

NO. 50231-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK D. WILMER,

Appellant.

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

The Honorable Daniel L. Goodell

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred in denying the defense motion to suppress Mr. Wilmer's statement to the Department of Corrections ("DOC") investigator because the incriminating statement was made during a custodial interrogation and Wilmer was not provided *Miranda* warnings.

B. ISSUE RELATED TO THE ASSIGNMENT OF ERROR

Was the statement to the DOC investigator regarding the custodial assaults obtained as the result of an impermissible custodial interrogation in violation of Wilmer's *Miranda* rights because the DOC investigator was the only law enforcement officer to interview inmate Wilmer about the assaults, elicited a response that he knew would be used by the prosecutor at trial and would be incriminating to a person being charged with custodial assault, and resulted in Wilmer being charged with the crimes?

C. STATEMENT OF FACTS

Mason County prosecutors charged Mark Wilmer with three counts of Custodial Assault for throwing urine on corrections officers. CP 52-53. Count I, involved Officer Nonamaker on 1/27/2015, Count II involved Officer Shinn on 1/31/2015, and Count III involved Officer Underberg on 2/1/2015. CP 52-53, 57, 73, 100. Mr. Wilmer resides in the Intensive Management Unit (IMU) at the Washington Corrections Center in Shelton, Washington. RP 10, 28, 59, 88, 138, 210.

Prior to trial, the defense moved to suppress Wilmer's statement to DOC investigator Josh Adams. At the 3.5 hearing, Defense counsel argued that Wilmer's statement should be suppressed because it was a custodial interrogation and Wilmer did not receive required *Miranda* warnings before Mr. Adams conducted the interrogation. RP 27-29. The State argued that Adams' interrogation of Wilmer was not a custodial interrogation. RP 26-27.

The court denied the motion to suppress, however, it found that Wilmer's statement to Adams was made during an interrogation and was the result of being asked a question by a State agent. RP 34. The trial court said the only remaining question was whether the interrogation was "custodial" for purposes of *Miranda*. RP 36. The court found that Wilmer, already an incarcerated person, was not in custody for purposes of *Miranda*, without further restrictions placed on his person.¹ RP 34, 35. Wilmer's incriminating statement to Adams was subsequently introduced at trial. RP 122-23, 156.

Following a jury trial before the Honorable Daniel L. Goodell, Wilmer was convicted of three counts of custodial assault. CP 6-23. He received a sentence of 56 months. CP 10. This appeal timely followed. CP 4-5.

¹ The court cited the following cases provided by the State in making its ruling: *State v. Post*, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995). RP 35.

D. ARGUMENT

THE TRIAL COURT VIOLATED WILMER'S FIFTH AMENDMENT RIGHTS BY ADMITTING THE STATEMENT HE MADE TO A DOC INVESTIGATOR DURING A CUSTODIAL INTERROGATION WITHOUT THE BENEFIT OF *MIRANDA* WARNINGS.

The Fifth Amendment protects a defendant from self-incrimination. The Fifth Amendment provides, "No person ... shall be compelled in any criminal case to be a witness against himself..." U.S. Const. amend. V. A suspect must be advised of his Fifth Amendment rights before a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Statements obtained in violation of this rule must be suppressed at trial. *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

The issue here is over the trial court's ruling that Wilmer was not in custody for purposes of *Miranda* because he was an incarcerated person, interviewed in his prison cell, and not placed under additional restriction during questioning. This Court reviews a trial court's custodial status determination *de novo*. *State v. Lorenz*, 152 Wash.2d 22, 36-37, 93 P.3d 133 (2004). An objective test is used to measure whether a person was in custody for purposes of *Miranda*. *Id.*

In finding that Wilmer was not in custody for purposes of *Miranda*, without further restrictions placed on his person, the trial court relied on case law provided by the State: *State v. Post*, 118 Wn.2d 596 (1992) and *State v. Warner*, 125 Wn.2d 876 (1995). RP 35. However,

despite the trial court's ruling, those cases do not provide a bright line rule that when a State actor interrogates an inmate in a prison setting, such interrogation is never custodial for purposes of *Miranda* unless the inmate is placed under additional restraint. Further, neither case relied on by the trial court gives guidance on what counts as a custodial interrogation for someone already incarcerated.

In *Post*, the court held that the defendant's statements made to a DOC psychologist as evidence of his future dangerousness did not violate the Fifth Amendment. *State v. Post*, 118 Wn.2d 596. In *Post*, the defendant did not assert his Fifth Amendment privilege during the interview with the psychologist, the court ruled that there are two situations where the failure to claim the privilege will be excused: custodial interrogation by a State agent (based on *Miranda*), and situations where the assertion of the privilege is penalized. *State v. Post*, 118 Wn.2d at 605.

The *Miranda* exception applies when the interview or examination is (1) custodial (2) interrogation (3) by a State agent. *State v. Post*, 118 Wn.2d at 605, citing *State v. Sargent*, 111 Wash.2d 641, 649-53, 762 P.2d 1127 (1988). And noting that, "in most cases "custodial" refers to whether the defendant's freedom of movement was restricted at the time of questioning. *Id.* The United States Supreme Court has defined interrogation for Fifth Amendment purposes, clarifying that "the term "interrogation" under *Miranda* refers

not only to express questioning, but also to any words to actions on the part of police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980).

Here, the trial court found that DOC investigator Adams’ interview of Wilmer was an interrogation by a State actor. RP 34-35. This finding is unchallenged. Adams went to Wilmer’s cell in the IMU to question him about the assaults. RP 8-12. However, the trial court did not find that the interrogation was custodial because no additional restrictions in Wilmer’s movement were in place. RP 35.

The Washington Supreme Court in *Post* did not agree with the assumption of the lower court “that a person serving a prison sentence is automatically in custody for purposes of *Miranda*”. *Post*, 118 Wn.2d 596 at 606. In *Post*, the record did not show the location of the interview, but supports that it occurred while the defendant was in DOC custody out on work release. *Id.* The *Post* court held:

The traditional “custody” analysis of *Miranda* is not appropriate when the interview or questioning may have occurred in a prison setting or the person being sentenced is serving a criminal sentence. All convicted felons serving their sentence are in “custody” because their freedom of movement is “restricted” until they have served their sentence. When the person being interviewed is serving a prison sentence, it is appropriate to analogize to the cases applying *Miranda* to the questioning of prisoners in prison. See *United States v. Conley*, 779 F.2d 970, 973 (4th Cir.1985), *cert. denied*, 479 U.S. 830, 107 S.Ct. 114, 93 L.Ed.2d 61 (1986); *Cervantes v. Walker*, 589 F.2d 424, 427–29 (9th Cir.1978). These cases note that traditional *Miranda* “custody”

analysis leads to the anomalous result of requiring *Miranda* warnings anytime a prison official desires to speak with an inmate. Instead, these cases consider the circumstances and setting of the interview to see if the inmate was subjected to more than the usual restraint to depart. In particular, they look for some act which places further limitations on the prisoner's already limited freedom of movement. See *Cervantes*, at 428.

Post, 118 Wn.2d 596 at 606-07.

Post held that the defendant in that case was not placed under physical restraints, and psychological compulsion, without more, is not enough to amount to custodial interrogation. *Post*, 118 Wn.2d 596 at 607. "The defendant must show some objective facts indicating his or her freedom of movement was restricted. In the context of determining custody in nonprison settings, we have said that the inquiry into freedom of movement is an objective one; the psychological state of the person being questioned is irrelevant to determining if his freedom of movement was restricted." *Post*, 118 Wn.2d 596 at 607. (See *State v. Sargent*, 111 Wash.2d at 649).

In *Post*, the questioning by the psychologist was not about acts that could result in new criminal liability for the defendant. *Post*, 118 Wn.2d 596 at 608. This key distinction sets the case at hand apart from *Post*, because here DOC investigator Adams, the only State actor to conduct an investigation in this case, was indeed seeking evidence for acts in which Wilmer could face new criminal liability. Unlike in *Post*, the questions posed by Adams here were not limited to assessing risk based on past conduct.

Similarly, *Post* distinguishes itself from *Sargent*, because the defendant in *Post* did not have a criminal case or appeal pending; there was no investigation of a new crime. *Post*, 118 Wn.2d 596 at 608. In *Sargent*, the court found the interrogation of a defendant while in jail locked in an interview booth was custodial for purposes of *Miranda*, in part because his freedom of movement was unquestionably limited. *State v. Sargent*, 111 Wash.2d at 649-50. *Sargent* involved a probation officer interviewing a defendant for purposes of preparing the presentence investigation report for the court, after the defendant had been convicted. The State actor in *Sargent* had asked the defendant “Did you do it?” and told him that to benefit from counseling he would need to come clean. *Sargent*, 111 Wash.2d at 642-43, 650. Not having received *Miranda* warnings at any time, the defendant later wrote out a confession to the probation officer, which was used against him during his re-trial. *Id.*

Wilmer’s case is closer to the facts of *Sargent* than of *Post*. In *Sargent*, like the present case, the defendant made the incriminating statement in response to the question of whether he committed the crime, which was asked by a State actor from DOC. Investigator Adams asked Wilmer “Why are you assaulting staff?” RP 14, 122. The question posed by Adams was the functional equivalent of “Did you do it?” This type of interrogation requires *Miranda* warnings because the question was designed to elicit an incriminating response

and was reasonably likely to elicit an incriminating response. See *Innis*, 446 U.S. 291 at 301.

The State argued that the Washington Supreme Court's more recent holdings in *Post* and in *Warner* weaken the holding in *Sargent*. However, both *Post* and *Warner* noted the *Sargent* opinion and did not overrule it. In addition, as explained above, *Sargent* stands for a different set of circumstances than in *Post*.

Similarly, in *Warner*, the Washington Supreme Court distinguished, but did not overrule *Sargent*, holding that, "When dealing with a person already incarcerated, 'custodial' means more than just the normal restrictions on freedom incident to incarceration. There must be more than the usual restraint to depart." *Warner*, 125 Wash.2d at 885, 889 P.2d 479.

Warner is distinguishable from the case at hand because it arose out of dissimilar circumstances. In *Warner*, a defendant in the custody of the Department of Juvenile Rehabilitation made incriminating statements during group therapy. *Warner*, 125 Wash.2d at 884, 889 P.2d 479. An inmate making incriminating statements during group therapy is a much different set of facts than in this case. Here, Wilmer was being directly asked about the commission of a crime by a State actor in charge of investigating crimes at the prison, who was also the only person to conduct an investigation.

Wilmer's statements were made during a custodial interrogation by a State actor where no *Miranda* rights were given. The DOC investigator who interviewed Wilmer was assigned to investigate allegedly criminal behavior and was the only law enforcement officer to interview him. This investigator interviewed Wilmer in his locked prison cell in the IMU and inquired why he had committed the crime without first giving him his *Miranda* warnings, this was the only time Wilmer was interrogated by law enforcement as a result on these incidents.

Wilmer was in his usual IMU cell and not free to leave during the interrogation by Adams. Wilmer was not placed in any additional restraints but had no choice other than to be present in his room in the IMU. However, it is incorrect to say that there was no more restraint on Wilmer than is usual in a prison setting. Wilmer's unit, the IMU, is by definition a more restrictive place in the prison than other living units. The IMU is traditionally reserved for those inmates who DOC decides needs to be in a more secured situation than the general prison population.

The trial court here found that Adams was a State actor who interrogated Wilmer. RP 35. And while Wilmer was not placed in any additional restraints beyond his IMU cell (such as being placed in the cuff port), he was subject to interrogation. Because this interrogation was designed to elicit an incriminating response and Wilmer was in a highly restrictive setting when this occurred, this questioning amounted

to custodial interrogation, which required Wilmer first receive his *Miranda* warnings so that any waiver he makes is knowing and voluntary. Therefore, because *Miranda* warnings were not provided, Wilmer's statement cannot be considered knowing and voluntary and must be suppressed.

E. CONCLUSION.

Based on the foregoing facts and authorities, Mr. Wilmer respectfully asks this Court to reverse his convictions for custodial assault and remand to the trial court for retrial without his incriminating statement to DOC investigator Adams.

DATED this 4th day of October, 2017.

Respectfully submitted,



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DIVISION TWO**

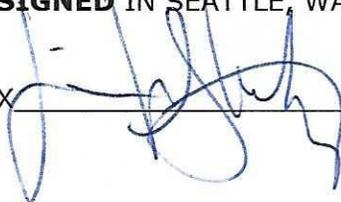
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 50231-3-II
)	
MARK D. WILMER,)	
)	
APPELLANT.)	

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STUTZER LAW PLLC

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