

NO. 36193-1

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CARLOS FORD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 06-1-02907-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Were *Miranda* warnings required when defendant was not in custody when he was interviewed by Detective Krancich, and the interview took place in the stairwell of defendant's residence?

B. STATEMENT OF THE CASE.

1. Procedure

On June 29, 2006, the State charged Carlos Lopez Ford, hereinafter "defendant," with one count of unlawful possession of a controlled substance, cocaine. CP 1¹. The State filed an amended information on October 25, 2006, which added community custody as an aggravating factor. CP 2. The parties appeared for trial before the Honorable Kathryn J. Nelson on March 12, 2007. RP 2. A 3.5 hearing was held and the court found that all defendant's statements were admissible. RP 63; CP 40-44. A jury convicted defendant as charged on March 14, 2007. CP 23. The court sentenced defendant to 16 months in the Department of Corrections with standard conditions, costs, and fines. SCP 8; CP 27-39.

¹ The verbatim record of proceedings consists of five volumes and shall be referred to as "RP" except the sentencing volume which shall be referred to as SRP.

2. Facts

a. 3.5 Hearing

Detectives Scott Yenne and Carol Krancich testified they, along with several other detectives, went to 2315 South Yakima to serve search warrant. RP 4, 29. The detectives were searching for a handgun that was used in a separate case. RP 4. Neither defendant nor Mrs. Ford were suspects in the other case. RP 8, 38-39.

Detective Krancich knocked on the door and identified herself as a police officer. RP 30, 37. Defendant answered the door and allowed the officers into the residence. RP 18, 25, 30, 37. Present in the residence were defendant, his wife, Amy Ford, and their children. RP 5, 30. Defendant, Mrs. Ford and their children were detained in the living room where Detective Krancich read the search warrant to them while the other detectives executed the warrant. RP 9, 36. Detective Yenne assisted the other officers by clearing the residence to ensure no other persons were in the residence. RP 9. Detective Yenne's gun was in his hand, at his side, and held in downward fashion when he initially entered the home, but was holstered once the residence had been cleared. RP 17, 26. Detective Krancich did not have her gun out of her holster and did not recall whether the other detectives did or not. RP 36, 41, 42.

While detained in the living room with his family, defendant was not handcuffed and both he and his wife were allowed to converse with their children. RP 9, 44. Defendant and his family were not free to move about the house during the search, but no one was under arrest. RP 10, 31, 32, 36-37.

During the search, Detective Yenne located a baggie that contained a rock like substance, a scale with residue, and a razor blade in a dresser drawer in the master bedroom. RP 11, 32. Detective Yenne believed the rock like substance was rock cocaine. RP 11. He notified Detective Krancich that he had found a suspected controlled substance. RP 12, 31, 32.

Detective Krancich decided to interview defendant and his wife to determine who possessed the controlled substance. RP 12. Defendant and his wife were interviewed separately. RP 12, 33. Mrs. Ford, who was not placed under arrest or handcuffed, was interviewed first. RP 12. Mrs. Ford was interviewed in the bedroom where Detective Yenne found the rock cocaine. RP 33. That interview took between 5-10 minutes. RP 24.

Similarly, when Detectives Krancich and Yenne interviewed defendant, he was not under arrest nor was he in handcuffs. RP 13, 33, 34. The detectives interviewed defendant on the landing of the stairs in his residence. RP 12-13, 33. Detective Yenne testified that he did not advise

defendant of his *Miranda*² warnings and did not know whether or not Detective Krancich had Mirandized defendant. RP 20, 21. Detective Krancich could not recall if she had advised defendant of his *Miranda* rights prior to interviewing him on the landing of the stairs. RP 35.

During the interview, which lasted close to five minutes, defendant appeared calm. RP 13, 14, 40. He answered questions without hesitation and was cooperative. RP 13, 14, 35. Defendant told the detectives that the rock cocaine was his and that he was a user. RP 14, 35. Defendant stated he was the person who rocks the cocaine up and that he was planning on doing it at the end of the week when his wife and children would be gone. RP 14.

After defendant's interview, Detectives Krancich and Yenne conferred. RP 14. Detective Krancich decided to arrest defendant for the possession of cocaine. RP 14-15, 36. Once defendant was arrested, a uniformed officer was called to transport defendant to jail. RP 16. Prior to defendant's arrest for unlawful possession of cocaine, there had been no uniformed officers present at defendant's residence. RP 16.

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

C. ARGUMENT.

1. DEFENDANT WAS NOT IN CUSTODY WHEN DETECTIVE KRANCICH INTERVIEWED HIM REGARDING COCAINE FOUND IN THE RESIDENCE.

Miranda warnings were designed to protect a defendant's right not to make incriminating statements while in police custody. State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986). "'Custody' for *Miranda* purposes is narrowly circumscribed and requires 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'" State v. Post, 118 Wn.2d 596, 606, 826 P.2d 172, modified, 837 P.2d 599 (1992) (citations omitted). The courts use an objective test to determine whether a defendant is in custody: 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. State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004) (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)).

In Lorenz, an officer posing as an internet distributor of child pornography exchanged emails with Lorenz's co-defendant, Rick Holdren, regarding a child "escort service." Lorenz at 25. A task force assigned to investigate child pornography tracked the email's IP (internet protocol) address to Merle "Rick" Holdren's and Pamela Lorenz's residence. Id. at 25-26. Officers obtained a search warrant to search the residence. Id. at 26. When the search warrant was executed on October 30, 2000, officers

seized several cameras and undeveloped film. Id. Holdren was arrested on outstanding warrants and Lorenz was arrested on drug charges when she was caught trying to hide methamphetamine under a mattress. Id. When the seized film was developed, officers found a photo of a child wearing a distinctive shirt holding a man's penis. Id. at 27. Officers believed the child in the photo was Lorenz's daughter and obtained a second search warrant to search Lorenz's residence for the child's shirt. Id.

Officers executed the second search warrant on November 3, 2000. Id. Lorenz, who had been released on the drug charge, was at home. Id. Officers asked her to step outside onto the front porch. Id. Lorenz was not placed under arrest, but was told she could not reenter her residence while the search warrant was being executed. Id. While on the porch, Special Agent Bennet of the FBI and Detective Roling questioned Lorenz. Id. After signing a statement that she was aware she was not under arrest, was free to leave, and could stop the questioning at any time, Lorenz told the officers that the picture depicted her daughter holding Holdren's penis. Id.

At trial, Lorenz attempted to suppress the statements she made during the November 3, 2000, search. Lorenz at 28. The court found that Lorenz was not in custody at the time she made those statements because she was not under arrest and was free to leave at any time. Id. at 29.

In State v. Radka, 120 Wn. App. 43, 46, 83 P.3d 1038 (2004), Radka was arrested for driving on a suspended license. After his arrest, Radka was placed in the back of the officer's patrol car, but was not handcuffed and was allowed to talk on his cell phone while the officer searched his vehicle. Radka, 120 Wn. App.43, 46. During the search, the officer found suspected methamphetamine and glass drug pipes. Radka at 46. The officer again arrested Radka, but did not give him *Miranda* warnings. Radka moved to suppress the physical evidence because it was not seized pursuant to a search incident to a custodial arrest. Id. at 47.

The trial court granted Radka's motion to suppress because the officer's subjective intent was to cite and release Radka not a custodial arrest. Radka at 47. On appeal, Division III held that the officer's subjective intent is not material when determining if a person is in custody. Id. at 49. Instead, the test is whether a reasonable person in defendant's position would believe he was under a full custodial arrest. Id. The court found that a reasonable person in Radka's position would not believe he was under full custodial arrest despite being advised he was under arrest and placed in the back of a patrol car. Id. at 50. The court considered the following factors in reaching its decision: 1) the officer did not frisk Radka prior to placing him in the back of the patrol vehicle; 2) Radka was allowed to keep his cell phone and receive telephone calls; and 3) Radka was not placed in handcuffs. Id.

In the present case, a reasonable person in defendant's position would not believe his freedom of movement was restrained to the degree associated with a formal arrest when defendant was interviewed by Detective Krancich. Defendant and his family were detained in the living room of his home while officers executed a search warrant. The search warrant, which was read to defendant and his family before defendant was interviewed by Detective Krancich, indicated the detectives were searching for a firearm used in a shooting. Neither defendant nor his wife were suspects in that shooting nor was the weapon itself alleged to be owned by either defendant or his wife. RP 31. Like Lorenz who was not allowed back into her house while officers search for the child's shirt, the detectives in this case made it clear to defendant and his family that they were not free to roam around the house while officers searched for the firearm. Also like Lorenz, defendant was not placed under arrest or handcuffed. Defendant was not in custody when interviewed by Detective Krancich because defendant was only questioned for a short period of time in the stairwell of his own home, was not placed under arrest and was not handcuffed during the interview. A reasonable person in defendant's position would not have felt his freedom of movement was restricted to a point associated with formal custodial arrest.

Defendant points to the fact that there were multiple detectives, "some with guns drawn" present executing the search warrant to support his claim that he was in custody when Detective Krancich interviewed

him. Brief of Appellant 9. This misrepresents the record. The only detective that testified his firearm was drawn was Detective Yenne. Detective Krancich said she had not drawn her weapon and did not notice if any other officer had his weapon drawn. Additionally, the fact that detectives were present executing a search warrant is not sufficient for the court to find a reasonable person would find that he was restrained to the degree for formal custodial arrest. In Lorenz, officers were also executing a search warrant while Lorenz was interviewed on her porch and the court found she was not restrained to the point of full custodial arrest. This was true even though in Lornez, unlike in the present case, the evidence sought in the search warrant would link Lornez to a crime. In the present case, the evidence sought in the search warrant was not owned by defendant or his wife, nor would it link either of them to a crime.

Defendant relies upon State v. Hawkins, 27 Wn. App. 78, 615 P.2d 1327 (1980), and State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007), to support his argument that he was restrained to the point of full custodial arrest because he was interviewed in his own home and not “in a public setting.” Brief of Appellant at 9. Both Daniels and Hawkins are distinguishable from the present case.

In Daniels, the defendant, who was 17 at the time, was interviewed for 90 minutes in an interview room at the police station. State v. Daniels, 160 Wn.2d 256, 266-67. The court also noted Daniels was under significant stress at the time of the interview because it took place the day

after her son's funeral. Daniels at 267. In contrast, defendant was interviewed for approximately five minutes in the stairwell of his own home and there is no evidence that defendant was under stress at the time of the interview.

In Hawkins, the defendant walked into a California police station and advised the officer that he had an outstanding warrant in Washington. 27 Wn. App. 78, 80. The officer informed Hawkins that he would not be given *Miranda* warnings because the California police would not participate in the investigation or prosecution of the Washington case. Id. Hawkins then made statements to the officer regarding the crime. Id. The court found that the officer's statement that he would not participate in the investigation was deceptive and therefore Hawkins's statements should be suppressed. Hawkins at 83-84. In the present case, defendant was interviewed in his own home and there is no evidence that the officers made any deceptive statements to defendant during the interview.

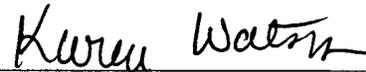
In the present case, *Miranda* warnings were not required because defendant was not under arrest or handcuffed when he was interviewed in the stairwell of his own home. Under the facts of this case, no reasonable person would have believed his freedom was curtailed to the degree associated with full custodial arrest. Defendant's claim is without merit and must fail.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this court affirm defendant's conviction.

DATED: DECEMBER 4, 2007

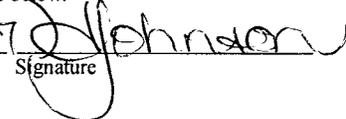
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/4/07 
Date Signature