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STATE OF WASHINGTON

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

BY  TERRY

NO. 40347-1-II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES WILLIAMS HOPKINS

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 09-1-00460-1

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**BRIEF OF RESPONDENT**

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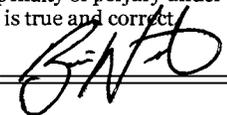
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I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED: July 12, 2010,  
at Port Angeles, WA



**TABLE OF CONTENTS**

	<u>PAGE</u>
I. <b>Counter Statement of the Issue:</b> .....	1
II. <b>Statement of the Case:</b> .....	1
a. Factual History. ....	1
b. Procedural History .....	5
III. <b>Argument:</b> .....	7
A. The trial court did not err when it admitted the statements against Mr. Hopkins because he was not in custody at the time of the stop. .....	7
IV. <b>Conclusion:</b> .....	16

**TABLE OF AUTHORITIES**

<u>U.S. Supreme Court Case Law</u>	<u>PAGE</u>
<i>Berkemer v. McCarty</i> , 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) . . . . .	8
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). . . . .	4, 8
<i>Terry v. Ohio</i> , 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). . . . .	5, 9
<u>Washington Case Law</u>	<u>PAGE</u>
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997). . . . .	9
<i>State v. Bray</i> , 143 Wn. App. 148, 177 P.3d 154 (2008) . . . . .	12
<i>State v. Broadaway</i> , 133 Wn.2d 118, 942 P.2d 363 (1997). . . . .	7
<i>State v. France</i> , 129 Wn. App. 907, 120 P.3d 654 (2005) . . . . .	14, 15
<i>State v. Heritage</i> , 152 Wn.2d 210, 95 P.3d 345 (2004). . . . .	7, 8, 9, 13, 16
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986) . . . . .	9
<i>State v. Laskowski</i> , 88 Wn. App. 858, 950 P.2d 950 (1997). . . . .	9
<i>State v. Marcum</i> , 149 Wn. App. 894, 205 P.3d 969 (2009). . . . .	6, 7, 10, 11, 13, 16
<i>State v. Mercer</i> , 45 Wn. App. 769, 727 P.2d 676 (1986) . . . . .	11, 12
<i>State v. Millan</i> , 151 Wn. App. 492, 212 P.3d 603 (2009). . . . .	7
<i>State v. Moon</i> , 48 Wn. App. 647, 739 P.2d 1157 (1987) . . . . .	11, 12
<i>State v. Samsel</i> , 39 Wn. App. 564, 694 P.2d 670 (1985) . . . . .	11, 12
<i>State v. Walker</i> , 66 Wn. App. 622, 834 P.2d 41 (1992). . . . .	8
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984). . . . .	11
<i>State v. Young</i> , 89 Wn.2d 613, 574 P.2d 1171 (1978). . . . .	13

Brief of Respondent  
*State v. Hopkins*, 40347-1-II

<u>Constitutional Provision</u>	<u>PAGE</u>
U.S. Const. amend. IV .....	9
Wash. Const. art. I, § 7 .....	9

**I. COUNTERSTATEMENT OF THE ISSUE:**

1. Whether the trial court erred when it admitted the defendant's statements that he made to an officer during an investigative *Terry* stop prior to receiving his *Miranda* warning.

**II. STATEMENT OF THE CASE:**

Factual History

On November 2, 2009, Officer Nutter responded to a call reporting that a person was trying to sell pain medication in a parking lot of the Walgreens in Port Angeles, Washington. RP (01/11/2010) at 16, 56. When Officer Nutter arrived at the scene, the store manager reported that a male dressed in black clothes, a blue cap, and wearing sunglasses attempted to sell pills to one of his employees. RP (01/11/2010) at 16. According to the manager, the suspect left the scene, heading east from the store. RP (01/11/2010) at 16, 58.

Officer Nutter proceeded to search the area for the suspect. RP (01/11/2010) at 16, 58. Two blocks from Walgreens, Officer Nutter located the defendant, Mr. Hopkins. RP (01/11/2010) at 16. Mr. Hopkins was dressed in black clothes, a blue cap, and wearing sunglasses. RP (01/11/2010) at 16, 58.

Officer Nutter exited his patrol vehicle and called out to Mr. Hopkins: “[H]ey, I need to talk to you for a second.” RP (01/11/2010) at

17, 27, 59. When Officer Nutter made contact with Mr. Hopkins, he was alone. RP (01/11/2010) at 24. However, two other officers soon joined Officer Nutter at the scene.<sup>1</sup> RP (01/11/2010) at 25.

Mr. Hopkins stopped and spoke with Officer Nutter. RP (01/11/2010) at 17. Officer Nutter informed Mr. Hopkins that he was investigating a report of an individual, matching Mr. Hopkins's description, who was selling pain medication in the Walgreens parking lot. RP (01/11/2010) at 17, 26-27, 59. Officer Nutter asked Mr. Hopkins if he was the one selling the pills. RP (01/11/2010) at 17, 59. Mr. Hopkins said no. RP (01/11/2010) at 17, 27, 59.

Officer Nutter then asked Mr. Hopkins if he had any pills on his person. RP (01/11/2010) at 17, 28, 59. Mr. Hopkins removed a pill container from his pocket, stating: "[W]ell, yeah, I have these." RP (01/11/2010) at 17, 59, 66. Officer Nutter recognized the pills as hydrocodone<sup>2</sup> due to the prescription label and Mr. Hopkins's own identification. RP (01/11/2010) at 20, 67.

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<sup>1</sup> The two officers arrived in separate patrol vehicles, and were present for the majority of Officer Nutter's contact with Mr. Hopkins. RP (01/11/2010) at 25, 28.

<sup>2</sup> A test at the state toxicology lab confirmed that the pills in Mr. Hopkins's possession were comprised of acetaminophen and dihydrocodeinone. Dihydrocodeinone is another variation of hydrocodone. RP (01/11/2010) at 92.

Because Officer Nutter knew Mr. Hopkins from previous contacts, he was aware that Mr. Hopkins suffered from alcohol withdrawals. RP (01/11/2010) at 18. Officer Nutter observed that Mr. Hopkins was physically shaking, and he asked if Mr. Hopkins was selling pills to earn money for alcohol. RP (01/11/2010) at 18, 28, 60. Mr. Hopkins answered: “[Y]eah, that’s what I was trying to do.” RP (01/11/2010) at 18, 28, 60.

Officer Nutter asked Mr. Hopkins to remain with him while another officer brought someone by to look at Mr. Hopkins. RP (01/11/2010) at 18-19. While Officer Nutter and Mr. Hopkins waited, the two engaged in friendly conversation.<sup>3</sup> RP (01/11/2010) at 18-19, 60.

While Officer Nutter and Mr. Hopkins spoke, a police officer drove past with the reporting witness in his patrol vehicle. RP (01/11/2010) at 19, 46. The witness positively identified Mr. Hopkins as the man who approached him in the parking lot and offered sell him the pain pills. RP (01/11/2010) at 19, 46. After receiving confirmation of the positive identification, Officer Nutter arrested Mr. Hopkins. RP (01/11/2010) at 20, 64.

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<sup>3</sup> The two discussed a facial injury that Mr. Hopkins had suffered, Mr. Hopkins’ alcoholism, the type of beer that Mr. Hopkins had hoped to purchase, and the amount of money he had on him at the time. RP (01/11/2010) at 18-19. Officer Nutter did not testify to these subjects at trial. RP (01/11/2010) at 55-82

After Officer Nutter secured Mr. Hopkins in restraints, he read the defendant his *Miranda*<sup>4</sup> rights.<sup>5</sup> RP (01/11/2010) at 20, 64, 74. Mr. Hopkins stated that he understood his rights. RP (01/11/2010) at 20-21. Officer Nutter placed Mr. Hopkins in the back of his patrol vehicle. RP (01/11/2010) at 21, 64.

At the Clallam County Jail, Officer Nutter did not re-read Mr. Hopkins's *Miranda* rights. RP (01/11/2010) at 29. Officer Nutter, again, asked Mr. Hopkins if he was selling his prescription pills in order to purchase alcohol. RP (01/11/2010) at 23, 74. Mr. Hopkins admitted that he was. RP (01/11/2010) at 22, 65. Officer Nutter conveyed his wish that Mr. Hopkins would get treatment for his alcoholism, so that he would not have to sell his prescriptions for beer money. RP (01/11/2010) at 22. Mr. Hopkins said he hoped for the same result. RP (01/11/2010) at 22. At no time did Mr. Hopkins request an attorney prior to making his statements, nor did the police make any threats or promises to obtain the confession. RP (01/11/2010) at 22-23.

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

<sup>5</sup> Officer Nutter did not obtain a signed waiver from Mr. Hopkins, nor did he document in his report that he read the defendant his *Miranda* rights at the scene of the arrest. RP (01/11/2010) at 29, 75.

### Procedural History

At a 3.5 hearing, the defense moved to suppress the statements that Mr. Hopkins made to Officer Nutter. RP (01/11/2010) at 13-15, 31. The defense argued that Mr. Hopkins confronted circumstances that would lead a reasonable person to believe that they were under formal arrest, and Officer Nutter was required to Mirandize the defendant when he first contacted the defendant at the scene. RP (01/11/2010) at 31, 39. The State responded that Mr. Hopkins's statements were admissible because he was not in custody when Officer Nutter first contacted him, and that the officer properly Mirandize the defendant after he was placed in restraints. RP (01/11/2010) at 32, 39-40.

The trial court recognized that Officer Nutter detained Mr. Hopkins pursuant to an investigative *Terry*<sup>6</sup> stop. RP (01/11/2010) at 40. The trial court found that Officer Nutter had a reasonable suspicion to contact Mr. Hopkins based on the previous report. RP (01/11/2010) at 33, 40. While the court recognized the presence of the other officers at the scene, it found that their presence did not convert the stop into a custodial detention. RP (01/11/2010) at 41. Thus, the court concluded that the pre-

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<sup>6</sup> *Terry v. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Mirandized statements Mr. Hopkins made to Officer Nutter were admissible.<sup>7</sup> RP (01/11/2010) at 41.

Additionally, the trial court found Officer Nutter read Mr. Hopkins his *Miranda* rights once he was secured in restraints. RP (01/11/2010) at 34. The trial court found that Mr. Hopkins understood those rights and that he elected not to exercise them. RP (01/11/2010) at 34. Thus, the trial court ruled that any statements made after Officer Nutter advised Mr. Hopkins of his *Miranda* rights were admissible. RP (01/11/2010) at 34.

A jury found Mr. Hopkins guilty of possession with intent to deliver a controlled substance. RP (01/12/2010) at 52. Mr. Hopkins timely appealed.

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<sup>7</sup> The trial court based its ruling on *State v Marcum*, 149 Wn. App. 894, 898, 205 P.3d 969 (2009).

**III. ARGUMENT:**<sup>8,9</sup>

A. THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED THE STATEMENTS AGAINST MR. HOPKINS BECAUSE HE WAS NOT IN CUSTODY AT THE TIME OF THE STOP.

*Miranda* warnings were developed to protect a defendant's constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). *Miranda* warnings must be given when a suspect endures a (1) custodial (2) interrogation (3) by an agent of the State. *Id.* Without *Miranda* warnings, a suspect's statements during custodial interrogation are presumed involuntary. *Id.*

Only the first requirement to invoke *Miranda* is at issue in this appeal. Mr. Hopkins argues that he was subject to a custodial interrogation when Officer Nutter contacted him on a public street. *See* Brief of Appellant at 5-13. Thus, Mr. Hopkins concludes that the statements he made prior to his receipt of a *Miranda* warning were inadmissible. *See* Brief of Appellant at 5-13. The State contends that Officer Nutter detained

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<sup>8</sup> Mr. Hopkins does not assign error to the trial court's findings of fact. Thus, they are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997); *State v. Marcum*, 149 Wn. App. 894, 898, 205 P.3d 969 (2009).

<sup>9</sup> Mr. Hopkins never moved to suppress the physical evidence against him. RP (01/11/2010) at 13-15. As such, Mr. Hopkins waives any error associated with the admission of the physical evidence, *i.e.* the prescription pills, at trial. *See State v. Millan*, 151 Wn. App. 492, 499, 212 P.3d 603 (2009).

Mr. Hopkins pursuant to an investigative *Terry* stop, and Mr. Hopkins was not in custody at the time he made certain incriminating statements. This Court should hold that Mr. Hopkins's pre-Mirandized statements were not the product of a custodial interrogation and were admissible.

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." *Heritage*, 152 Wn.2d at 217 (quoting *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 Supreme Court refined the definition of "custody," developing an objective test – whether a reasonable person in the suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Heritage*, 152 Wn.2d at 218 (citing *Berkemer*, 468 U.S. at 441-42). Washington employs this test. *Id.*

A brief seizure of a suspect in the context of a routine, on-the-street *Terry* stop, does not rise to the level of "custody" for the purposes of *Miranda*. *Heritage*, 152 Wn.2d at 218 (citing *Berkemer*, 468 U.S. at 439-40). This is because routine *Terry* stops are short, occur in public, and are substantially less police dominated than the police interrogations contemplated by *Miranda*. *Id.* Thus, 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 the purposes of *Miranda*.  
*Id.*

To justify a *Terry* stop under the Fourth Amendment and Article 1, section 7 of the Washington Constitution, a police officer must be able to "point to specific and articulable fact which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Probable cause is not required for a *Terry* stop because the stop is significantly less intrusive than an arrest. *Id.*

The scope of an investigatory stop is determined by considering (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect's liberty, and (3) the length of time of the seizure. *See State v. Laskowski*, 88 Wn. App. 858, 950 P.2d 950 (1997), *review denied*, 135 Wn.2d 1002 (1998). If the stop is justified by reasonable suspicion, and it does not exceed its allowable purpose, the presence of numerous officers

does not convert it into a custodial arrest. *State v. Marcum*, 149 Wn. App. 894, 910, 205 P.3d 969 (2009).

Here, Officer Nutter stopped Mr. Hopkins because he had a reasonable suspicion that the defendant was recently involved in criminal activity. The police received a report that an individual wearing black clothes, a blue cap, and sunglasses was trying to sell pain pills in a Walgreens parking lot. RP (01/11/2010) at 16. The description of the suspect was relayed via a Walgreens' employee and manager. RP (01/11/2010) at 44-45. At all times, the physical description of the suspect and the direction that he departed remained consistent. RP (01/11/2010) at 16, 44-45, 57-58. Mr. Hopkins was located only two blocks from the Walgreens parking lot, and his physical appearance matched the description received from dispatch and the witnesses. RP (01/11/2010) at 16, 58. In light of these facts, there was sufficient individualized suspicion of criminal activity, and Officer Nutter lawfully detained Mr. Hopkins for the sole purpose to confirm or dispel whether he was the individual who had attempted to sell prescription medications. RP (01/11/2010) at 16.

Additionally, the intrusion upon Mr. Hopkins's right to privacy was de minimis. Officer Nutter approached Mr. Hopkins on foot, after he parked his patrol vehicle ten yards away. RP (01/11/2010) at 17. Officer Nutter did not turn-on his emergency lights, and he never brandished his

weapon. RP (01/11/2010) at 17. Officer Nutter engaged Mr. Hopkins in a courteous and “social conversation.” RP (01/11/2010) at 17-19. In addition, the stop occurred in a public setting, two blocks east of the Walgreens in downtown Port Angeles. RP (01/11/2010) at 16. The intrusion into Mr. Hopkins’s privacy was no greater than necessary to realize the stop in a safe and effective manner.

While Officer Nutter did ask Mr. Hopkins to remain with him until a second officer could transport a witness to the scene for a possible identification, this request did not impermissibly intrude upon the defendant’s privacy rights. Washington’s appellate courts have held that police officers may hold a suspect at the scene of a stop to allow a witness to arrive for identification purposes. *See State v. Moon*, 48 Wn. App. 647, 739 P.2d 1157 (1987); *State v. Mercer*, 45 Wn. App. 769, 727 P.2d 676 (1986); *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985). Furthermore, while additional officers were present at the scene of the stop, case law has established that the presence of numerous officers does not render the defendant in custody. *See State v. Marcum*, 149 Wn. App. 894, 910, 205 P.3d 969 (2009).

Finally, the length of the detention was not excessive. There is no bright line rule for how long is too long for a *Terry* stop. *See State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). While appellate

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courts do seem to be concerned with stops that exceed the 20-minute maximum suggested by the American Law Institute, detentions of 20 minutes or longer have been upheld in Washington when the delay was due to investigation/officer safety reason and not merely for harassment. *See e.g. State v. Bray*, 143 Wn. App. 148, 177 P.3d 154 (2008) (detaining suspect for 30 minutes while officers checked storage units to determine which ones had been burglarized held reasonable); *State v. Moon*, 48 Wn. App. 647, 739 P.2d 1157 (1989) (detaining suspect for 20 minutes while victim of robbery was brought to detention site held reasonable); *State v. Mercer*, 45 Wn. App. 769, 727 P.2d 676 (1986) (20 minute detention of suspect by trooper who did not feel competent to investigate potential theft until city police officer arrived held reasonable); *State v. Samsel*, 39 Wn. App. 564, 694 P.2d 670 (1985) (detaining suspects for 10 to 12 minutes until victim arrived to identify them held reasonable).

Here, Officer Nutter detained Mr. Hopkins for approximately 30 minutes. RP (01/11/2010) at 47. However, as stated above the detention lasted only for the time necessary to transport the witness to the scene of the stop for purposes of identification. RP (01/11/2010) at 20, 64. Mr. Hopkins's 30-minute detention was reasonable under the circumstances.

This Court should hold that Mr. Hopkins's detention was the result of a lawful *Terry* stop. Officer Nutter had a reasonable suspicion that Mr.

Hopkins was involved in criminal activity, and the detention did not exceed the scope of a permissible *Terry* stop. As such, Mr. Hopkins was not in custody for the purposes of *Miranda*, and the trial court did not err when it admitted the contested statements and evidence at trial. *See Heritage*, 152 Wn.2d at 218-219 (trial court properly admitted a juvenile's admission learned by security guards pursuant to a lawful *Terry* stop); *Marcum*, 149 Wn. App. at 909-912 (trial court erred when it suppressed statements obtained pursuant a lawful investigative detention).

Mr. Hopkins contends that there was an insufficient basis to justify a *Terry* stop. *See* Brief of Appellant at 8-10. Mr. Hopkins appears to argue that Officer Nutter was required to confirm whether the substance in the suspect's possession was a narcotic or controlled substance before making a *Terry* stop. *See* Brief of Appellant at 8-9. According to Mr. Hopkins, because pain medication can include "lawful, over-the-counter, pain relievers" there were insufficient grounds to warrant the State's interest in detaining him. *See* Brief of Appellant at 9.

However, Mr. Hopkins cites no authority for this position. As such, this Court may assume that no authority exists to support the claim. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (the court is not required to search out authorities, but may assume that counsel, after

diligent search, has found none). Furthermore, Mr. Hopkins's argument ignores the reality that medication often involves controlled substances, and the police regularly investigate crimes involving "pain pills," where one or more of the active ingredients are controlled substances.

In the present case, Mr. Hopkins was attempting to sell his prescribed medication where one of the active ingredients was a controlled substance – dihydrocodeinone. RP (01/11/2010) at 92. Officer Nutter also determined that Mr. Hopkins's pain medication involved a controlled substance from the prescription label. RP (01/11/2010) at 20, 67. This Court should hold that it is not necessary for a police officer to first confirm whether a substance in a suspect's possession is a narcotic/controlled substance before making a *Terry* stop.

Mr. Hopkins also relies on *State v. France*, 129 Wn. App. 907, 120 P.3d 654 (2005), to support his argument that his detention was unlawful. *See* Brief of Appellant at 11-12. However, this case is easily distinguished. This Court should find that Mr. Hopkins's reliance on *State v. France* is misplaced.

In *France*, the detaining officer knew that the defendant (1) was the suspect of a reported assault, (2) had a court order prohibiting him from contacting the victim, and (3) had a history of domestic violence involving the victim. 129 Wn. App. at 909-910. In the present case, unlike

the officer in *France*, Officer Nutter did not know the identity of the individual who had attempted to sell drugs in the parking lot. RP (01/11/2010) at 16.

In *France*, the detaining officer told the defendant that he was not free to leave until the matter was cleared-up, making the duration of the stop unlimited. 129 Wn. App. at 910. Here, the detention was limited in scope and duration. Officer Nutter requested that Mr. Hopkins remain with him only for the time necessary for a second officer to transport a witness to the scene to see if he could make a positive identification. RP (01/11/2010) at 18.

Finally, the detaining officer in *France* had probable cause to make an arrest, but delayed doing so in order to avoid a *Miranda* warning. 129 Wn. App. at 911. Here, the officer did not believe he had probable cause to arrest until he received confirmation that the witness positively identified Mr. Hopkins. RP (01/11/2010) at 20. Once Officer Nutter was convinced that he had probable cause, he initiated an arrest and gave Mr. Hopkins his *Miranda* warning. RP (01/11/2010) at 20-21.

This Court should recognize that the facts in *France* are markedly different from those involved in this appeal. *France* does not control the present case because Officer Nutter detained Mr. Hopkins pursuant to a lawful *Terry* stop, and Mr. Hopkins was not in custody at the time he

made his statements and revealed the prescribed medication in his possession.

In sum, this court should find that Officer Nutter had a reasonable suspicion that Mr. Hopkins was involved in a criminal activity. Officer Nutter lawfully detained Mr. Hopkins only to confirm or dispel his suspicion. Because the detention was justified by a reasonable suspicion, occurred in public, and did not exceed its allowable purpose, the stop did not rise to the level of “custody” for the purposes of *Miranda*. Because Mr. Hopkins was not yet in custody at the time he made statements to Officer Nutter, the trial court did not err when it admitted the statements and evidence at trial. *See Heritage*, 152 Wn.2d at 218-219; *Marcum*, 149 Wn. App. at 911.

This Court should affirm.

#### IV. CONCLUSION:

For the reasons stated above, the State respectfully requests that this Court affirm the trial court’s evidentiary ruling and Mr. Hopkins’s conviction for possession with intent to deliver a controlled substance.

DATED this July 12, 2009.



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Brian Patrick Wendt, WSBA #40537  
Deputy Prosecuting Attorney