suspect him of transporting narcotics." Id. Officers asked Royer to accompany them to a room 40 feet away. Id. They never told Royer he was free to leave. Id. at 501. The Court held Royer was seized for the purposes of the Fourth Amendment and that the circumstances "surely amount[ed] to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'" Id. at 502 (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)

(plurality opinion)). "As a practical matter, Royer was under arrest." Royer, 460 U.S. at 503.

The only difference between this case and Royer is that Dent was not placed in a closed room, but that issue was not dispositive. The Court focused more heavily on the fact that officers retained Royer's ticket and identification. Id. at 494, 496, 501, 503; see also id. at 508 (Powell, J., concurring), 512 (Brennan, J., concurring in the result). The Court also indicated Royer felt compelled to comply simply because officers identified themselves and said they were investigating Royer of criminal activity. Id. at 494, 496, 501-02. As Justice Brennan put it, "It is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received his airline ticket and driver's license." Id. at 512 (Brennan, J., concurring in the result). Like Royer, Dent was unquestionably under arrest.

The Court of Appeals stated the record is unclear when D'Amico returned Dent's ID. Dent, slip op. at 3 n.3. The Court of Appeals also suggested the burden was on Dent to "show some objective facts indicating his freedom of movement or action was restricted or curtailed." Id. at 5 (citing State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004)). The Court of Appeals was incorrect.

The CrR 3.5 testimony shows D'Amico possessed Dent's ID during the entirety of her questioning. D'Amico took Dent's ID before the questioning began to "confirm[] his ID." 1RP 15. After testifying regarding the various questions she asked Dent, D'Amico indicated she "waited for another patrol officer to get there . . . ." 1RP 19. Then the prosecutor asked whether D'Amico "still ha[d] his ID *at that point*," to which D'Amico responded, "I gave it back to him." 1RP 20 (emphasis added). This shows that D'Amico had Dent's ID during the entirety of her questioning and while she waited for another officer for an unspecified amount of time.

Even if the record were unclear, the State bears the burden of proving Dent's statements were given voluntarily as a matter of constitutional due process. Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Any lack of clarity in the record is the result of the State failing to carry its burdens of proof and production at the suppression hearing. To the extent that the Court of Appeals is correct, and this court misplaced the burden of demonstrating the voluntariness of statements to police on defendants in Lorenz, 152 Wn.2d at 37 (citing State v. Post, 118 Wn.2d 596, 607, 826 P.2d 172 (1992)), this court should take this opportunity to correct this constitutional error by granting review pursuant to RAP 13.4(b)(3).

The Court of Appeals also relied on Howes v. Fields, ___ U.S. ___, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012), and Yarbourough v. Alvarado, 541 U.S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004), for the proposition that "courts have found defendants not to be in custody for custodial interrogation purposes even within the confines of a law enforcement building or with several law enforcement officers present." Dent, slip op. at 6. Both cases employed the heightened federal habeas standard under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. Fields, 132 S. Ct. at 1187 (reciting standard under 28 U.S.C. § 2254(d)(1)); Alvarado, 541 U.S. at 660 (same). They also had nothing to do with encounters between police and citizens in public. Fields, 132 S. Ct. at 1185-86 (Fields was prisoner in Michigan jail when corrections personnel took him to be interviewed by sheriff's deputies); Alvarado, 541 U.S. at 656 (Alvarado reported to police station voluntarily to be interviewed). Neither Fields nor Alvarado support the Court of Appeals' erroneous holding in this case.

Any reasonable person whose identification was in the possession of a police officer while being questioned about involvement in criminal activity would have felt his or her freedom of action curtailed to a degree associated with formal arrest. This court should grant review of this important constitutional question, suppress Dent's statements, and reverse.

2. The totality of circumstances analysis must account for the realities of modern day policing and race relations

As the Court of Appeals indicated, courts examine a totality of the circumstances to determine whether a reasonable person in a particular scenario would feel arrested. Dent, slip op. at 5. Based on the fact that D'Amico did not command Dent to speak with her or sit on the bench, did not touch or handcuff Dent, and did not place Dent into a police car or other confined space, the Court of Appeals determined Dent would not have felt his liberty constrained to a degree associated with formal arrest. Id. at 5-6. This legal fiction does not reflect the world we live in, especially for those who do not enjoy the privilege of whiteness. This significant question of constitutional law and matter of substantial public interest makes review appropriate under RAP 13.4(b)(3) and (4).

Courts engaging in a totality-of-circumstances analysis have traditionally examined "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." Mendenhall, 446 U.S. at 554. This no longer goes far enough, as we have transitioned to a society where an average citizen contacted by a police officer as the subject of a criminal investigation would feel compelled to comply with the officer's

requests in almost any and every conceivable circumstance. The reasonable person standard vis-à-vis police-citizen encounters is in need of an update.

Modern day police forces increasingly resemble militarized forces on public streets. This change has been well documented among commentators. See, e.g., Kimberly D. Bailey, Watching Me: The War on Crime, Privacy, and the State, 47 U.C. DAVIS L. REV. 1539, 1547 (2014) ("The indoctrination of military ethos into law enforcement makes it so that, with respect to drug crimes, the job of the police is no longer to serve and to protect; instead, their job is to destroy the enemy."); Rosa Brooks, The Trickle-Down War, 32 YALE L. & POL'Y REV. 583, 589 (2014) (footnotes omitted) ("In general, American policing has become far more militarized over the last few decades. The trend towards increased militarization predates 9/11, but accelerated substantially after the attacks."); Radley Balko, Rise of the Warrior Cop: How Did America's Police Become a Military Force on the Streets?, 99 Jul. A.B.A. J. 44, 48-52 (Jul. 2013) (tracing the increased militarization of law enforcement from reconstruction through the post-September 11, 2001 era, and noting that between 1982 and 1995, the percentage of police departments with a SWAT team in cities of more than 100,000 grew from 59 to 89 percent); Al Baker, When the Police Go Military, N.Y. Times (Dec. 3, 2011), http://www.nytimes.com /2011/12/04/sunday-review/have-american-police-become-militarized.html?

pagewanted=all&_r=l&; see also War Comes Home: The Excessive Militarization of American Policing, AMERICAN CIVIL LIBERTIES UNION (June 2014), https://www.aclu.org/sites/default/assets/jus-14-warcomes home-report-web-rel1.pdf. Given this marked change in the attitudes towards and practices of law enforcement, a reasonable person approached by an armed police officer who is investigating the person for criminal activity now automatically feels that "compliance with the officer's request might be compelled." Mendenhall, 446 U.S. at 554.

Moreover, nowhere has this change in the policing landscape been felt more than in communities and among persons of color. To acknowledge how race impacts perceptions towards and contacts with police, some scholars have called for a "reasonable person of color" or "reasonable African American person" standard to govern police encounters. See, e.g., Mia Carpiniello, Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion" Terry Stops, 6 MICH. J. RACE & L. 355, 377 (2001) ("The mythical reasonable person standard ignores the feelings of fear and distrust toward police that cause Black men to feel unable to leave a police encounter even though the encounter would not be considered coercive enough to qualify as a seizure under the reasonable person standard."); Omar Saleem, The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop

and Frisk", 50 OKLA. L. REV. 451, 483 (1997) ("[H]ow can a Terry stop for Blacks possibly rely upon a reasonable person standard? Blacks have a unique and subjective set of experiences during police encounters which are beset in invasive conduct and invective words. There is an attempt to ignore this question by characterizing the issue as 'playing the race-card.'"). Though he would welcome it, Dent does not firmly request that this court adopt a reasonable black person standard in this case. But there is no justification—aside from unacceptably ignoring the issue of race altogether—for courts considering a totality of the circumstances not to consider the effects of race in their analysis as *one* of the circumstances. Any reasonable person in Dent's position would have felt compelled to comply with D'Amico's requests and would have felt his freedom of action curtailed to a degree associated with formal arrest. This is particularly true for a reasonable person who, like Dent, is African American.

The reasonable person standard is in need of this court's reexamination to reflect the realities of policing in the 21st century. No longer does a reasonable person feel free to refuse an armed police officer's requests or questioning. Unfortunately, this is especially true among people of color and for young black men in particular. Our courts have largely ignored this change in circumstances, and continue to employ a reasonableness standard that does not account for changed perceptions of

law enforcement and that fails to address the issues of race. This court should address this important constitutional question and matter of substantial and timely public interest by granting review pursuant to RAP 13.4(b)(3) and (4) so that it can bring the reasonable person standard in line with modern times.

F. CONCLUSION

A reasonable person in Dent's position would have felt under arrest. Dent was entitled to receive Miranda warnings to honor his right against self-incrimination. Dent asks this court to grant review and reverse the Court of Appeals.

DATED this 23d day of December, 2014.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KIEL NOEL DENT, Appellant.	No. 70666-7-I DIVISION ONE UNPUBLISHED OPINION FILED: November 24, 2014

APPELWICK, J. — Dent appeals his conviction for forging an Oxycodone prescription in violation of the Uniform Controlled Substances Act.[1] He contends that the trial court erred in admitting statements he made during a custodial interrogation prior to receiving Miranda[2] warnings. He argues that he would not have been convicted had the statements been excluded. We affirm.

FACTS

On May 11, 2012, Officer Natalie D'Amico was dispatched to a Rite Aid store in Redmond, Washington. A pharmacy technician from Rite Aid had called 911 to report Kiel Dent as a possible suspect of prescription forgery. As Officer D'Amico walked into the Rite Aid, a store employee behind Dent pointed to him as if he were the man the store

[1] Chapter 69.50 RCW.
[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

reported. Dent was approaching the exit of the store. Dent matched the description the pharmacy technician had provided over the phone. Officer D'Amico approached Dent, who was on his phone at the time, and said, "Mr. Dent." Officer D'Amico was wearing a police uniform. Dent stopped and looked at Officer D'Amico and put down his phone.

Officer D'Amico then asked Dent to step outside of the store. Dent cooperated and walked outside with Officer D'Amico. At Officer D'Amico's request, Dent sat down on a bench outside of the store. Officer D'Amico remained standing. Officer D'Amico's patrol car was parallel parked outside the store within 15 feet of the bench.

Officer D'Amico asked Dent if he had any identification. Dent handed Officer D'Amico his Washington identification card (ID) that confirmed Dent's identity. Officer D'Amico then asked Dent why he was at the Rite Aid. Dent responded that he had gone there to fill his prescription for oxycodone. Dent explained that he had been in a car crash and needed the oxycodone to help with the pain. Officer D'Amico asked Dent what injuries he suffered as a result of the crash. Dent was not able to provide an answer or any additional details about the car accident.

Officer D'Amico asked Dent how he obtained the prescription. Dent claimed that he received it from a family friend. Officer D'Amico asked Dent if that friend was a doctor, and Dent said, "'I thought so.'" Officer D'Amico asked Dent if he knew the name of the person who provided the prescription. Dent responded that he did not know. But, Dent said that he received the prescription from someone at a house somewhere between Burien and White Center. According to Officer D'Amico, Dent was not in custody at the time she asked him these questions.

After Officer D'Amico finished questioning Dent, she waited for another patrol officer to arrive to stay with Dent. Officer D'Amico then went back into Rite Aid to speak with the technician, Kevin Christoph, who assisted Dent with the prescription and made the initial 911 call.[3] He said that he was suspicious about the prescription, because oxycodone was misspelled and there was a forgery note on file for the doctor listed on the prescription. Christoph said that the forgery note requested that the doctor, Dr. Andrew Graustein, be contacted to verify all prescriptions before filling the requests. Christoph stated that he spoke with Dr. Graustein about the prescription and Dr. Graustein confirmed that the prescription was invalid.

After speaking with Christoph, Officer D'Amico called Dr. Graustein. Dr. Graustein confirmed that he did not know Dent and did not write an oxycodone prescription for him. After speaking with Dr. Graustein, Officer D'Amico walked back outside. Dent was still sitting on the bench with the other officer standing in front of him. At that point, Officer D'Amico arrested Dent and read him his CrR 3.1[4] rights.

Dent was charged with violation of the Uniform Controlled Substances Act – forged prescription, RCW 69.50.403(1)(c).[5]

Dent moved to have the statements he made to Officer D'Amico suppressed. The trial court held a CrR 3.5 hearing in which Officer D'Amico testified to the questions she

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[3] Officer D'Amico had returned Dent's ID to him before going back into Rite Aid. It is unclear from the record exactly when Officer D'Amico returned the ID to Dent. The record indicates only that Officer D'Amico returned the ID to Dent sometime between originally asking for it and when she went back into Rite Aid.

[4] CrR 3.1 provides that all persons taken into custody must be immediately advised of their right to a lawyer. However, unlike Miranda, it does not require advisement of the right to remain silent. Compare CrR 3.1, with Miranda, 384 U.S. at 479.

[5] Dent was also charged with and convicted of identity theft in the second degree. This charge was eventually vacated.

asked Dent and his responses prior to receiving Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Dent argued that his statements should have been excluded, because he made them subject to custodial interrogation without first receiving his Miranda warnings. The trial court concluded that Dent's statements were admissible, because "Miranda was not applicable as the defendant was not in custody to the degree associated with formal arrest. These statements were voluntary." In reaching that conclusion, the court opined that under the circumstances—Dent was sitting on a park bench and he was not handcuffed—there was no formal custody or arrest. It further noted that Officer D'Amico conducted a limited investigation and interrogation that was not custodial in nature. As a result, the trial court found that Miranda did not attach until Dent was formally arrested.

At trial, the State presented the forged prescription along with five witnesses including Officer D'Amico; Rite Aid pharmacy technicians, Christoph and Margaret Lyons; and Dr. Graustein.

The jury found Dent guilty of Violation of the Uniform Controlled Substances Act – Prescription Forgery. Dent appeals.

DISCUSSION

Dent argues his statements to Officer D'Amico should have been excluded, because he was in custody and thus entitled to Miranda warnings.[6] Additionally, he argues that the admission of the statements was not harmless error.

[6] Dent assigns error to conclusions of law (a)(i)-(ix). These conclusions admitted Dent's statements into the State's case-in-chief.

Miranda warnings must be given whenever a suspect is subject to custodial interrogation by a state agent. 384 U.S. at 467-68; State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). If police conduct constitutes a custodial interrogation without Miranda warnings, statements made by the suspect during the interrogation must be suppressed. Miranda, 384 U.S. at 479. A person is in "custody" for the purpose of custodial interrogation if, after considering the circumstances, a reasonable person would feel that his freedom was curtailed to a degree associated formal arrest—an objective test. Heritage, 152 Wn.2d at 218. The defendant must show some objective facts indicating his freedom of movement or action was restricted or curtailed. State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). We review a trial court's custodial determination de novo. Id. at 36. Statements admitted in violation of Miranda are subject to harmless error analysis. State v. Reuben, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991).

Dent argues that the circumstances surrounding his encounter with Officer D'Amico illustrate that he was in custody when he answered her questions. While there are objective facts supporting both the State's and Dent's arguments, overall, the facts here indicate that neither Dent, nor a reasonable person in the same situation, would have felt that his or her freedom was curtailed to a degree associated with formal arrest prior to and during the questioning.

Officer D'Amico initially asked to speak with Dent and did not command it. Additionally, Officer D'Amico asked Dent to sit on a public bench in the middle of the day. She did not demand it. Dent was not handcuffed, and he was not in a police car or another confined space. There is no evidence in the record that Officer D'Amico ever touched

Dent or told him that he was required to stay and answer questions. Further, that Officer D'Amico was wearing a police uniform, her squad car was in Dent's line of sight from the bench, and she and the other officer were standing as Dent sat on the bench do not alone result in Dent being in custody. In fact, courts have found defendants not to be in custody for custodial interrogation purposes even within the confines of a law enforcement building or with several law enforcement officers present. See, e.g., Yarborough v. Alvarado, 541 U.S. 652, 656, 665, 124 S. Ct 2140, 158 L. Ed.2d 938 (2004); Howes v. Fields, ___ U.S. ___132 S. Ct. 1181, 1185-86, 1188-89, 182 L. Ed. 2d 17 (2012).

Officer D'Amico did not consider Dent in custody when she was asking him questions. Officer D'Amico did ask for and take Dent's ID, but she returned it to Dent after asking him questions but before going into Rite Aid. Officer D'Amico did not go back into the store until another officer arrived. That Officer D'Amico purposefully waited for the other officer to arrive before going back into Rite Aid, would signal to a reasonable person that his or her freedom was curtailed at that point. That action signaled to Dent that Officer D'Amico did not feel comfortable leaving him alone outside for fear that he might leave—an indication that he was not free to go. But, sequentially, this did not happen until after Officer D'Amico had already asked Dent her questions and not until after Dent had already provided the statements at issue.

Dent was not in custody, at least until Officer D'Amico decided not to leave his side until another officer arrived. At that point he was no longer free to leave, but the questioning was over. We do not believe that Dent's freedom of action was limited to a degree associated with formal arrest during the questioning.

However, even if Dent's statements were admitted in error, we find that the error was harmless. A constitutional error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). We look at only the untainted evidence to determine if the evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426.

Dent contends the admission of his statements was not harmless, because the statements formed the overwhelming proof of the mens rea element of RCW 69.50.403. RCW 69.50.403(1) states:

> It is unlawful for any person knowingly or intentionally:
>
> . . . .
>
> (c) To obtain or attempt to obtain a controlled substance, or procure or attempt to procure the administration of a controlled substance, (i) by fraud, deceit, misrepresentation, or subterfuge; or (ii) by forgery or alteration of a prescription or any written order.

(Emphasis added.)

At trial, the State presented the prescription itself as evidence. Further, the jury heard testimony from Lyons, Christoph, and Dr. Graustein. The prescription and the testimony demonstrated that "oxycodone" was misspelled on the face of the prescription, the amount and dosage of the drug were rather large, and there was a clinic listed on the prescription that did not exist. Further Dr. Graustein testified about not knowing Dent nor having ever treated Dent.

Based on the untainted evidence, any reasonable jury would conclude beyond a reasonable doubt that the prescription was forged. Further, a reasonable jury would

conclude that Dent knowingly and intentionally attempted to obtain the oxycodone by means of a false and forged prescription in light of the fact that his name was on the prescription yet he had never met or been treated by the doctor who allegedly wrote it.[7] Any potential error was harmless.

We affirm.

WE CONCUR:

[7] Dent's statements were not even the State's strongest evidence that Dent acted knowingly or intentionally. Nothing Dent said in his conversation with Officer D'Amico unequivocally confirmed that he acted knowingly or intentionally whereas Dr. Graustein's testimony confirmed that Dent had never been treated by the doctor who allegedly wrote the prescription—a much more compelling piece of evidence.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. KIEL DENT, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 70666-7-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF DECEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KIEL DENT
1212 SW HOLDEN STREET, NO. 3
SEATTLE, WA 98118

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF DECEMBER 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

December 23, 2014 - 2:43 PM

Transmittal Letter

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