

NO. 36193-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CARLOS L. FORD,

Appellant.

07 SEP 21 11:11 AM '07  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
BY *SE*

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

The Honorable Kathryn Nelson, Judge

BRIEF OF APPELLANT

LISE ELLNER  
Attorney for Appellant  
WSBA# 20955

LAW OFFICES OF LISE ELLNER  
P.O. Box 2711  
Vashon, WA 98070

*PM 9-20-07*

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. Procedural Facts .....	1
2. Substantive Facts.....	2
C. <u>ARGUMENT</u> .....	4
<p>APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM CUSTODIAL INTERROGATION WITHOUT A PRIOR ADMONISHMENT OF RIGHTS UNDER <u>MIRANDA v.</u> <u>ARIZONA</u>.<sup>1</sup></p>	
D. <u>CONCLUSION</u> .....	12

---

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

**TABLE OF AUTHORITIES**

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Daniels</u> , 160 Wn.2d 256, 156 P.3d 905 (2007).....	7, 9
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996). ....	11
<u>State v. France</u> , 121 Wn. App. 394, 88 P.3d 1003 (2004).....	8, 9
<u>State v. France</u> , 129 Wn. App. 907, 120 P.3d 654 (2005).....	8
<u>State v. Harris</u> , 106 Wn.2d 784, 725 P.2d 975 (1986), <u>cert. denied</u> , 480 U.S. 940 (1987).....	5-6
<u>State v. Hawkins</u> , 27 Wn. App. 78, 615 P.2d 1327 (1980).....	7-9
<u>State v. Hilliard</u> , 89 Wn.2d 430, 432, 573 P.2d 22 (1977).....	6
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	5-6
<u>State v. Miller</u> , 131 Wn.2d 78, 929 P.2d 372 (1997).....	10
<u>State v. Reuben</u> , 62 Wn. App. 620, 814 P.2d 1177, <u>review denied</u> , 118 Wn.2d 1006 (1991).....	10
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	5

**TABLE OF AUTHORITIES**

Page

FEDERAL CASES

Arizona v. Fulimante,  
499 U.S. 279, 111 S.Ct. 1246, 1132 L.Ed.2d 302 (1991).....10

Berkemer v. McCarty,  
468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).....5,6,7,9,10

Miranda v. Arizona,  
384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).....1,3-7, 9, 10

Terry v. Ohio,  
392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....6,9

RULES, STATUTES AND OTHERS

RCW 69.50.4013(1).....3

RCW 9.94A.525(17).....2

CrR 3.5.....2

A. ASSIGNMENTS OF ERROR

1. The failure to give Miranda warnings when Mr. Ford was interrogated while in custody denied him his constitutional right to remain silent.

2. Mr. Ford assigns error to disputed finding of fact number 14.

3. Mr. Ford assigns error to conclusion of law as to disputed facts number 4 which states that he was not in custody during the interrogation.

4. Mr. Ford assigns error to conclusion of law as to admissibility number 2 which indicates that Mr. Ford's statement regarding possession of the cocaine was admissible.

Issue Pertaining to Assignment of Error

1. Did the failure to give Miranda warnings when Mr. Ford was interrogated while in custody deny him his constitutional right to remain silent?

2. Did the trial court err in concluding that Mr. Ford was not in custody during the interrogation?

3. Did the trial court err in determining that Mr. Ford's statements regarding possession of cocaine were admissible?

B. STATEMENT OF THE CASE

1. Procedural Facts

Carlos Ford was charged by amended information with one count of possession of a controlled substance, to-wit: cocaine contrary to RCW 69.50.4013(1) and pursuant to RCW 9.94A.525(17) the crime was aggravated by Mr. Ford being on community custody. CP2.2 Mr. Ford stipulated to being on community custody. 1RP 6.3 Following a 3.5 hearing, the trial court held that Mr. Ford's statements to the police were admissible. CP 40-44Mr. Ford was convicted as charged following a jury trial, the honorable Kathryn Nelson presiding. CP 23, 27-39. This timely appeal follows. CP 48-61.

### 3.5 Hearing

Detectives Scott Yenne and Carol Krancich testified that they and 5-6 other detectives and a uniformed police officer went to 2315 South Yakima to server a warrant related to a different case in search of a weapon that someone may have left at this residence. RP 4, 8, 15,29, 31. According to both Yenne he had his weapon drawn when Mr. Ford answered the door and allowed the police to enter. RP 16. Yenne was not sure how many other detectives also had their weapons drawn. RP i6. Yenne had his weapon drawn during the entire search of the apartment. RP 17. Krancich testified that some of the other detectives also had their guns drawn. RP 42.

---

2 CP refers to the clerk's papers designated from Pierce County Superior Court cause number 06-1-02907-2

3 IRP refers to the verbatim report of the March 30, 2006 Sentencing proceedings.

Yenne testified that either Mr. or Mrs. Ford answered the door. RP 8, 19. Mr. Ford was cooperative and allowed the police to enter the apartment. RP 19. Mr. Ford was not a suspect in the search warrant and his name did not appear associated with the residence. RP 38. As soon as the police entered the residence, Mr. and Mrs. Ford were told that they were not free to leave and they and their children had to sit on the couch and not move. RP 17, 36.

During the search, Yenne found suspected rock cocaine in an upstairs bedroom he assumed was an adult bedroom. RP 11. Krancich removed Mrs. Ford from the couch and interrogated her away from Mr. Ford. She denied having any knowledge of the drugs. RP 12, 32. Krancich testified that it was possible that during the interrogation of Mrs. Ford she told Mrs. Ford that something could happen to the children if drugs were found in the apartment. RP 43. Krancich also testified that she may have told Mrs. Ford that if she could identify where the drugs came from, she might be able to help Mrs. Ford. RP 43.

Mr. and Mrs. Ford were not allowed to speak with each other during or in between the interrogations. RP 44. Both Yenne and Krancich interrogated Mr. Ford on the landing to the stairwell. RP 12. Yenne was certain that he did not provide Mr. Ford and Miranda warnings and was not sure if Krancich provided Miranda warnings. RP 12.

When interrogated on the stairwell, Mr. Ford stated that the drugs were his and that his wife did not know about them and that he planned to

use them when she and the children were away later in the week. RP 14, 35. Krancich testified that it was possible that Mr. Ford was told that something could happen to the children if drugs were found in the apartment and that the police could help if he identified his source. RP 43.

Krancich and Yenne conferred together after the interrogations and decided to arrest Mr. Ford. RP 15, 44. During the entire time that he was detained in the apartment he was not free to leave or move from the couch and the detectives had their weapons drawn until the search was completed. RP 9, 17-18, 36-37

C. ARGUMENT

APPELLANT WAS DENIED HIS  
CONSTITUTIONAL RIGHT TO BE FREE  
FROM CUSTODIAL INTERROGATION  
WITHOUT A PRIOR ADMONISHMENT  
OF RIGHTS UNDER MIRANDA v.  
ARIZONA.<sup>4</sup>

Ford was interrogated in his home while in police custody. There is no dispute regarding the fact that Ford was interrogated by the police. The only issue is whether he was in "custody" for purposes of requiring Miranda warnings.

Miranda warnings were developed to protect a defendant's constitutional right not to make incriminating confessions or admissions to

---

<sup>4</sup> Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

police while in the coercive environment of police custody. State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940 (1987). 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, 647, 762 P.2d 1127 (1988) (citing Miranda, 384 U.S. at 444). Without Miranda warnings, a suspect's statements during custodial interrogation are presumed involuntary. Sargent, 111 Wn.2d at 647-48.

The Appellate Court's review de novo a trial court's decision as to whether the defendant was in custody during police questioning. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). "Custodial" refers to whether the defendant's movement was restricted at the time of questioning. Lorenz, 152 Wn.2d at 36 (citing State v. Sargent, 111 Wn.2d at 649). A person is not in custody if he reasonably believes he is free to leave at any time. Lorenz, 152 Wn.2d at 37-38. In Miranda, the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444.

In Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), the United States Supreme Court clarified that the

determination of whether one is in "custody" is based on an objective test-whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. Berkemer, 468 U.S. at 441-42. Our state supreme court adopted this test in State v. Harris, 106 Wn.2d 784, 790, 725 P.2d 975 (1986); accord, Lorenz, 152 Wn.2d at 37.

Berkemer involved a short routine Terry<sup>5</sup>-type traffic stop that did not rise to the level of "custody" even though the person's freedom was curtailed. The Court stated that the individuals were not in custody because they were in public and not sequestered in a more coercive police dominated setting, and the detention was brief. Berkemer, 468 U.S. at 439-40. In such a brief public setting, the police may ask a limited number of questions to determine the identity of the suspect and to confirm or dispel the officer's suspicions without requiring Miranda warnings. Berkemer, 468 U.S. at 439-40; Accord,. State v. Hilliard, 89 Wn.2d 430, 432, 435-36, 573 P.2d 22 (1977).

In the instant case, Ford was in custody for a prolonged period of

---

<sup>5</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

time. The police encounter was not brief and the police did not limit their questions to determining identity or to confirm or dispel other suspicions..

Five or six detectives entered Ford's home to execute a search warrant. The police had guns drawn and Ford and his family were told not to move. The entire family was placed on the couch and forced to stay there while the police with guns drawn searched their home for an item that did not belong to them. Custody continued after the police read the search warrant; after the police found suspected cocaine in an adult bedroom upstairs and when two detectives interrogated Ford on the landing of the stairwell and asked him whether the cocaine was his. The police did not provide Miranda warnings at any time.

Recently, in State v. Daniels, 160 Wn.2d 256, 266, 156 P.3d 905 (2007), citing, to Berkemer, 468 U.S. at 428 (quoting Miranda, 384 U.S. at 444), our State Supreme held that 17 year old Daniels was in custody as defined by Berkemer when she was placed in an interview room without her father and questioned 90 minutes at police headquarters. Daniels, 160 Wn.2d at 267.

In State v. Hawkins, 27 Wn. App. 78, 615 P.2d 1327 (1980), the defendant was in custody when he voluntarily walked into a police station and informed the police that he had a warrant outstanding in another state. The police after informing the defendant that they were only assisting the

other state, and would not give Miranda warnings asked the defendant basic questions about his height and weight. The defendant then told the police about the crime he committed. The police did not inform Hawkins that he was not free to leave. The Court of Appeals held that Hawkins was in custody and that the failure to provide Miranda warnings required suppression of the statements. State v. Hawkins, 27 Wn. App at 80-82. In France, the defendant was in custody when the police stopped him on the street following a 911 call that had identified him as the suspect in a violation of a no contact order.

In State v. France, 121 Wn. App. 394, 88 P.3d 1003 (2004), the police received a dispatch identifying France as having been involved in a domestic dispute. The police saw France walking down the street and stopped him. The officer told France that there was an alleged domestic dispute and that they "needed to clear it up" before France would be free to leave. State v. France, 121 Wn. App. at 399-400. France then admitted to being at the location of the dispute. The Court of Appeals held that the trial court erred in admitting the statements without Miranda warnings because a reasonable person would not have felt free to leave even though in a public setting. The Court of Appeals reversed the trial court and suppressed the statements. France, 121 Wn. App. at 400.

In a subsequent appeal, State v. France, 129 Wn. App. 907, 120 P.3d 654 (2005), the Court of Appeals confirmed its holding that France was in custody but determined that the error in admitting France's statements was harmless error because France was aware of a valid no contact order and the complainant identified France as having been at her home, therefore even without France's statements, there was sufficient evidence to establish guilt. France, 129 Wn. App. at 910-11.

In the instant case, Ford was told that he was not free to leave; he was not in a public setting; the police entered his home with guns drawn; and by the time they questioned him, they had found contraband and wanted Ford to identify it as his own. The instant case shares factually similarities with the cases cited. In Hawkins and Daniels the individuals were not in public. In France, Hawkins and Daniels, the detentions were not brief like in a Terry stop and in France the defendant was told that he was not free to leave. Finally in each of these cases under an objective test, the courts held that no reasonable person would have felt free to leave the arrest-like detention.

In Ford's case, like these cases a reasonable person in his situation, faced with being told that he was not free to leave and faced with 5-6 detectives some with guns drawn would have felt that his freedom was curtailed to the degree associated with a formal arrest. Berkemer, 468 U.S.

at 441-42. This scenario is precisely the type of coercive police environment contemplated by the Court in Berkemer requiring Miranda. Berkemer, 468 U.S. at 439-40.

Had the police provided Miranda warnings as required, Ford could have immediately exercised his right to remain silent. He was not however given that opportunity. The police took advantage of the fact that Ford was calm and cooperative rather than scrupulously honoring his right to remain silent. The interrogation was custodial and the questions were interrogation: Miranda warnings were required.

Harmless Error Analysis.

Admission of statements in violation of Miranda is an error of constitutional magnitude. State v. Reuben, 62 Wn. App. 620, 627, 814 P.2d 1177, review denied, 118 Wn.2d 1006 (1991), citing, Arizona v. Fulimante, 499 U.S. 279, 111 S.Ct. 1246, 1257, 1132 L.Ed.2d 302 (1991). Constitutional error is presumed prejudicial, and the state bears the burden of proving the error harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). A constitutional error is harmless only if it is: "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. Id.

In Ford's case, his statements were the only evidence linking

himself to the contraband. Without the statements the state would not have had any evidence of the crime charged. Admission of the statements was not harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The only testimony presented connecting Ford to the contraband came from Ford. Without the evidence the state did not have a case against him. Under these facts, the Court cannot conclude beyond a reasonable doubt that a reasonable jury would have reached the same result absent the allegedly improper evidence. Thus, the error was not harmless.

D. CONCLUSION

Mr. Ford requests this court suppress his admissions and dismiss the charges.

DATED this 19<sup>th</sup> day of September, 2007.

Respectfully submitted

LAW OFFICES OF LISE ELLNER



---

Lise Ellner, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Ryan Carlos Ford DOC # 3737959 Larch Corrections Center 15314 NE Dole Valley Road Yacolt, Washington 98675-9531 a true copy of the document to which this certificate is affixed, on September 20, 2007. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature \_\_\_\_\_