

FILED  
COURT OF APPEALS

NO. 40380-3-II

APR 16 2014

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

BY *Vn*

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW DAVID LAURO,

Appellant.

BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. To the extent the following may be considered a finding of fact, and in the absence of substantial evidence in the record, the trial court erroneously entered the following findings:

i. *Finding of Fact No. N:*

That as we look at the totality of the circumstances up to this point (observation of a verbal heated discussion with an obvious injury to the female with her being upset and the defendant walking away upon the officer approaching) Officer Garland had a reasonable belief that a crime may be afoot. CP 96.

ii *Findings of Fact No. VIII:*

That the defendant has three crimes of dishonesty as part of his criminal history and he acknowledged not being truthful to Officer Garland; therefore the defendant lacks credibility relating to his testimony at this hearing. CP 96.

iii. *Finding of Fact No. IX:*

That Officer Garland's contact with the defendant (to speak with him) as the defendant walked away was not based on a command to stop but rather a request for the defendant to do so. CP 96.

2. In denying Mr. Lauro's' motion to suppress evidence, the trial court erroneously entered the following conclusions of law:

i. *Conclusion of Law No. It.*

That Officer Garland's contact with the defendant was a permitted *Terry* stop... CP 97.

ii *Conclusion of Law No. III:*

That because Officer Garland's contact with the defendant

was an appropriate investigatory stop under all of the circumstances, the defendant was not in custody at the time of inquiry and therefore providing the defendant Miranda warnings was not required. CP 97.

iii. *Conclusion of Law No. IV:*

That the request to suppress defendant's statements under a 3.5 or 3.6 analysis is denied. . CP 97.

3. The trial court erred in concluding Officer Garland's contact with Mr. Lauro was a valid Terry stop because the stop was not supported by a reasonable suspicion of criminal activity.
4. The trial court erred in concluding law enforcement was not required to provide Mr. Lauro with his Miranda Rights.

**B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Are the findings and conclusions entered by the trial court pursuant to its ruling in the Motion to Suppress Evidence supported by substantial evidence? (Assignment of Error No. 1, 2)
2. Did the trial court err in denying Mr. Lauro's motion to suppress where the officer lacked reasonable suspicion to conduct a *Terry* stop. (Assignment of Error Nos. 2,3)
3. Did the trial court err in failing to grant Mr. Lauro's motion to suppress evidence where the State did not prove that Mr. Lauro was advised of his Miranda rights prior to

interrogating him and under circumstances where Mr. Lauro did not feel he was free to leave. (Assignment of Error No. 2,4)

### C. STATEMENT OF THE CASE

#### 1. Procedural History:

The State charged by way of a Second Amended Information with the crimes of Violation of a Court Order and Making a False Misleading Statement to a Public Servant. CP 47-49. Trial counsel for Mr. Lauro filed a motion to suppress evidence pursuant to CrR 3.5. CP1-6. Trial counsel also filed a motion to suppress evidence pursuant to CrR 3.6 CP 7-11. The Motions to suppress evidence pursuant to CrR 3.5 and CrR 3.6 were consolidated. The hearing was held on February 16, 2010 before the Honorable Judge Mills. RP 3-86. At the conclusion of the hearing, the trial court denied the motion to suppress evidence. CP 95-97.

A jury facts was held in this matter on February 17, 2010. RP 87-160 On that date, Mr. Lauro was found guilty of both Violation of a Court Order and Making a False or Misleading Statement to a Public Servant. CP 93, 98-108. Mr. Lauro was sentenced to 14 months in confinement. RP 169, CP 98-108. This appeal timely follows. CP 109.

## 2. Statement of the Facts:

Shortly after noon on January 1, 2010 Officer Garland received a dispatch call. RP 9, 10. An anonymous individual reported seeing what appeared to be an argument between a male and a female, and the female appeared to have been struck in the face. RP 9. The caller did not see the male strike the female. Id. Officer Garland, in his uniform and marked patrol car, drove to the location of the alleged argument, located outside a store. RP 9, 25. Upon his arrival, Officer Garland saw a male, later identified as Mr. Lauro, and a female, later identified as Ms. Dragoo, in a heated discussion. RP 11. He could see the two of them talking together. RP12. Officer Garland stepped outside of his vehicle and walked towards Mr. Lauro and Ms. Dragoo. RP 12-13. As he approached the discussion broke up and Mr. Lauro saw Officer Garland and walked away. RP13. Mr. Lauro was attempting to leave the scene. RP 58.

As Officer Garland approached Ms. Dragoo he noticed that it appeared she had been crying and saw what appeared to be dried blood around her mouth. Id. The injury appeared to Officer Garland to have occurred at some point during the previous 24 to 48 hours. RP 16. Ms. Dragoo reported the injury was the result of a fight she had with her sister the previous night, New Year's Eve. RP 16.

As Mr. Lauro was walking away, Officer Garland called to Mr. Lauro to return so that he could speak with Mr. Lauro. Id. Mr. Lauro was about 15 feet away before he walked to Officer Garland. RP 14.

Officer Garland did not recall the exact words he used to get Mr. Lauro to return to the area where Officer Garland was standing. Id. Officer Garland testimony was as follows:

Q: Do you recall what you said specifically to him to get him to return?

A: I don't remember specifically, but I remember phrasing it in the form of a question. In other words, it wasn't a command to come back to where I was at. It was along the lines of: Hey, can I talk to you for a second.

RP 13.

Mr. Lauro recalled that Officer Garland gave him a verbal command to walk towards the Officer. RP 58. Mr. Lauro did not feel that he had any option other than to return to the scene. RP 58.

Officer Garland recalled watching Mr. Lauro stop after the Officer called out to Mr. Lauro, pause, and then walk towards the Officer. RP 14. Officer Garland asked questions of both Mr. Lauro and Ms. Dagoo. Id. Ms. Dragoo appeared uncomfortable during the Officer Garland's questioning. RP 15. Officer Garland questioned Mr. Lauro regarding his contact with Ms. Dragoo.

Q: And did you ask the defendant what was going on when you returned?

A: I did. I asked him what brought him there and what was going on between he and the female, because it appeared to me that they had been in this heated discussion. RP 15.

Mr. Lauro answered Officer Garland's question and told the Officer he was trying to borrow a cigarette from Ms. Dragoo. Id. Mr. Lauro felt during the time he was questioned, that he was not free to leave the scene. RP 59. Mr. Lauro first reported that he did not know Ms. Dragoo. RP 28. Officer Garland believed that Mr. Lauro's answers to his questions were not truthful. RP 18. Officer Garland asked questions of Mr. Lauro for the purpose of establishing probable cause for an assault he suspected had occurred. RP 28. Sergeant Davis did not have any suspicion of any crimes other than a suspected assault. RP 50.

Sergeant Davis arrived at the scene after Officer Garland's arrival. RP 17. Sergeant Davis was in uniform, armed and drove a marked police car. RP 53. The record is not clear in regards to how many questions were asked of either Mr. Lauro or Ms. Dragoo prior to separating them, but Officer Garland did indicate that Ms. Dragoo kept looking to Mr. Lauro before she would answer the Officer's questions. RP 18. Upon Sergeant Davis' arrival Mr. Lauro and Ms. Dragoo were separated. RP 19. Sergeant Davis then spoke with Mr. Lauro. Id. Officer Garland had begun speaking with Mr. Lauro and Ms. Dragoo prior to Sergeant Davis' approach. RP 39. Sergeant Davis told Mr. Lauro to keep his hands out of his pockets, and she had her hand on her taser. RP 59. Mr. Lauro felt intimidated by the officers and felt that he had to comply with their directions. Id.

Officer Garland's patrol car and Sergeant Davis' patrol car were parked on opposite sides of where Mr. Lauro and Ms. Dragoo were standing. RP 26. Officer Garland spoke with Ms. Dragoo after she and Mr. Lauro moved to separate areas for further contact with law enforcement. RP 19. Ms. Dragoo reported that she had previously been in a dating relationship with Mr. Lauro, spent the previous night together, and walked to the store together. RP 19-20. She also reported that she had been in an argument with Mr. Lauro that morning concerning \$80 she owed him. RP 20. According to Ms. Dragoo, the two of them walked to the store with the intent of obtaining \$80 with her Qwest card to pay the debt. Id.

Officer Garland then returned to Mr. Lauro to question him further. Id. Sergeant Davis questioned Ms. Dragoo further. RP 45. Although nothing in his conversation with Ms. Dragoo suggested that Mr. Lauro was responsible for her injury, Officer Garland continued his conversation because he believed that Mr. Lauro and Ms. Dragoo were trying to hide something, Mr. Lauro's report that he did not know Ms. Dragoo, and her demeanor contributed to his ongoing suspicion as well. RP 30-31. Officer Garland was not aware of any no contact order prohibiting contact between Mr. Lauro and Ms. Dragoo at the time he spoke with them. RP 31.

Officer Garland engaged in further communications with Mr. Lauro with the purpose of confronting Mr. Lauro. "To see if his story had

changed about whether or not he knew Ms. Dragoo, and then to confront him with the facts that Ms. Dragoo had given him and see what his response was.”. RP 21. Officer Garland felt suspicious and believed Mr. Lauro was not being truthful at the time he confronted Mr. Lauro. RP 32. Officer Garland did confront Mr. Lauro in regards to his relationship with Ms. Dragoo, a cell phone, and asked to look in Mr. Lauro's wallet to determine if Ms. Dragoo's Qwest card was in his wallet. RP 21. Officer Garland had the cell phone in his hand at the time he confronted Mr. Lauro. RP 43. Mr. Lauro provided the Qwest card to Officer Garland. Id. The activities on the scene as described by Officer Garland transpired by his estimate in a 15 to 20 minute time span. RP 23.

Sergeant Davis determined probable cause to arrest Mr. Lauro existed based on her conversation with Ms. Dragoo which occurred while Officer Garland confronted Mr. Lauro. RP 33,45-46. Ms. Dragoo eventually told Sergeant Davis that Mr. Lauro assaulted her after Sergeant Davis told Ms. Dragoo that she believed Mr. Lauro assaulted her. RP 52. While Sergeant Davis drafted her report later, she discovered the no contact order prohibiting Mr. Lauro from contacting Ms. Dragoo. RP 47. That information was obtained after law enforcement had left the scene. Id.

At trial, both law enforcement officers testified. Ms. Dragoo did not testify at either the motion hearing or trial.

## D. ARGUMENT

1. Insufficient Evidence was presented at the Cr.R 3.5/3.6 hearing to support entering Cr.R 3.5/3.6 Findings of Fact: IV, VII, and IX.

Where the trial court has weighed the evidence, the appellate court review is to determine whether the findings made by the trial court are supported by substantial evidence. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978), citing *Morgan v. Prudential Ins.Co. of America*, 86 Wn.2d 432, 545 P.2d 1193 (1976). A trial court's determination of the issues raised in a motion to suppress is reviewed for substantial evidence and to see if the findings support the conclusions of law. *State v. Schlieker*, 115 Wn.App. 264, 269, 62 P.3d 520 (2003). Substantial evidence is defined as "a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The conclusions of law made by the trial court are to be reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 212, 970 P.2d 722 (1999).

The appellant assigns error to Cr.R 3.6 Findings of Fact: IV, VIII, and IX and Conclusions of Law II, III and IV entered by the trial court.

(A) Insufficient Evidence was presented at the Motion to Suppress hearing to support entering Cr.3.5/3.6 Findings of Fact No. IV

because the testimony did not support the finding entered by the trial court .

The Cr.R 3.5/ 3.6 Findings of Fact IV states as follows in pertinent part:

“That as we look at the totality of the circumstances up to this point (observation of a verbal heated discussion with an obvious injury to the female with her being upset and the defendant walking away upon the officer approaching) Officer Garland had a reasonable belief that a crime may be afoot.” CP 96.

There was insufficient evidence presented to support the trial court's finding of fact. This finding appears to actually be a conclusion of law. Any conclusion of law, even if erroneously denominated as a finding of fact will be subject to a de novo review. Kane v. Klos, 50 Wn.2d 778, 788, 314 P.2d 672 (1957). This finding/conclusion goes to whether Officer Garland had a valid basis for a Terry stop. In this case an anonymous caller reported observing a male and female engaged in a heated discussion, an apparent injury, but did not witness any assault or criminal act. RP 9 Mr. Lauro did walk away, but that in itself is not necessarily indicative of the commission of a crime. At the point Officer Garland called for Mr. Lauro to return, he had no information indicating that an illegal activity had taken place. It is not unlawful to have a heated conversation and Officer Garland stated he believed that Ms. Dragoo's injuries were 24 to 48 hours old. RP 16. Ms. Dragoo told the officer that she had been injured by her sister the night before. Id. Additionally, Mr. Lauro walked about 15 feet away then

returned to the scene after Officer Garland called to him. RP 14. Prior to the interrogation of the parties, there was no reasonable basis for Officer Garland to believe that “a crime may be afoot”. The trial court erred in making such a finding.

**(B). Insufficient Evidence was presented at the Motion to Suppress hearing to support entering Cr.3.5/3.6 Findings of Fact No.VIII. because the testimony did not include the Finding of Fact entered by the trial court.**

The CrR 3.5/3.6 Findings of Fact No. VIII states in pertinent part as follows:

“That the defendant has three crimes of dishonesty as part of his criminal history and he acknowledged not being truthful to Officer Garland; therefore the defendant lacks credibility relating to his testimony at this hearing.” CP 96.

There was insufficient evidence presented to support the trial court’s finding of fact.

In the case at hand, the evidence did not support a finding that Mr. Lauro was untruthful. The Court erred in entering such a finding. Mr. Lauro acknowledged that he had a criminal history during the suppression hearing. Mr. Lauro answered questions posed to him with detail. There was no indication that Mr. Lauro was dishonest with his answers to questions during his testimony. The finding did not comport with the testimony provided. The trial court erred in making this finding.

**(C) Insufficient Evidence was presented at the CrR 3.6 hearing to support entering CrR 3.6 Findings of Fact No. IX.**

Findings of Fact No. IX states in pertinent part as follows:

“That Officer Garland’s contact with the defendant (to speak with him) as the defendant walked away was not based on a command to stop but rather a request for the defendant to do so.” CP 96.

In the case at hand, the evidence did not support such a finding .

The Court erred in entering such a finding. The finding did not comport with some of the testimony provided. The finding of fact entered by the Court does not accurately reflect the testimony of Mr. Lauro. First for consideration of this court, Officer Garland testified that he was not entirely certain of what he said to Mr. Lauro to get him to return to the area where Officer Garland was standing. RP 13 Mr. Lauro testified that Officer Garland gave him a direct command to return to the place where the Officer was standing. RP 58 Given Officer Garland’s uncertainty regarding what he said to Mr. Lauro and in light of Mr. Lauro’s testimony that a direct command was given, the Court erred in making finding No. IX.

**2. The trial court erred in denying Mr. Lauro’s motion to suppress because Officer Garland lacked reasonable suspicion to conduct a Terry stop.**

In this matter, the trial Court made Conclusion of Law No. 2 which states: That Officer Garland's contact with the defendant was a permitted *Terry* stop... CP 97

The trial court also concluded that the motion for suppression was denied in its conclusion of law No. IV, which is also challenged by the appellant pursuant to both the *Terry* stop analysis which follows and the violation of Miranda rights analysis which is presented later in this brief. The appropriate review in this case is a de novo determination of whether the trial court derived proper conclusions of law from the unchallenged findings of fact and whether the challenged findings were supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); State v. O'Cain, 108 Wn.App. 542, 548, 31 P.3d 733 (2001).

In the case at hand, the trial court erred in concluding the officers made a lawful *Terry* stop. The *Terry* stop was unlawful in this case because there was insufficient facts to show a reasonable suspicion of criminal activity.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution protect against unreasonable searches and seizures. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Warrantless searches are per se unreasonable under both Article I, Section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution.

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980). The lawfulness of a warrantless search is to be reviewed de novo. State v. Kypreos, 110 Wn.App. 612, 616, 39 P.3d 371 (2002), (citing United States v. Van Poyck, 77 F.3d 285, 290 (9<sup>th</sup> Cir. 1996)). A seizure occurs when “an individual’s freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request to an officer’s use of force or display of authority.” State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). The State has the heavy burden of proving that the warrantless search and seizure is justified under one of the “jealously and carefully drawn” exceptions to the warrant requirement. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Williams, 102 Wn.2d at 736.

In the absence of either a warrant and probable cause to arrest, law enforcement may conduct a brief investigative detention, which is known as a Terry stop. Terry v. Ohio, 392 U.S. 1, 19-21, 88 S.Ct. 1686, 20 L.Ed. 889 (1968). The investigative stop is a seizure and therefore must be reasonable under the Fourth Amendment to the United States Constitution and under article I, section 7 of the Washington State Constitution. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). In order for a Terry stop to be lawful, the initial interference with a suspect’s freedom of movement must be justified at the inception of the contact. State v. Williams, 102 Wn.2d at 739 (citing Terry v. Ohio, 392 U.S. at 19-20). The stop must be based on a well-founded suspicion which is drawn

from “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. Terry v. Ohio, 392 U.S. at 21; State v. Gluck, 83 Wn.2d 424, 426, 518 P.2d 703 (1974).

The reasonableness of law enforcement’s suspicion is to be determined by examining the totality of the circumstances known to the officer at the inception of the stop. State v. Kennedy, 107 Wn.2d at 6. The level of articulable suspicion required to justify a stop is defined as “a substantial possibility that criminal conduct has occurred or is about to occur.” Id. The facts justifying the stop must be more consistent with criminal conduct than with innocent conduct. State v. Pressley, 64 Wn.App. 591, 596, 825 P.2d 749 (1992). A search which is not reasonable at its inception will not be validated even if it uncovers incriminating evidence. State v. Grundy, 25 Wn.App. 411, 607 P.2d 1235 (1980).

In the case of State v. Pressley, supra, the Court determined that a Terry stop was not supported by the evidence. In that case the officer observed two females “huddling” in an area known for drug transactions. State v. Pressley, 64 Wn.App at 593-594, 597. The females were looking at something in the defendant’s hand. The officer had observed drug transactions on previous occasions and believed the females were dealing drugs. The officer approached the females. One of them said an

expletive and both walked away in two different directions. The Court concluded in that case the events that transpired before the officer approached the females was not sufficient to support a Terry stop because the actions were “susceptible to a number of innocent explanations.”. Id. At 593-594. It is well established that the facts justifying a Terry stop must be more consistent with criminal activity than with innocent contact to give rise to a reasonable suspicion. State v. Pressley, 64 Wn.App. At 596.

In the case of State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997), the Court held that no reasonable suspicion existed to conduct a Terry stop on the observation that the defendants were not doing anything inherently suspicious when they were seized even though the defendants fit the officer’s perception of likely drug dealers. Additionally, in that case the Court found that the money in the possession of the defendant’s was an innocuous fact that could not be used to support a reasonable suspicion for a Terry stop.

In the case at hand, law enforcement received an anonymous call reporting that a male and female were engaged in a verbal argument and the female had an injury. RP 9 The caller did not see any assault or other criminal activity occur. Id Under an objective standard, the report made by the caller did not provide any evidence that criminal activity “may be afoot”. When Officer Garland arrived at the scene, he did see Mr. Lauro

and Ms. Dragoo engaged in a "heated discussion", but that alone is not an illegal activity. The testimony of Officer Garland established that he first saw Mr. Lauro and Ms. Dragoo from his patrol car. RP 12 When Officer Garland approached Mr. Lauro and Ms. Dragoo, Mr. Lauro started to walk away. RP 13 At the time Officer Garland observed Mr. Lauro walking away he noticed dried blood around Ms. Dragoo's mouth. Id As Mr. Lauro was walking away Officer Garland called for him to return. Id

Officer Garland did notice an injury on Ms. Dragoo, but it appeared to him that the injury was 24 to 48 hours old. RP 16 The inference to be made from the testimony is that Officer Garland noticed the old injury immediately, and before he called for Mr. Lauro's return. Officer Garland noticed the injury as he approached Ms. Dragoo and Mr. Lauro. Id. Additionally, initially Ms. Dragoo reported to Officer Garland that her sister caused the injury the night before, although that report was made after Officer Garland called Mr. Lauro back to the scene. RP 13-14, 16 Officer Garland, at the point he called for Mr. Lauro to return, had no reason to suspect Mr. Lauro assaulted Ms. Dragoo. Mr. Lauro did walk away from the scene, but again that is not necessarily an illegal act either. At the time Officer Garland called to Mr. Lauro as he was leaving the area, a seizure occurred. As Mr. Lauro testified, Officer Garland commanded him to return and Mr. Lauro felt that he had no choice but to walk to Officer

Garland. RP 58-59 Once Mr. Lauro returned to the area, interrogation of both Mr. Lauro and Ms. Dragoo commenced. RP 14.

A seizure of Mr. Lauro occurred when Officer Garland called to Mr Lauro compelling him to return to the scene. There was no legal justification for that seizure. At the time the seizure occurred, Officer Garland had no basis to reasonably believe that a crime had occurred. Officer Garland continued questioning both Mr. Lauro and Ms. Dragoo for the purpose of attempting to obtain probable cause to arrest Mr. Lauro for an assault. RP 28 At the time of the contact at the scene, Officer Garland was unaware of the no contact order and no efforts were made to discover if such an order was in existence at the scene. RP 31, 47

The actions of Mr. Laruo and Ms. Dragoo were innocuous and were more consistent with innocent rather than criminal activity. The facts of this case were insufficient to justify a Terry stop. The facts known to Officer Garland before he called out to Mr. Lauro for him to return include the heated discussion and an old injury. Neither of which are illegal acts. Therefore, Officer Garland had no basis to compel Mr. Lauro to return to the scene.

The appropriate remedy to the violation is suppression of the evidence obtained by law enforcement. The exclusionary rule requires suppression of evidence obtained as a result of an unlawful seizure under the Fourth Amendment to the United States Constitution and under Article

I, section 7 of the Washington State Constitution. Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). As stated in the Ladson case: "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladsen, 138 Wn.2d at 359; see also State v. Williams, 102 Wn.2d 742. In the Williams, supra, case evidence found as a result of an unlawful Terry stop was suppressed. To determine if evidence should be suppressed as the fruits of an unlawful search, the court is to look at whether the evidence "has been come at by exploitation of that illegality". Wong Sun v. United States, 371 U.S. at 488. In the event a Terry stop is found to be unlawful, the ensuing search and its results are inadmissible under the fruit of the poisonous tree doctrine. State v. Kennedy, 107 Wn.2d at 4.

In the case at hand the evidence and statements made to law enforcement are fruits of the poisonous tree. The evidence illegally obtained includes the identification of Mr. Lauro and Ms. Draqoo which was obtained in direct response to the illegal detention of the parties. The statements of Mr. Lauro should not be allowed into evidence as the statements were the direct result of an illegality. The identification of Ms. Dragoo and Mr. Lauro came about through the unlawful detention of the parties. Evidence of the identification should therefore be suppressed.

Here the evidence would not have been obtained but for law enforcement's illegal detention of Mr. Lauro. The evidence was discovered as a product of unlawful government activity, and the evidence gathered must be suppressed. The proper remedy for the violation is reversal of the conviction and dismissal of the charges. State v. Brown, 119 Wn.App. 473, 474, 81 P.3d 916 (2003); State v. Sweeney, 56 Wn.App. 42, 51, 782 P.2d 562 (1989); State v. Knighten, 109 Wn.2d 896, 897, 748 P.2d 1118 (1988).

**2. The trial court erred in denying Mr. Lauro's motion to suppress because the statements made by Mr. Lauro were not preceded by any *Miranda* warnings.**

In the case of Miranda v. Arizona, 384 U.S. 436, 444, 16 L.Ed.2d 694, 86 S.Ct., 1602, 10 A.L.R.3d 974 (1966), the United States Supreme Court created a practical rule to ensure the integrity of the privilege against self-incrimination under the Fifth Amendment.

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Id.*

The Fifth Amendment to the United States Constitution provides that no person shall be required in any criminal case to be a witness against himself. The Washington State Constitution in Article I, section 9 is

equivalent to the Fifth Amendment to the U.S. Constitution. Article I, section 9 of Washington State's Constitution should be given the same definition and interpretation as given to the Fifth Amendment. City of Tacoma v. Heater, 67 Wn.2d 733, 736, 409 P.2d 867 (1966), (citing State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)).

A suspect's Fifth Amendment privilege against self-incrimination and the right to be informed of the privilege attaches when custodial interrogation begins. Miranda v. Arizona, 384 U.S. at 444. Custodial interrogation was defined by the Court as questioning initiated by law enforcement after a person is either taken into custody or otherwise deprive of his freedom of action in any significant way. *Id.* When a suspect's freedom of action is curtailed to a "degree associated with formal arrest" Miranda rights must be given. California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983).

Miranda warnings must be given whenever a person is in custody or has his/her freedom of action curtailed and is subjected to interrogation or its functional equivalent. Rhode Island v. Innis, 443 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Interrogation means not only questioning by law enforcement, but also refers to any words or action by law enforcement, other than those normally attendant to arrest and custody, that the law enforcement should know are reasonably likely to elicit an incriminating response from the suspect. Innis, 446 U.S. at 300-

301. The definition of interrogation for the purpose of this analysis focuses primarily on the perceptions of the suspect rather than the intent of law enforcement. Innis, 446 U.S. at 301. The intent of law enforcement does not have a bearing on whether law enforcement should have known their words or actions were reasonably likely to elicit an incriminating response. Id. at 301-302. The nature of any conversation between law enforcement and a suspect that leads up to the confession is also a determining factor as to whether an interrogation has taken place. State v. Willis, 64 Wn.App. 634, 637, 825 P.2d 357 (1992). The words and actions of law enforcement, including requests for more detail, must be viewed in context to determine whether the responses sought by law enforcement would in all likelihood be incriminating. State v. Willis, 64 Wn.App. At 637.

The State must show that an accused person's waiver of his right to not self-incriminate himself was "an intentional relinquishment or abandonment of a known right or privilege." State v. Jones, 19 Wn.App. 850, 853, 578 P.2d 71 (1978) (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938)). In other words, the State must "establish by a preponderance of the evidence that the defendant, after being fully advised of his rights, knowingly and intelligently waived them." State v. Haack, 88 Wn.App. 423, 435-36, 958 P.2d 1001 (1997). The State must show the accused received Miranda warnings because "it cannot be said that there has been a knowing and intelligent waiver

unless it is shown that the defendant knew of his right. Unless the defendant is informed of his right, he cannot be presumed to know it.”.

State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988).

As previously argued, Mr. Lauro was seized when Officer Garland called him back to the scene. Mr. Lauro recalled that Officer Garland commanded him to return to where the Officer was standing and he felt that he was not free to leave. RP 58. Mr. Lauro was not advised of his Miranda rights. Mr. Lauro felt that he had no choice but to remain and answer law enforcement’s questions. RP 59. Undoubtedly Mr. Lauro felt compliance was required in part due to Sergeant Davis placing her hand on her taser. Id. The placement of the patrol vehicles also contributed to Mr. Lauro’s belief that he was not free to leave. The testimony of the Officer Garland was that the patrol cars were parked on opposite ends of where the group was standing. RP 25-26 Since Mr. Lauro was not free to leave, he was in custody for the purpose of the analysis required by Miranda. Miranda warnings should have been given immediately when Mr. Lauro returned to Officer Garland and before questions were asked of Mr. Lauro.

In this case, a custodial interrogation occurred. Here law enforcement did much more than ask Mr. Lauro simple questions meant to elicit only a yes or no response. The words and actions of both Officer Garland and Sergeant Davis amounted to a compelling request for more

information regarding his contact with Ms. Dragoo. Officer Garland briefly interrogated both Mr. Lauro and Ms. Dragoo together. RP 16-18. Officer Garland did not believe Mr. Lauro and questioned him further with the goal of establishing probable cause. RP 28 Mr. Lauro and Ms. Dragoo were separated and questioned further. RP 19. Sergeant Davis then questioned Mr. Lauro further. RP 39. Sergeant Davis gave Mr. Lauro an instruction to keep his hands out of his pockets. RP 89. Sergeant Davis had her hand on her taser which intimidated Mr. Lauro. RP 59. Mr. Lauro felt that he had no choice but to answer the questions posed by law enforcement. Id.

Not only was Mr. Lauro interrogated about what had occurred between himself and Ms. Dragoo, he was also confronted by Officer Garland who asked to look through Mr. Lauro's wallet to determine if he had Ms. Dragoo's Quest card. RP 20-21 Mr. Lauro was also confronted by Officer Garland with a cell phone which had been one of the subjects of the questioning. RP 21 Officer Garland believed that Mr. Lauro was not being truthful, he questioned Mr. Lauro and then confronted him with the information he had been provided by Ms. Dragoo. Id. Officer Garland questioned Mr. Lauro with the purpose of attempting to establish probable cause. RP 28 It is clear that intensive questioning of Mr. Lauro occurred without any Miranda rights provided to him. The record is not clear in regards to the length of time Mr. Lauro was questioned, but the estimates

of the encounter between Mr. Lauro and law enforcement was 15 to 20 minutes as indicated by the law enforcement officers during the hearing. RP 23 The questioning went beyond casual contact and into interrogation, including confrontation with facts. Officer Garland thought Mr. Lauro was not truthful and questioned Mr. Lauro to see if his story changed. RP 21 This type of questioning is interrogation which requires advisement of Miranda rights. Mr. Lauro should have been given his Miranda rights. The failure to do so violated Mr. Lauro's rights. Under these circumstances, both Officer Garland and Sergeant Davis should have known their express questions, as well as their words and actions, were likely to elicit an incriminating response from Mr. Lauro.

The appropriate remedy is reversal and remand. The erroneous admission of custodial statements is subject to a constitutional harmless error review. Arizona v. Fulminante, 499 U.S. 279, 295, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Therefore, the question for the Court to consider is whether the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 8247, 17 L.Ed.2d 705 (1967). The erroneous admission of a confession has great risk of prejudice because a jury is likely tempted to rely on the confession alone in reaching its decision. Arizona v. Fulminante, 499 U.S. at 296.

In the case at hand, Mr. Lauro's statements led to the conviction for count two of the information, providing false information or misleading

statements to a public servant. The statements made by Mr. Lauro were likely used to obtain a conviction for the charge of violating a court order as well. The act of stopping Mr. Lauro from leaving the scene when there was no evidence that a crime had been committed at the scene, and when leaving the scene would have dissipated the heated discussion between Mr. Lauro and Ms. Dragoo, is tantamount to custody and Miranda warnings should have been given prior to police interrogation.

**E. CONCLUSION**

For the reasons cited above, Mr. Lauro respectfully requests the court to reverse the convictions entered in this matter.

RESPECTFULLY SUBMITTED this 18th day of August, 2010.



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MICHELLE BACON ADAMS  
WSBA No. 25200  
Attorney for Appellant

# Appendix A



1 between a male (later identified as the defendant, Matthew Lauro) and a female (later identified  
2 as Amanda Drago) and that as Officer Garland got out of his patrol car and approached the two  
3 individuals, he observed the female had an injury to her lip.

4 **III.**

5 That as Officer Garland approached the two on foot, the defendant began to walk away  
6 and he observed the female to be upset.

7 **IV.**

8 That as we look at the totality of the circumstances up to this point (observation of a  
9 verbal heated discussion with an obvious injury to the female with her being upset and the  
10 defendant walking away upon the officer approaching) Officer Garland had a reasonable belief  
11 that a crime may be a foot.

12 **V.**

13 That upon the defendant walking away, Officer Garland said something to the effect of  
14 asking the defendant: "Can I talk to you?" or "Would you stop?" and that the defendant stopped,  
15 paused and then returned to speak with Officer Garland.

16 **VI.**

17 That the defendant testified at the suppression hearing that Officer Garland made a verbal  
18 command for him to stop.

19 **VII.**

20 That the defendant testified he did not tell the truth when questioned by Officer Garland  
21 about not knowing the female he was arguing with.

22 **VIII.**

23 That the defendant has three crimes of dishonesty as part of his criminal history and he  
24 acknowledged not being truthful to Officer Garland; therefore the defendant lacks credibility  
25 relating to his testimony at this hearing.

26 **IX.**

27 That Officer Garland's contact with the defendant (to speak with him) as the defendant  
28 walked away was not based on a command to stop but rather a request for the defendant to do so.

29 **X.**

30 That at this point, there was no evidence presented to the defendant regarding his guilt.  
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**CONCLUSIONS OF LAW**

**I.**

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

**II.**

That Officer Garland's contact with the defendant was a permitted *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968); and subsequent case law.

**III.**

That because Officer Garland's contact with the defendant was an appropriate investigatory stop under all of the circumstances, the defendant was not in custody at the time of inquiry and therefore providing the defendant *Miranda* warnings was not required. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); and subsequent case law.

**IV.**

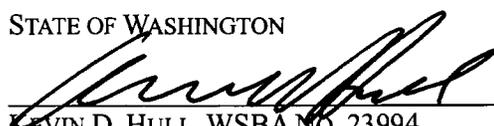
That the request to suppress defendant's statements under a 3.5 or 3.6 analysis is denied.

SO ORDERED this 19<sup>th</sup> day of February, 2010.

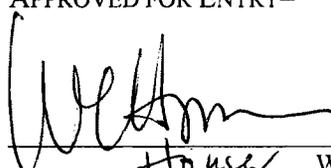
  
\_\_\_\_\_  
JUDGE **LEILA MILLS**

PRESENTED BY--

STATE OF WASHINGTON

  
\_\_\_\_\_  
KEVIN D. HULL, WSBA NO. 23994  
Deputy Prosecuting Attorney

APPROVED FOR ENTRY--

  
\_\_\_\_\_  
Hauge, WSBA No. 33386  
Attorney for Defendant

Prosecutor's File Number-10-137651-29



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NO. 40380-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW DAVID LAURO,

Appellant.

CERTIFICATION OF MAILING

I, ALICIA A. LANOUE, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

Original Mailed To:

Clerk of Court  
Court of Appeals, Division II  
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Tacoma, WA 98402

Copy Mailed To:

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Copy Mailed To:

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DATED this 18<sup>th</sup> day of August, 2010, at Port Orchard, Washington.

  
ALICIA A. LANOUE  
Legal Assistant