73422-9

73422-9

NO. 73422-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAHROD JIMMA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES

1. A law enforcement officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions of criminal activity. Jimma was one of four occupants in a car lawfully stopped for speeding. The officer immediately smelled marijuana coming from inside the car and observed that all of the occupants appeared to be in their teens or early twenties. Was Jimma improperly "seized" when the officer addressed all of the occupants collectively and asked, "where's the marijuana?"

2. A suspect is entitled to Miranda warnings only when a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest. A person who is only subjected to a Terry routine investigative stop need not be given Miranda warnings prior to questioning. Was Jimma, as one of four occupants of the car, entitled to Miranda warnings before the officer asked the group collectively "where's the marijuana?"

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Jahrod Jimma was charged by information with Unlawful Possession of a Firearm in the First Degree (based on a predicate conviction of Robbery in the Second Degree); Violation of the Uniform

Controlled Substances Act (possession with intent to distribute marijuana); and Resisting Arrest. CP 1-2. All three charges arose from an October 31, 2013, incident in which Jimma was arrested after having been a passenger in a car that was pulled over for speeding. CP 4-5.

Jimma moved pretrial to suppress marijuana and a firearm taken from Jimma by law enforcement at the time of his arrest. CP 7-55. After an evidentiary hearing, the trial court denied the CrR 3.6 motion to suppress. CP 109-13. The trial court also admitted statements made by Jimma before and after he had been placed under arrest. Supp. CP __ (Sub #102).[1]

After a jury trial, Jimma was convicted of Unlawful Possession of a Firearm in the First Degree. CP 106. He was found not guilty of Resisting Arrest and of Possession With Intent to Deliver a Controlled Substance. CP 108, 105. He was found guilty of the lesser included offense of Possession of Marijuana While Under the Age of 21. CP 107.

Jimma, who had prior juvenile felony convictions for second degree robbery, residential burglary (2X), attempted residential burglary, and first degree theft, was given a standard range sentence of 34 months in

[1] There was a delay in filing the written findings of fact and conclusions of law regarding the admissibility of Jimma's statements pursuant to CrR 3.5. The findings were filed on December 22, 2015. Supp. CP __ (Sub #102). The trial prosecutor filed a declaration indicating he had not spoken to the appellate unit about the case and was not aware of the appeal issues when he filed the findings. Supp. CP __ (Sub #103).

prison on his conviction for Unlawful Possession of a Firearm in the First Degree. CP 151-58. A concurrent 90-day sentence was imposed on his conviction for marijuana possession. CP 159.

2. SUBSTANTIVE FACTS

Pretrial, the court conducted a joint CrR 3.5 and CrR 3.6 hearing at which the State presented testimony from Kent Police Department officers Rex Miller and Joseph Mello.

Before becoming an officer for the Kent Police Department, Rex Miller was a corrections officer for 10 years with the Washington State Department of Corrections. 1RP[2] 22. For a "couple years" as a corrections officer he was a canine handler and conducted many searches of inmate cells for marijuana and other drugs. 1RP 22-23. Miller became familiar with the smell of marijuana. 1RP 23-24.

At the hearing, Miller testified that on October 31, 2013, he was on patrol as a police officer in the traffic unit of the Kent Police Department. 1RP 24. After 10:00 p.m. that night, Miller stopped a car for speeding (53 mph in a 40 mph zone). 1RP 26. Miller contacted the driver, LaShelle Cox, who identified herself with a Washington ID card that indicated Cox was 19. 1RP 27-28. She appeared that age to Officer

[2] The verbatim report of trial court proceedings consists of three volumes, which will be referred to in this brief as follows: 1RP (1/12/15 and 1/13/15 a.m.); 2RP (1/13/15 p.m., 1/14/15, and 1/15/15 a.m.); 3RP (1/15/15 p.m., 1/16/15, 2/20/15, 3/27/15, and 4/24/15).

Miller. 1RP 28. For his own safety when making stops at night, Miller uses a flashlight to light the interior of a vehicle so he can see the occupants. 1RP 29. In the car were the female driver, two other females, and the defendant he later identified as Jahrod Jimma. 1RP 28-29. He could see the passengers clearly, and all three appeared to be about the same age as the driver. 1RP 29. They all appeared to be in their late teens or early twenties. 1RP 63.

As soon as Miller started talking to Cox he was able to smell "a very strong odor" of unburnt marijuana through the open driver's window. 1RP 30. Miller knew that it was a crime to possess marijuana only for persons under 21. 1RP 54. In order to determine whether a crime was being committed (or whether anyone in the car could legally possess marijuana), Miller asked the group of four whether anyone was 21. 1RP 31. They all quickly indicated they were not 21. 1RP 31-32, 55. Miller next asked, addressing the whole group, "where the marijuana was at." 1RP 32. All four indicated, either through head shakes or saying "no," that they didn't have any marijuana. 1RP 32. Miller then told them that he had been a narcotics canine handler and that he knew the smell of marijuana. 1RP 32-33. Miller then asked a second time whether anyone had marijuana. 1RP 33. At that time Jimma admitted he had marijuana and reached into the pocket of his jacket and held in his hand what Miller

recognized to be marijuana. Id. Jimma was sitting directly behind the driver. Id. Miller asked Jimma to hand him the marijuana and Jimma did so. Id. Miller then asked Jimma if he had ID, and Jimma gave him a state driver's permit. Id. The permit indicated Jimma was twenty years old. 1RP 34.

At that point, Officer Miller went back to his patrol car and called for backup. Officer Miller waited in his patrol car until Officer Mello arrived a few minutes later. 1RP 34-35. Miller explained the situation to Mello, told him he was going to arrest Jimma, and told Mello where Jimma was sitting in the car. 1RP 35. The officers then approached the car on the left side and Miller opened the back door, asked Jimma to get out, and told him that he was under arrest for possession of marijuana. Id. The officers had to encourage and assist Jimma out of the car, and he began to stiffen and resist when the officers tried to put him into handcuffs. 1RP 36. Because of continuing resistance, the officers had to use a foot sweep to take Jimma to the ground. 1RP 37.

Eventually, officers were able to control Jimma, handcuff him, search him incident to the arrest, and place him in Miller's patrol car. 1RP 39. During the search of Jimma, officers found a firearm in his possession. 1RP 59. When Jimma was in the patrol car Officer Miller

advised him of his Miranda[3] rights.[4] 1RP 39. Jimma then agreed to answer questions. 1RP 41. He told Miller that he used the gun for protection because he had previously been shot in the foot and assaulted with a baseball bat. 1RP 41-42. He said he had gotten the gun "on the street." 1RP 44. He told Miller that he was a gang member – "South Cloverdale." 1RP 45-46.

The defendant chose not to testify at the combined CrR 3.5 and CrR 3.6 hearing. 1RP 66. The defense called no witnesses. 1RP 66. The trial court denied defendant's motion to suppress physical evidence and entered CrR 3.6 findings. 1RP 130; CP 109-13. Regarding the CrR 3.5 hearing, the court admitted Jimma's pre-Miranda statement that he had marijuana, which he made contemporaneously as he handed the marijuana to Miller. 1RP 94; Supp. CP __ (Sub #102). The court also admitted Jimma's post-Miranda statements. 1RP 95; Supp. CP __ (Sub #102).

C. ARGUMENT

Jimma claims that the trial court erred by not excluding the admission he made to Officer Miller as he handed Miller his marijuana when he was still seated as a passenger in the stopped car. Jimma argues that the officer had no right to question him at all, and also that his

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

[4] At the pretrial hearing Jimma stipulated that the Miranda warnings had been properly given. 1RP 40.

admission was made when he was in custody for Miranda purposes but before he had been advised of his rights. Both of Jimma's arguments fail. No person in Jimma's position, simply a backseat passenger in a car stopped for speeding, could have reasonably believed he was "in police custody to a degree associated with formal arrest" at the time that he admitted he had marijuana. Because he was not entitled to Miranda warnings, the trial court properly admitted Jimma's admission and the marijuana he handed over. Therefore, Jimma's conviction for marijuana possession should be upheld.

Jimma also asks that his conviction for Unlawful Possession of a Firearm in the First Degree be reversed. In support of that request Jimma argues that Officer Miller had no right to ask the young occupants of the car about the marijuana he smelled. The argument is without merit. Within the parameters of a Terry[5] investigative stop, Officer Miller asked a few questions to confirm or dispel his suspicion that one or more of the car's occupants was unlawfully in possession of marijuana. There is no basis to reverse Jimma's conviction on the gun charge.

[5] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

1. JIMMA WAS LAWFULLY DETAINED DURING A TERRY STOP AND ADMITTED TO HAVING MARIJUANA BEFORE HE WAS ENTITLED TO MIRANDA WARNINGS.

A suspect is entitled to Miranda warnings only when he is in custody and subjected to interrogation. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). An objective standard is used to determine whether an interrogation is custodial, by asking "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." Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317, 335 (1984); State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004)).

Not all detentions of persons by law enforcement officers amount to custody for Miranda purposes. Pursuant to Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), officers are not required to warn suspects of their Miranda rights during investigatory stops. A "temporary and relatively nonthreatening detention involved in a traffic stop or Terry stop does not constitute Miranda custody." Maryland v. Shatzer, 559 U.S. 98, 113, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010). "To justify the initial stop the officer must be able to point to specific and articulable facts that give rise to a reasonable suspicion that there is criminal activity afoot." State v. White, 97 Wn.2d 92, 105-06, 640 P.2d 1061 (1982). An

officer may "briefly detain a person for questioning if the officer has reasonable suspicion that the person stopped is or is about to be engaged in criminal activity." State v. Fuentes, 183 Wn.2d 149, 158, 352 P.3d 152 (2015). Thus, a suspect is not in custody during an investigatory Terry stop where the police question the suspect "to confirm or dispel [their] suspicions." State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). But the suspect "is not oblig[ated] to respond." State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992) (quoting Berkemer v. McCarty, 468 U.S. 420, 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

A "Terry stop must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'" State v. Saggers, 182 Wn. App. 832, 839 n.14, 332 P.3d 1034 (2014) (quoting Terry, 392 U.S. at 20)). But "'[t]he scope of an investigatory stop ... may be enlarged or prolonged ... if the stop confirms or arouses further suspicions.'" State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990).

"In custody" and "seizure" or "seized" (not free to leave) are distinct concepts. A person who is only subjected to a Terry routine investigative stop need not be given Miranda warnings prior to questioning. State v. Huynh, 49 Wn. App. 192, 201, 742 P.2d 160 (1987). Even the fact that a suspect is not "free to leave" during the course of a Terry or investigative stop does not make the encounter comparable to a

formal arrest for Miranda purposes. State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less "police dominated," and does not lend itself to deceptive interrogation tactics. State v. Cunningham, 116 Wn. App. 219, 228, 65 P.3d 325 (2003); Walton, 67 Wn. App. at 130.

Miranda warnings are required when a temporary detention ripens into a custodial interrogation. State v. Templeton, 148 Wn.2d 193, 208, 59 P.3d 632 (2002); State v. King, 89 Wn. App. 612, 624-25, 949 P.2d 856 (1998) ("Because a Terry stop is not a custodial interrogation, an officer making a Terry stop need not give the Miranda warnings before asking the detainee to identify himself."); State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997) (Miranda safeguards apply as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest).

Here, Jimma was not in custody for Miranda purposes at the time of his confession to possessing marijuana. He was a passenger in a car that had been lawfully stopped for a traffic infraction. As a passenger in a stopped car, Jimma and the other occupants were seized for purposes of the Fourth Amendment. Brendlin v. California, 551 U.S. 249, 257, 127

S. Ct. 2400, 168 L. Ed. 2d 132 (2007). But the lawful scope of a Terry stop may be enlarged or prolonged as needed to investigate unrelated suspicions that crop up during the stop. State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990); State v. Guzman-Cuellar, 47 Wn. App. 326, 332, 734 P.2d 966 (1987). Here, after stopping the car for a routine traffic infraction, Officer Miller, observing the youthful occupants and smelling marijuana, naturally began to investigate his suspicion that a crime was being committed by one or more occupants of the vehicle.

Miller did what any law enforcement officer would be expected to do, and his actions are permitted by law. For example, an officer who conducts a Terry stop of a vehicle based upon reasonable suspicion that the driver has committed a traffic offense may expand the questioning to the consumption or possession of unlawful drugs when there is objective evidence supporting such questioning. State v. Santacruz, 132 Wn. App. 615, 133 P.3d 484 (2006) (the officer's questioning of driver, who was initially stopped for expired vehicle registration, regarding drugs and the subsequent consensual search were justified by the driver's dilated pupils which did not constrict when a flashlight was shined in the eyes and by the absence of any odor of alcohol). In State v. McIntosh, 42 Wn. App. 579, 582, 712 P.2d 323 (1986), this Court held that where a traffic stop is based on a violation committed by the driver, police may require

identification of other individuals in the car if other circumstances give the police independent grounds to question passengers.

State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004) is instructive. Although the encounter did not involve passengers in a car, the facts are otherwise very similar to the case at bar. There, the 16-year-old defendant and three other juveniles were sitting together in a park. 152 Wn.2d at 212. Two private security officers saw one of the juveniles smoking what appeared to be a marijuana pipe and the officers approached the group. Id. An officer asked one of the juveniles whether the pipe was his and he denied ownership. Id. at 213. Then the officer addressed the entire group and asked, "whose marijuana pipe is it?" Id. at 213. The defendant admitted ownership. Id. at 213. The supreme court discussed the custody requirements and compared them to a traffic stop and a Terry stop.[6] Id. at 217-18. The court stated that a routine traffic stop, like a Terry stop, "is a seizure" for Fourth Amendment purposes because it "curtails the freedom of a motorist such that a reasonable person would not feel free to leave the scene." Id. at 218. But the court "recognized that because both traffic stops and routine Terry stops are brief, and they occur in public, they are substantially less police dominated than the police

[6] The supreme court first determined that the private security officers were functioning as state actors for purposes of Miranda. Heritage, 152 Wn.2d at 217.

interrogations contemplated by Miranda." Id. (citing Berkemer, 468 U.S. at 439).

The Heritage court also stated that "a detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody'" for Miranda purposes. Id. at 218-19. Thus, routine Terry stops are not custodial for Miranda purposes. Id. at 218.

In Heritage, the court determined that the defendant was not in custody at the time that she admitted ownership of the marijuana pipe because the "encounter was analogous to a Terry stop." Id. at 219. Specifically, the court determined that the questioning occurred publicly and that the defendant was never physically restrained or isolated from her friends. Id. The court also found that the security officers asked questions which related to their suspicions. Id. Lastly, the court determined that the defendant's age did not make the encounter custodial, and that a 16-year-old would not have reasonably "believed she was detained to a degree analogous to arrest." Id.

> Within the first minute or two of questioning they asked to whom the pipe belonged. Heritage admitted it was her pipe. An officer making a Terry stop may ask a moderate number of questions to determine the identity of the suspect and to confirm or dispel the officer's suspicions without

> rendering the suspect "in custody" for the purposes of Miranda. At the time the officers asked to whom the marijuana pipe belonged they were in the midst of asking a moderate number of questions related to their suspicions that members of the group were smoking marijuana. A reasonable person in Heritage's position would not have believed her freedom was curtailed to a degree analogous to arrest. The encounter was analogous to a Terry stop, not custodial interrogation, at the time Heritage admitted to ownership of the pipe.

Heritage, at 219 (citations omitted).

Here, although Jimma was "seized" by virtue of simply being a passenger in a stopped vehicle, he was not in custody for purposes of Miranda at the time that he admitted having marijuana and handing it to the officer. After smelling the marijuana and observing the ages of the car's occupants, Officer Miller did not even ask for identification from the passengers or question Jimma or any of the others individually. Miller simply posed the question to the group collectively: "where's the marijuana?" Jimma, as one of four occupants being addressed collectively, could not have reasonably believed he was "in custody to a degree associated with formal arrest" when he responded by handing a baggie of marijuana to Miller.

The trial court did not err in admitting Jimma's admission to possessing marijuana and his testimonial act of handing the marijuana to Officer Miller.

2. ANY ERROR IN ADMITTING JIMMA'S PRE-MIRANDA ADMISSION WAS HARMLESS.

Even if this Court were to hold that Jimma was in custody for Miranda purposes at the time of his admission to having marijuana and his testimonial act of producing it to Officer Miller, the trial court's error in admitting the evidence was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result had the error not occurred. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

The Fifth Amendment remedy for a Miranda violation is limited to suppression of the statement and testimonial act of surrendering the drugs, not the contraband itself. United State v. Patane, 542 U.S. 630, 641-42, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004); State v. Russell, 125 Wn.2d 24, 56, 882 P.2d 747 (1994); State v. Lozano, 76 Wn. App. 116, 119, 882 P.2d 1191 (1994) (citing State v. Wethered, 110 Wn.2d 466, 473-74, 755 P.2d 797 (1988) (Only evidence obtained in which violations of the right to Miranda warnings involve actual coercion will result in suppression as "fruits of the poisonous tree.")). Jimma recognizes this authority and argues only that the admission of his statement of ownership and testimonial act of producing the marijuana impacted his conviction for possession of marijuana; he does not argue that the erroneous admission

impacted his conviction for Unlawful Possession of a Firearm in the First Degree. Brief of Appellant at 18-19.

Jimma's argument that the admission of his statement of ownership and testimonial act of handing the marijuana to Miller was not harmless error should be rejected. Even if the jury had not heard that testimony, any reasonable jury would have convicted Jimma of possession of marijuana because the search incident to arrest resulted in additional marijuana being found on his person. Officer Miller began the search incident to arrest and located a 9.mm Taurus handgun in Jimma's right front coat pocket. 2RP 55. Because officers Miller and Mello were both winded from the struggle to subdue Jimma, Kent Police Department Sergeant John Pagel, who had arrived at the scene during the struggle, then took over the search. 3RP 82-85. The jury heard that Pagel found additional baggies of marijuana in Jimma's left front jacket pocket, and that the marijuana was sorted into equal amounts in the baggies.[7] 3RP 85-89. Thus, even if the State would not have been able to connect Jimma to the marijuana he produced to Miller while still in the car, the jury heard testimony that additional baggies of marijuana were found on him during the search. Since Jimma did not testify and the defense called no

[7] The precise number of baggies was unclear from the testimony.

witnesses, the evidence was unrefuted and any reasonable jury would have convicted Jimma of possession of marijuana.

D. CONCLUSION

The State respectfully asks this Court to affirm Jimma's judgment and sentence.

DATED this 25 day of February, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Mick Woynarowski, containing a copy of the Brief of Respondent , in STATE V. JAHROD JIMMA, Cause No. 73422-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date : Feb. 25, 2016

Done in Seattle, Washington