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

State of Washington
Respondent

v.

JAMES WILLIAM HOPKINS
Appellant

40347-1

On Appeal from the Superior Court of Clallam County

Cause No. 09-1-00460-1

The Honorable George L. Wood

BRIEF OF APPELLANT

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court erroneously admitted physical evidence seized from Appellant in violation of Wash. Const. art. 1, §7 and the Fourth Amendment.
2. The trial court erroneously admitted Appellant's incriminating statements that were obtained in violation of Wash. Const. art. 1, §9 and the Fifth Amendment.

B. Issues Pertaining to Assignments of Error

1. The pain pills offered in evidence to prove Appellant possessed a controlled substance with intent to deliver were obtained in violation of Wash. Const. art. 1, § 7 and the Fourth Amendment.
 - (a) The initial police contact with Appellant was not a social contact.
 - (b) The contact exceeded the scope of a Terry stop.
- 2.. Appellant's statements at the scene were inadmissible under Wash. Const. art. 1, § 9 and the Fifth Amendment.
 - (a) Appellant did not feel free to leave.
 - (b) The circumstances were coercive.
 - (c) The police did not obtain a valid waiver of Miranda rights.

III. STATEMENT OF THE CASE

Appellant, James William Hopkins, appeals his conviction and sentence for possession of a controlled substance with intent to deliver in violation of RCW 69.50.401(1).¹ CP 7. Hopkins challenges the legality of his detention and questioning and contends the trial court erroneously admitted evidence obtained in violation of Wash. Const. art 1, § 7 and the Fourth and Fifth Amendments to the United States Constitution.

The following facts were established at the CrR 3.5 hearing and at the jury trial. 2RP 15.²

The police in Port Angeles, Washington, received a report at 11:00 a.m. on November 11, 2009, from the manager of a Walgreen's store.

2RP 16. An employee, William Curry, had said a man approached him in the parking lot and asked if he wanted some pain pills. 2RP 16.

Officer Jon Nutter arrived within a few minutes. Curry described the man's clothing and pointed Nutter in the direction he had gone down the street. Nutter followed in his patrol car and within a couple of blocks spotted Appellant, James William Hopkins in an alley. 2RP 16. Hopkins'

¹ RCW 69.50.401(1): Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

² The reported proceedings are contained in a single volume with four separately paginated sections. In this brief, the pretrial proceedings are designated 1RP; the first trial day is 2RP; the second trial day is 3RP (not cited); and the sentencing hearing is 4RP.

appearance matched Curry's description: all black clothing and a blue cap, bruising on the face and a black eye. 2RP 44.

Nutter recognized Hopkins from previous encounters. 2P 18. He got out of his car and approached Hopkins on foot. 2RP 17. Nutter told Hopkins, "Hey, I need to talk to you for a second." Hopkins stopped. 2RP 17. Nutter told Hopkins he was investigating a report that someone matching Hopkins' description had just tried to sell some pain pills. Hopkins said it was not him. 2RP 17, 26.

Nutter then asked Hopkins whether he had any pills with him. 2RP 17. Hopkins said he did. He removed a prescription pill bottle from his pocket and handed it to Nutter. 2RP 17. The label was made out to Hopkins by a local emergency room doctor. Hopkins explained that he had been prescribed the pills after a recent bicycle accident. 2RP 18.

Nutter noticed that Hopkins was trembling and his legs were shaking. 2RP 18. He suggested that maybe Hopkins tried to sell his pills to get money to buy beer. Hopkins admitted that he had. 2RP 18. Nutter characterized this as just a "social conversation." 2RP 19.

Nutter detained Hopkins for about ten minutes, until Nutter's supervisor arrived with another officer. 2RP 19. The second officer was sent back to Walgreens to fetch the witness. 2RP 24-25. Nutter continued to detain Hopkins until the witness arrived and performed a drive-by

identification of Hopkins. The elapsed time from 911 call to drive-by identification was half an hour. 2RP 47, 53, 54.

At this point, Nutter decided he had probable cause to arrest Hopkins. 2RP 19. He handcuffed Hopkins, read his Miranda rights, did a search incident to arrest, put him in his patrol car, and drove him to the jail. 2RP 20-21. Nutter did not obtain a signed Miranda waiver. 2RP 29. At the jail, Nutter questioned Hopkins again, and Hopkins repeated his earlier admission that he had tried to sell his pain pills. 2RP 22.

Hopkins challenged the legality of his detention and the constitutionality of his questioning by Nutter. 2RP 31. Nutter testified that his initial interaction with Hopkins was merely a “social contact.” The judge disagreed based on Nutter’s testimony that he was investigating a reported crime and told Hopkins that was the reason for the stop. 2RP 16. But the judge concluded *sua sponte* that Nutter had articulable suspicion of ongoing criminal activity sufficient to support a *Terry* stop.³ 2RP 40.

Accordingly, the judge concluded that Hopkins’s pre-Miranda statements to Nutter were admissible. 2RP 41. The pill bottle was not specifically mentioned at the suppression hearing. The pills were admitted

³ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

at trial along with the Washington State Patrol Crime Lab's forensic expert's identification testimony. 2RP 90.

Hopkins was charged with knowing and unlawful possession of a Schedule II controlled substance with intent to deliver, in violation of RCW 69.50.401(1). The day before trial, the State amended the Information to charge knowing and unlawful possession of a Schedule III controlled substance, instead of Schedule II. 1RP 6, 10. Before issuing the jury instructions, the court permitted the State to amend the Information to eliminate the allegation the possession was unlawful. The jury received a to-convict instruction including only the elements that Hopkins possessed a controlled substance with intent to deliver it.

Hopkins was convicted. CP 22. On the State's recommendation, the judge imposed a local D.O.S.A. disposition. 4RP 6. Hopkins appeals. CP 6.

IV. ARGUMENT

1. HOPKINS WAS UNLAWFULLY DETAINED IN VIOLATION OF WASH. CONST. ART. 1, § 7 AND THE FOURTH AMENDMENT.

Our state Constitution's protection against government intrusion into private affairs⁴ is broader than, and encompasses, the Fourth

⁴ Article I, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Amendment guarantee against unreasonable searches and seizures.⁵ Const. art. 1, § 7; *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). No *Gunwall* analysis⁶ is necessary. *Harrington*, 167 Wn.2d at 663. Whether police have seized a person is a mixed question of law and fact. *Harrington*, 167 Wn.2d at 662. But whether the facts constitute a seizure is ultimately one of law that is reviewed de novo. *Harrington*, 167 Wn.2d at 662. The Appellant bears the burden of proving he was seized in violation of art. 1, § 7. *Harrington*, 167 Wn.2d at 664, citing *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

“If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government’s illegality. *Harrington*, 167 Wn.2d at 664. Here, the police unconstitutionally seized Hopkins. Therefore, all evidence obtained during the seizure should have been suppressed.

(a) **No Social Contact:** In Washington, a seizure occurs when, in light of the particular circumstances, a reasonable person in the individual’s position would feel he was being detained. *Harrington*, 167 Wn.2d at 663, citing *State v. O’Neill*, 148 Wn.2d 564, 581, 62 P.3d 489

⁵ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....” U.S. Const. amend. IV.

⁶ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

(2003). This standard is “a purely objective one, looking to the actions of the law enforcement officer....” *Id.*, quoting *Young*, 135 Wn.2d at 501.

Encounters between citizens and the police are consensual only if a reasonable person under the circumstances would feel free to walk away. *Harrington*, 167 Wn.2d at 663-64. Generally, inoffensive contact between individuals and the police do not amount to seizure. But certain actions by the police likely will result in a seizure. Such conduct includes ‘the threatening presence of several officers.’ *Harrington*, at 664, quoting *Young*, 135 Wn.2d at 512, quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

In *Harrington*, the arrival of a single additional officer dispelled any claim of a social contact. *Harrington*, 167 Wn.2d at 666. Here, two more officers arrived almost immediately, each in a separate patrol car, resulting in three officers and three police cars crowding in on Hopkins in an alley. This was a display of force that eliminated any social element from the contact.

Also, the officer in *Harrington* said, “Hey, can I talk to you,” or “Mind if I talk to you for a minute?” *Harrington*, 167 Wn.2d at 661. Here, Nutter did not ask, “Can I talk to you?” He said “I need to talk to you.” As trial counsel pointed out, under the particular circumstances

here, a reasonable person in Hopkins' position would translate that to mean, "You need to stop and talk to me." 1RP 31.

The trial court correctly concluded the pre-identification interaction between Nutter and Hopkins was not a social contact. But the court erroneously ruled that the encounter was a lawful *Terry* stop.

(b) **Insufficient Grounds for a Terry Stop:** The police may conduct a *Terry* investigative stop without probable cause to support a full arrest if the seizing officer has a reasonable suspicion of criminal activity, the seizure falls within the class of limited intrusions that can be justified without probable cause, and the governmental interest justifies the scope of the intrusion, in light of the particular circumstances of the case. *State v. Belieu*, 112 Wn.2d 587, 593-594, 773 P.2d 46 (1989).

In evaluating whether an investigative stop was lawful, the first question is whether the initial interference with the suspect's freedom of movement was justified at its inception. *Belieu*, 112 Wn.2d at 595-596, citing *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

Here, all Nutter knew was that the police had received a report that some person of unknown reliability had told his boss something about someone asking him if he wanted some pain pills. The informant, Curry, did not say he was offered any particular narcotic or any sort of controlled

substance. 2RP 44, 48, 51. And Nutter did not testify that he understood the report to include any mention of a controlled substance.

This was not articulable grounds to support a government intrusion on a citizen's privacy. Pain pills include a wide range of substances, most of which are lawful, over-the-counter, pain relievers.

In this case, WSP expert Marshall testified that the primary active ingredient in Hopkins's pills was acetaminophen plus a small amount of dihydrocodeinone, a less-dangerous Schedule III isomer of the Schedule II drug, hydrocodone.⁷ 2RP 110. Acetaminophen is the active reagent in Extra Strength Tylenol, the possession and deliver of which is perfectly legal. 2RP 105.

Hopkins said nothing to Curry about selling him a controlled substance, and Curry did not tell the police Hopkins did say that. For all Nutter knew, the pills Hopkins hoped to trade with Curry for beer money were some innocuous over-the-counter nostrum.

A second factor in evaluating the lawfulness of a purported *Terry* stop is the length of time the individual is detained. *Belieu*, 112 Wn.2d at 596. In *Williams*, 102 Wn.2d at 741 n. 4, a 35-minute interval was deemed to "approach excessiveness." *Belieu*, 112 Wn.2d at 596. Here, it

⁷ "The board finds that the following substances have a potential for abuse less than the substances listed in Schedules I and II ... not more than 15 milligrams per dosage unit of dihydrocodeinone... ." WAC 246-887-160(g)(3).

was undisputed that the police detained Hopkins for half an hour before Curry drove by and identified him.

Custodial Detention Mandates Suppression: “If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government’s illegality. *Harrington*, 167 Wn.2d at 664. That is what happened here. The trial court should have excluded all evidence resulting from the unlawful seizure, including the pills.

2. NUTTER’S PRE-MIRANDA INTERROGATION OF HOPKINS VIOLATED WASH. CONST. ART. 1, § 9 AND THE FIFTH AMENDMENT.

While being unlawfully detained, Hopkins was in custody for the purposes of Fifth Amendment analysis.⁸ Therefore, any statements Hopkins made before receiving *Miranda*⁹ warnings were inadmissible at trial.

The constitutional function of the *Miranda* warnings is to protect suspects from making incriminating admissions to police “while in the

⁸ The Fifth Amendment of the United States Constitution states, in part, that no person “shall . . . be compelled in any criminal case to be a witness against himself.” Article I, section 9 of the Washington Constitution reads: “[n]o person shall be compelled in any criminal case to give evidence against himself.” Washington courts “give the same interpretation to both clauses and liberally construe the right against self-incrimination.” *State v. Easter*, 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996).

⁹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

coercive environment of police custody.” *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940, 107 S. Ct. 1592, 94 L. Ed. 2d 781 (1987). The police must advise a suspect of his *Miranda* warnings when the person is subjected to custodial interrogation. *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988); *Miranda*, 384 U.S. at 444.

Had the stop of Hopkins been within the scope of a *Terry* investigative stop, it would not be deemed custodial for *Miranda* purposes. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). One reason for this is that a true *Terry* stop is less police-dominated than some other forms of detention. *Id.* As discussed above, this stop far exceeded the lawful parameters of *Terry*. Hopkins was in custody.

The facts are similar to those in *State v. France*, 129 Wn. App. 907, 909-11, 120 P.3d 654 (2005). There, police officers responded to a reported crime, knew the defendant, told the defendant he could not leave until “the matter was cleared up,” and asked him incriminating questions based on information about the alleged crime. This Court held the questioning was custodial. *France*, 129 Wn. App. at 909-11. If the questioning officer knew or should have known that his questions were

reasonably likely to elicit an incriminating response, Miranda warnings are required. *State v. Denney*, 152 Wn. App. 665, 671, 218 P.3d 633 (2009).

Here, as in *France*, Nutter stopped Hopkins to investigate a reported crime, knew Hopkins, implicitly communicated by the presence of three response units that Hopkins could not leave until the officers said he could leave, and proceeded to ask questions designed to elicit an incriminating response. And Hopkins proceeded to incriminate himself.

To be admissible, any statements by a suspect must be accompanied by a knowing and intelligent waiver of his right to remain silent. *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996); *Miranda*, 384 U.S. at 475. Otherwise, any statements a suspect makes during custodial interrogation are presumed involuntary. *Sargent*, 111 Wn.2d at 647-48. Custodial interrogation means “questioning initiated by law enforcement officers after a person has been ... deprived of his freedom in any significant way.” *Miranda*, 384 U.S. at 444.

Washington courts entertain every reasonable presumption in favor of the defendant and against finding a knowing, intelligent and voluntary waiver of constitutional rights. *State v. Riley*, 19 Wn. App. 289, 294, 576 P.2d 1311 (I-1978), citing *Barker v. Wingo*, 407 U.S. 514, 525, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The State must prove “an intentional relinquishment or abandonment of a known right or privilege.” *Brewer v.*

Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), quoting *Johnson*, 304 U.S. at 464. “*Miranda* prohibits the presumption of waiver from a mere warning followed by a confession or admission[.]” *State v. Blanche*, 75 Wn.2d 926, 933, 454 P.2d 841 (1969), quoting *Miranda*, 384 U.S. at 475.

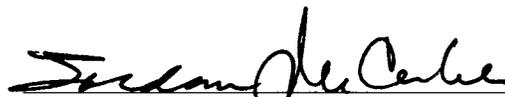
Here, Nutter asked Hopkins questions that he reasonably should have realized would elicit an incriminating response. Therefore, Hopkins’s unMirandized responses were not admissible at his trial.

Reversal is required.

V. CONCLUSION

For the forgoing reasons, the Court should reverse Mr. Hopkins’s conviction and vacate the judgment and sentence.

Respectfully submitted this 12th day of May, 2010.



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CERTIFICATE OF SERVICE

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