

62659-1

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NO. 62659-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIC PAUL DAY,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUE

In order for Miranda¹ warnings to be required, a suspect must be *both* in custody *and* subject to interrogation. Here, the evidence established that during his conversation with Detective Gordon, the defendant was free to leave at any time and was never in custody or under arrest. Did the trial court properly admit Day's statements to Detective Gordon incriminating himself in a charge of child molestation?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Eric Paul Day was charged by Amended Information with one count of child molestation in the second degree. CP 12. A jury trial on that charge commenced on August 7, 2008 before the Honorable Chris Washington. 1RP 1.² The jury returned a verdict of guilty on August 19, 2008. CP 36. At the sentencing hearing on October 22, 2008, the trial court denied the

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

² The Verbatim Report of Proceedings consists of seven volumes, referred to in this brief as follows: 1RP (Aug. 7, 2008); 2RP (Aug. 11, 2008); 3RP (Aug. 12, 2008); 4RP (Aug. 13, 2008); 5RP (Aug. 18, 2008); 6RP (Oct. 22, 2008); and 7RP (June 11, 2009). Transcripts were not provided for the re-sentencing hearing held on January 27, 2009.

defendant's request for a Special Sex Offender Sentencing Alternative ("SSOSA") and imposed a standard range sentence. CP 58-67; 6RP 14. The court then reconsidered that request on January 27, 2009 and agreed to allow the defendant a SSOSA. Supp. CP ____ (Sub no. 147 Revised Felony Judgment and Sentence). However, on June 11, 2009, the court found the defendant in violation of the conditions of his sentence, and revoked the SSOSA sentence; the original standard range sentence was then imposed. CP 156; 7RP 20.

2. SUBSTANTIVE FACTS

On August 13, 2006, Trisha Partida rushed her daughter A.N. to the Highline Medical Center emergency room because she had been discovered cutting herself. 5RP 58. While there, A.N., then sixteen, revealed that when she had been twelve years of age, she had been sexually molested by the defendant, who was the older boyfriend of her best friend's sister. 5RP 59-60. Based upon A.N.'s report that evening, the King County Sheriff's Office was contacted and an investigation was begun. 4RP 34, 51-52; 5RP 61.

During the course of that investigation, Detective Michael Gordon spoke with A.N. 4RP 53. A.N. revealed that when she was

twelve years of age, while watching a movie at her best friend's house, Day, who was sitting next to her, slipped his hand up under her boxer short PJ's, and put his finger in her vagina. 4RP 28. Scared and unsure of what was happening, A.N. did nothing; fortunately, however, the assault ended shortly thereafter when Day was distracted by his infant child who began to cry nearby. 4RP 29-30.

Based upon A.N.'s report, the detective contacted the defendant by phone with hopes of speaking with him. 4RP 55. Day indicated he was willing to speak with the detective and the two made arrangements to meet the following day at a location near Day's mother's home in Everett. 4RP 56. On June 13, 2007, as Detective Gordon was driving to the pre-arranged meeting location, he saw Day on foot headed in that direction. 4RP 56. Detective Gordon offered Day a ride, which Day accepted, and the two then sat in the detective's car in a nearby parking lot to discuss the reported incident. 4RP 56. During that conversation, which was taped with Day's consent, the defendant admitted to touching and massaging A.N. on her vagina on the night in question, but claimed to only have done so over her clothing. Ex. 2, 3. At the conclusion of their conversation,

the detective dropped Day off close to his mother's house so that he didn't have to walk far to get home. 2RP 24.

At that time, Day agreed to meet with the detective again to take a polygraph test. 2RP 13. Although Detective Gordon read Day Miranda warnings prior to Day's giving of a statement during that first meeting, it was out of an abundance of caution; at no point was Day under arrest or in-custody. 2RP 19. Day was not handcuffed or frisked and remained free to terminate the conversation and leave at any point. 2RP 19; 4RP 57.

On June 19, 2007, as previously arranged, the detective and Day met again, this time in the parking lot of the Fred Meyer store in Burien. 2RP 24-25. The detective then drove Day, who did not have his own vehicle, to the Regional Justice Center ("RJC") in Kent so he could meet with the polygrapher as he had agreed to do. 2RP 24-25; 4RP 68. During that ride, Day rode in the front seat of the detective's county car, and was at no point under arrest or in-custody. 2RP 25. Day was not handcuffed or frisked and remained free to terminate the meeting and leave at any point. 2RP 25; 4RP 67-68.

At the RJC, Day willingly submitted to a polygraph examination administered by Jason Brunson. 4RP 81-82. Again out of an abundance of caution, Brunson read Day his Miranda warnings

before administering the test. 4RP 83. Nonetheless, at no point during the polygraph was Day under arrest or in-custody. 2RP 25-26; 4RP 81-83. Again, Day was not handcuffed or frisked and remained free to terminate the meeting and leave at any point. Id.

At the conclusion of the test, Day and Detective Gordon met again; Detective Gordon offered to drive Day back to the Fred Meyer where they had met so that Day wouldn't have to walk or get a bus. 4RP 69. Day accepted the ride, which took between twelve to fourteen minutes. 4RP 71. During that time, additional conversation about the allegations ensued, and Day admitted that he may have touched A.N.'s vagina under her clothes, a contradiction to prior statements wherein he had only admitted to touching her vagina over her clothes. During that drive, Day was free to leave at any time; had he so requested, the detective would have pulled over at any time and let him out of the car. 2RP 26; 4RP 71. Day made no such request, nor did he hesitate to speak with the detective; at no point did he indicate a wish to remain silent. 2RP 27. At no point on the return trip to the Fred Meyer store was Day placed under arrest or in-custody. 2RP 26; 4RP 71. Just as before, Day was not handcuffed or frisked and remained free to terminate the meeting and leave at any point. Id.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY RULED THAT DAY'S STATEMENTS TO DETECTIVE GORDON WERE ADMISSIBLE AT TRIAL.

For the first time on appeal,³ Day argues that he was in custody during the return trip from the polygraph examination, and thus entitled to Miranda warnings before being interrogated. He further argues that the Miranda warnings he had been given on two prior occasions were not sufficient and thus, that the court erred in admitting his statements. Brief of Appellant 10-14. His claim should be rejected as it is without merit. At no point prior to his conviction for the charge at issue, was Day under arrest, in-custody or even placed in handcuffs. The evidence was ample that Day repeatedly agreed to speak with Detective Gordon, arrived of his own free will to those meetings, and that on every occasion, Detective Gordon made it abundantly clear that Day was *not* under arrest and was free to leave. Moreover, even if we assume that Day was in custody during the return trip to Burien, given that he had been adequately and properly Mirandized by Jason Brunson, there was no requirement that Detective Gordon re-Mirandize him before again discussing the

³ At trial, following the testimonial portion of the CrR 3.5 hearing, defense counsel offered no substantive argument. 2RP 33.

allegations. Finally, any error was harmless. Prior to the admissions made during the return trip from the RJC, Day had already made incriminating statements that constituted admissions to child molestation in the second degree.

In order for Miranda warnings to be required the defendant must be both “in custody” and subject to “interrogation.” Both factors must be present for the Miranda protection to attach. State v. Warness, 77 Wn. App. 636, 639-40, 893 P.2d 665 (1995). “A suspect who is not in custody does not have Miranda rights.... A suspect who is in custody but not being interrogated does not have Miranda rights.” Id., citing Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 1528, 128 L. Ed. 2d 293 (1994) (emphasis added).

“Custody” for the purposes of Miranda is established “as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” State v. Walton, 67 Wn. App. 127, 129, 834 P.2d 624 (1992), quoting Berkmer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). In determining whether the defendant was in custody, the relevant inquiry is based upon an objective standard: how would a reasonable person in the defendant’s position have understood his situation. Id. See also

State v. Ferguson, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995).

The issue is not whether a reasonable person would believe he was not free to leave, but whether a reasonable person would believe he was in police custody of the degree associated with formal arrest. Id.

Here, Day had been told on multiple occasions that he was not under arrest and that his participation in the interviews was voluntary—during his first meeting with Detective Gordon on June 13, 2007, and then again during his meeting with the detective and Mr. Brunson on June 19, 2007. 2RP 17, 25. Day was never handcuffed or frisked, and during the drive to and from the RJC, he was permitted to sit in the front seat with the detective rather than in the back seat where arrested parties are typically placed. 2RP 17-19, 25-26. Further, Day's presence in the detective's car was as a courtesy to him—the detective offered him a ride to and from the RJC because Day didn't have his own car and the detective didn't want him to have to walk or take a bus. 2RP 67-69. Finally, at the conclusion of his first meeting with Detective Gordon, Day had been driven home; thus, it was reasonable that he take the detective at his word at the conclusion of his second meeting and assume that he was being returned back to the Fred Meyer as

promised. 2RP 24-25. And, in fact, that is precisely what occurred. 2RP 27.

Taking all of these factors into consideration, the only logical conclusion is that a reasonable person in Mr. Day's circumstances would have felt free to leave and that therefore, Mr. Day was not in custody. The fact that it may have been *inconvenient* for him to get out of the car and make his own way home⁴ does not translate into the conclusion that he was in custody for purposes of a Miranda analysis. The question is only whether he would have felt free to do so, or, put differently, did he have reason to believe that if he so requested, Detective Gordon would have let him out of the car at any point? The answer to that question is clearly "yes."

That said, even if this Court should find that Mr. Day was in custody during the return trip from the RJC, Mr. Day was properly Mirandized, and thus the statements should still have been deemed admissible. Prior to his polygraph examination, Jason Brunson read Day his rights; at no point did Day express confusion, nor did he express a desire to exercise any of those rights. 4RP 83. The

⁴ Day asserts in his brief that he was twelve *miles* from home. Brief of Appellant at 13. The evidence presented at trial does not support this; rather, the testimony was that to travel from the RJC to the Burien Fred Meyer, it took roughly twelve to fourteen minutes. 4RP 71.

fact that Detective Gordon did not then re-Mirandize Day prior to returning him to Burien is of no consequence: “Where a defendant has been adequately and effectively warned of his constitutional rights, it is unnecessary to give repeated recitations of such warnings prior to the taking of each separate in-custody statement.” State v. Gilcrist, 91 Wn.2d 603, 607, 590 P.2d 809 (1979), citing State v. Vidal, 82 Wn.2d 74, 78, 508 P.2d 158 (1973). Thus, if we assume (as Day presumably does, as this issue is not contested by Day on appeal), that he was adequately and properly read his rights by Mr. Brunson, there was no requirement that the detective read them again, particularly given that the detective had already read them once to Day. Thus, even if Day was in custody, his statements to the detective were still properly admitted.

Finally, even if this Court determines that there was error and that the trial court should not have admitted the statements at issue, any error was harmless. Prior to that car ride, Day had already admitted on numerous occasions having had illegal sexual contact with A.N. as she alleged.⁵ 4RP 65, 84-85; Ex. 2,3. Moreover, the clear and unavoidable inference from Day's

⁵ Moreover, as trial approached, Day made a number of similar admissions on several occasions to the ex-girlfriend who was present on the night in question. 4RP 12, 13.

admissions, A.N.'s report, and the circumstances of the crime was that the sexual contact was done for the purpose of sexual gratification. Day's comments to the detective during the meeting in question notwithstanding, there was ample evidence from which the prosecutor could and did argue and the jury could and did decide that Day was guilty of the crime charged. Because the outcome of the trial would not likely have been different even without evidence of those final admissions, any error is most certainly harmless. Day is not entitled to a reversal or dismissal of his conviction.

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Day's conviction for child molestation in the second degree.

DATED this 15 day of March, 2010.

Respectfully submitted,

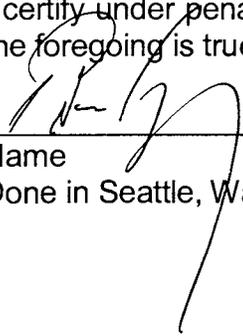
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Vanessa M. Lee, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ERIC PAUL DAY, Cause No. 62659-1-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.



Name
Done in Seattle, Washington

03/15/10

Date