

FILED
Court of Appeals
Division II
State of Washington
4/12/2018 4:30 PM
NO. 51461-3-II

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

STATE OF WASHINGTON, Appellant

v.

JEFFERY JEROME JOHNSON, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00944-1

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR	1
I. The trial court erred in entering conclusion of law 6 holding that “when police engage in conversation with an individual, and the police officer’s questions are likely to elicit incriminating statements, the police officer must first inform the individual of his rights under <i>Miranda</i> prior to any questioning, whether or not the individual is in custody.”	1
II. The trial court erred in entering conclusion of law 7 holding that “the officers asked the defendant questions reasonably likely to illicit [<i>sic</i>] incriminating responses, therefore the police were required to inform the defendant of his rights under <i>Miranda</i> prior to any questioning.”	1
III. The trial court erred in entering conclusion of law 8 holding “because <i>Miranda</i> was required and not given, the statements are not admissible in the State’s case in chief.”	1
IV. The trial court erred in entering conclusion 9 finding the statements were only admissible for impeachment purposes....	1
V. The trial court erred in excluding the defendant’s statements made to police officers when he was not subject to custodial interrogation.	1
VI. The trial court erred in holding that police must always inform citizens of <i>Miranda</i> warnings if their questions are likely to elicit an incriminating response regardless of the individual’s custodial status.	1
VII. The trial court erred in failing to follow controlling legal precedent on the subject of admissibility of a defendant’s statements to law enforcement.	2
VIII. The trial court erred in excluding the statements the defendant made to law enforcement from the State’s case in chief.....	2
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
I. Whether <i>Miranda</i> warnings are required during non-custodial interrogations by a state actor.....	2

II.	Whether an individual is “in custody” when he is outside his residence, unrestrained, voluntarily speaking with police officers.	2
III.	Whether the trial court erred in excluding statements made by an individual who was not subject to custodial interrogation and whose constitutional rights were not violated.	2
IV.	Whether this Court should reverse the trial court’s ruling on the CrR 3.5 hearing and direct admission of the statements made by the defendant to police during the state’s case-in-chief.	2
	STATEMENT OF THE CASE.....	2
	ARGUMENT.....	9
I.	<i>Miranda</i> is only required when all elements of custodial interrogation are met.	9
II.	Johnson was not “in custody” during police questioning.....	13
III.	The trial court erred in applying the exclusionary rule, thus excluding the statements Johnson made to police.....	18
IV.	This Court should reverse the trial court’s order excluding the statements Johnson made to police and direct the superior court to allow the State to offer the statements in its case-in-chief. .	22
	CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Beckwith v. U.S.</i> , 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).....	15
<i>Berkemer v. McCarty</i> , 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).....	13, 14, 16
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	11, 12, 13, 21
<i>Oregon v. Elstad</i> , 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985)	11
<i>Oregon v. Mathiason</i> , 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977)	15
<i>State v. Bockman</i> , 37 Wn.App. 474, 682 P.2d 925, <i>rev. denied</i> , 102 Wn.2d 1002 (1984).....	16
<i>State v. Bonds</i> , 98 Wn.2d 1 653 P.2d 1024 (1982).....	19
<i>State v. Broadaway</i> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	10
<i>State v. Campos-Cerna</i> , 154 Wn.App. 702, 226 P.3d 185 (2010).....	9
<i>State v. Davis</i> , 79 Wn.App. 355, 901 P.2d 1094 (1995).....	22
<i>State v. Eserjose</i> , 171 Wn.2d 907, 259 P.3d 172 (2011)	19
<i>State v. Gasteazoro-Paniagua</i> , 173 Wn.App. 751, 294 P.3d 857 (2013).	10
<i>State v. Gibbons</i> , 118 Wn. 171, 203 P. 390 (1922).....	19
<i>State v. Grogan</i> , 147 Wn.App. 511, 195 P.3d 1017 (2008).....	12, 14, 20
<i>State v. Harris</i> , 106 Wn.2d 784, 725 P.2d 975 (1986), <i>cert. denied</i> , 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987).....	12
<i>State v. Heritage</i> , 152 Wn.2d 210, 95 P.3d 345 (2004)....	12, 13, 14, 18, 21
<i>State v. Hilliard</i> , 89 Wn.2d 430, 432, 435-36, 573 P.2d 22 (1977).....	14
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	12, 17
<i>State v. Marshall</i> , 47 Wn.App. 322, 737 P.2d 265 (1987).....	16, 17
<i>State v. Posenjak</i> , 127 Wn.App. 41, 111 P.3d 1206 (2005).....	15
<i>State v. Rehn</i> , 117 Wn.App. 142, 69 P.3d 379 (2003).....	15
<i>State v. Sargent</i> , 111 Wn.2d 641, 647, 762 P.2d 1127 (1988).....	12, 17, 21
<i>State v. Short</i> , 113 Wn.2d 35, 775 P.2d 458 (1988)	13
<i>State v. Sinclair</i> , 11 Wn.App. 523, 523 P.2d 1209 (1974).....	17
<i>State v. Ustimenko</i> , 137 Wn.App. 109, 151 P.3d 256 (2007)	10, 12
<i>U.S. v. Craighead</i> , 539 F.3d 1073, 1082 (9th Cir. 2008).....	14

Rules

ER 801(d)(2)	10, 18
CrR 3.5.....	1, 3, 5, 10, 22
CrR 3.5(a)	10
GR 14.1	11

Constitutional Provisions

5th Am. U.S. Const..... 11

Unpublished Opinion

State v. Betancourth, 197 Wn.App. 1005, slip op. at 12 (Div. 3, 2016) ... 11

INTRODUCTION

The State of Washington is the plaintiff below and the appellant on appeal. Jeffrey Johnson was charged with Child Molestation in the Second Degree in Clark County Superior Court Cause No. 16-1-00944-1. The State appeals the trial court's order excluding statements the defendant made to law enforcement after a CrR 3.5 hearing in this matter.

ASSIGNMENTS OF ERROR

- I. The trial court erred in entering conclusion of law 6 holding that "when police engage in conversation with an individual, and the police officer's questions are likely to elicit incriminating statements, the police officer must first inform the individual of his rights under *Miranda* prior to any questioning, whether or not the individual is in custody."
- II. The trial court erred in entering conclusion of law 7 holding that "the officers asked the defendant questions reasonably likely to illicit [*sic*] incriminating responses, therefore the police were required to inform the defendant of his rights under *Miranda* prior to any questioning."
- III. The trial court erred in entering conclusion of law 8 holding "because *Miranda* was required and not given, the statements are not admissible in the State's case in chief."
- IV. The trial court erred in entering conclusion 9 finding the statements were only admissible for impeachment purposes.
- V. The trial court erred in excluding the defendant's statements made to police officers when he was not subject to custodial interrogation.
- VI. The trial court erred in holding that police must always

inform citizens of *Miranda* warnings if their questions are likely to elicit an incriminating response regardless of the individual's custodial status.

- VII. The trial court erred in failing to follow controlling legal precedent on the subject of admissibility of a defendant's statements to law enforcement.
- VIII. The trial court erred in excluding the statements the defendant made to law enforcement from the State's case in chief.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- I. Whether *Miranda* warnings are required during non-custodial interrogations by a state actor.
- II. Whether an individual is "in custody" when he is outside his residence, unrestrained, voluntarily speaking with police officers.
- III. Whether the trial court erred in excluding statements made by an individual who was not subject to custodial interrogation and whose constitutional rights were not violated.
- IV. Whether this Court should reverse the trial court's ruling on the CrR 3.5 hearing and direct admission of the statements made by the defendant to police during the state's case-in-chief.

STATEMENT OF THE CASE

The State charged Jeffrey Jerome Johnson (hereafter 'Johnson') in Clark County Superior Court with one count of Child Molestation in the Second Degree for an incident that occurred between January 1, 2013 and January 1, 2015, against his young niece. CP 1-4. The State also alleged

Johnson used his position of trust to facilitate the commission of the crime. CP 4. The charges were based on Johnson's niece's allegation that Johnson had entered her bedroom during the night, when she was lying in bed, and rubbed her on her vaginal area. CP 2-3.

During their investigation, law enforcement officers spoke with Johnson. RP 4. Sergeant Aaron Kanooth of the Battle Ground Police Department detailed his contact with Johnson during a CrR 3.5 hearing held in superior court on this matter. RP 1-10. Sergeant Kanooth explained that he responded to a call regarding an allegation of sexual abuse; a student at a nearby high school had disclosed a sexual assault that had occurred in Battle Ground. RP 2. Sergeant Kanooth responded to the high school and spoke with the victim, A.L. RP 3. A.L. told Sergeant Kanooth that Johnson was the perpetrator. RP 3. After speaking with her, Sergeant Kanooth went to Johnson's residence in Battle Ground intending to speak with Johnson about the allegations. RP 3.

Sergeant Kanooth went to Johnson's residence with another police officer, and contacted Johnson's wife at the front door. RP 4. They asked to speak to Johnson and Johnson came to the door. RP 4. Sergeant Kanooth asked if they could speak with him; Johnson directed the officers to the front driveway area, in front of the garage. RP 4. The officers went there and they began speaking with Johnson. RP 4. Sergeant Kanooth was

in plain clothes and had his badge on his waistline. RP 4. His fellow officer was in uniform. RP 4. Neither Sergeant Kanooth nor his fellow officer pulled any weapons during their contact with Johnson; Sergeant Kanooth did not tell Johnson he had to speak with him. RP 4. In the front driveway area, Sergeant Kanooth explained to Johnson why they were there, what they wanted to talk about and then began asking him questions. RP 4. Sergeant Kanooth made no threats or promises to get Johnson to agree to speak with him. RP 4. Sergeant Kanooth did not coerce Johnson in any way before or during the conversation. RP 7. Johnson willingly agreed to come and speak with Sergeant Kanooth and Johnson chose the location of the conversation, outside of Johnson's home, in the driveway, in front of the garage. RP 3-4. Sergeant Kanooth believed Johnson voluntarily spoke with him. RP 7.

During this conversation, Johnson was not placed in custody. RP 5, 7. After he spoke with Johnson, Sergeant Kanooth went inside to speak with Johnson's wife; while he was in there, he heard over his radio that his fellow officer was placing Johnson in custody. RP 7. Sergeant Kanooth went back outside and at that time informed Johnson of the *Miranda* warnings. RP 7.

During pretrial proceedings, the State sought to admit statements Johnson made to Sergeant Kanooth prior to being taken into custody. CP

15-22; RP 1-28. The superior court held a CrR 3.5 hearing on October 20, 2017, wherein the State presented the testimony of Sergeant Kanooth; the defense presented no witnesses. RP 1-28. The State argued the statements were admissible because Johnson was not in custody at the time he made the statements to police because his freedom was not curtailed to the degree normally associated with arrest. RP 10. The State further argued that interviews at suspects' residences are considered less coercive, and that Johnson voluntarily spoke with police. RP 11-12. Johnson did not make any argument to the court on the admissibility of his statements to police. RP 12.

Upon that record, the trial court ruled that Sgt. Kanooth's questions were "reasonably likely to elicit incriminating responses" and therefore "*Miranda* was required." RP 13-14. The trial court also ruled that Johnson was not in custody and that the statements Johnson made were voluntary. RP 15-16, 21. During the court's oral ruling, the State interjected numerous times to clarify the trial court's ruling, initially indicating that no case law supported the standard for giving *Miranda* as whether the officer's questions were designed to elicit an incriminating response. RP 13-15. The State also argued that it was clear Johnson was not in custody and that the officer's subjective motivation in questioning the defendant is irrelevant to admissibility of Johnson's statements. *Id.* at 16-20.

The trial court maintained that in this situation *Miranda* was required prior to the officers speaking with Johnson. RP 20. The trial court asked for Johnson's attorney's input, and defense counsel told the court the pertinent inquiry was whether Johnson was subjected to a custodial interrogation. RP 20-21. Defense counsel told the court that while Johnson was certainly subject to interrogation, that "there's very little in the record actually to support that he was in custody...." RP 21. The trial court then ruled in response,

Well if I'm hearing your argument correctly you believe that if he's not in custody and I'm going on the record now to say that at the time that he made the statements he was free to leave and so he – it's not a custodial interrogation. That's not the thought process that I had.

The thought process that I had was whether or not law enforcement can have what some might call *carte blanche* to interrogate people just because they don't have handcuffs on them.

...

I'm kind of rolling it back to – the system then there's a very powerful privilege that we all have –

...

– to not be forced to incriminate ourselves and – through police interrogation. I'm also finding that the police interrogated him –

...

– on that garage door step. So we’ve got this struggle between non-custodial and interrogation and what gets left out is the Defendant’s understanding of whether he has the right to not incriminate himself. So we’ve got this three legged stool that we’re trying to bounce around.

RP 21-22. The State interjected referencing the case law the way it is now, but the court interrupted the prosecutor saying, “Well maybe we’re making – maybe we’re making new case law.” RP 22. The court went on to discuss the case law as it stands, saying

– all the case law our Courts of Appeals and Supreme Court are saying law enforcement just go out – interrogate people – but don’t put handcuffs on them.

...

That – that just can’t be true!

RP 23. The prosecutor argued additional points, eventually telling the court its decision was essentially saying police had to give *Miranda* anytime they spoke with someone, and the trial court responded:

What’s wrong with that?

...

What’s wrong with that – that’s a practice for *Miranda*.

RP 25. The court further stated:

– and I know you understand what my – my issue is with it. I do not believe under any civilized society in the State of Washington or the State of George – wherever – law enforcement does not have an unfettered right to interrogate people just because they don’t put handcuffs on them.

RP 26. And the court stated broadly:

My ruling is that any time the situation arises where the police are likely to in – elicit incriminating statements, that’s where the line gets drawn for me.

When they start asking him about her underwear and rubbing her belly or her – or her vagina that’s likely to elicit incriminating statements from the defendant who had not been read his *Miranda* – that he has a right to remain silent.

So if it’s likely to elicit incriminating statements and the purpose of it is to interrogate for the purpose of getting incriminating statements I believe *Miranda* is required.

RP 26-27.

The following week, on October 27, 2017, the trial court entered findings of fact and conclusions of law, holding that Johnson was not in custody during the conversation with police, that he was free to leave during the entirety of the conversation, his statements were voluntary, and that the conversation was not a custodial interrogation. CP 25-28. The court further held that:

When police engage in conversation with an individual, and the police officer’s questions are likely to elicit incriminating statements, the police officer must first inform the individual of his rights under *Miranda* prior to any questioning, whether or not the individual is in custody.

CP 27. The court held as *Miranda* was not given, and the police asked the defendant questions designed to elicit an incriminating response, the statements were not admissible in the State's case-in-chief. CP27.

The State sought discretionary review by this Court of the superior court's decision. CP 29. This Court granted review.

ARGUMENT

The trial court improperly excluded the statements Johnson made to police. The trial court erroneously believed law enforcement officers are required to inform an individual of their constitutional rights pursuant to *Miranda* anytime an officer speaks to an individual with the intent to obtain incriminating statements, whether or not that individual is in "custody" as that term is defined by case law. In this case, law enforcement were not required to inform Johnson of *Miranda* warnings as he was not in "custody" at the time he was questioned by the officers. As Johnson was not subject to "custodial interrogation" and his statements to police were voluntary, the trial court erred in excluding his statements.

I. ***Miranda* is only required when all elements of custodial interrogation are met.**

Miranda claims are issues of law that this Court reviews de novo. *State v. Campos-Cerna*, 154 Wn.App. 702, 226 P.3d 185 (2010); *State v.*

Gasteazoro-Paniagua, 173 Wn.App. 751, 294 P.3d 857 (2013) (citations omitted). Thus this Court should review the trial court's conclusions of law de novo. The trial court's findings of fact are verities on appeal if they are unchallenged, and if challenged, they are verities if supported by substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 942 P.2d 363 (1997). The State does not challenge any of the trial court's findings of fact. Under a de novo review of this court's legal conclusions on the admissibility of Johnson's statements, the State urges this Court to find the trial court erred and to reverse the trial court's order excluding Johnson's statements to police.

Pursuant to Evidence Rule (ER) 801(d)(2), out-of-court statements made by a defendant are not hearsay when offered by the State. When those statements are made to law enforcement, the procedure under CrR 3.5 applies. Pursuant to CrR 3.5, the trial court shall hold a hearing to determine whether a defendant's statements to law enforcement are admissible. CrR 3.5(a). During a CrR 3.5 hearing, the trial court determines whether the statements made to law enforcement were voluntary or whether they were obtained by coercion. *See State v. Ustimenko*, 137 Wn.App. 109, 151 P.3d 256 (2007). If a defendant is subject to "custodial interrogation" and makes statements prior to being informed of the *Miranda* warnings, the statements are presumed

involuntary due to the coercive nature of custodial interrogations. *Id.* (citing *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985)). However, if a defendant is not subject to a “custodial interrogation,” the statements are not presumed involuntary in the absence of *Miranda* warnings and would thus be admissible. *See id.*

“Law enforcement officers need not deliver the *Miranda* warnings whenever speaking with a citizen, let alone questioning a prime suspect of a crime.” *State v. Betancourth*, 197 Wn.App. 1005, slip op. at 12 (Div. 3, 2016) – unpublished).¹ Despite the clear jurisprudence on this issue, the superior court below ruled that whenever officers speak to an individual about something potentially incriminating, those officers must give *Miranda* warnings in order for the statements to be admissible at trial, regardless of whether or not the individual is in custody. This is clearly erroneous.

Individuals have the constitutional right not to make incriminating statements or admissions to police. 5th Am. U.S. Const.; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). “No person ... shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. *Miranda* warnings were developed to

¹ GR 14.1 allows for citation to unpublished opinions of the Court of Appeals filed after March 1, 2013, when they are identified as unpublished opinions. This opinion is not binding on this Court and this Court may give this opinion as much or as little persuasive value as it chooses.

protect this right when individuals are “in the coercive environment of police custody.” *State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004) (citing *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987)). Police must inform an individual of the *Miranda* warnings “when a suspect endures (1) custodial (2) interrogation (3) by an agent of the State.” *Id.* (citing *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988) (citing *Miranda*, 384 U.S. at 444)). All three “elements” must be present to require a police officer inform a suspect of the *Miranda* warnings prior to questioning. *State v. Grogan*, 147 Wn.App. 511, 195 P.3d 1017 (2008). A suspect’s statements given during a custodial interrogation without *Miranda* are presumed involuntary. *Id.* (citing *Sargent*, 111 Wn.2d at 647-48). However, when a suspect is not in “custody” during police questioning, the statements are admissible in evidence. *See Ustimenko*, 137 Wn.App. at 116 (holding that because the questioning did not occur when the defendant was in custody that they should have been admitted into evidence (citing to *State v. Lorenz*, 152 Wn.2d 22, 93 P.3d 133 (2004))). Thus, as Johnson was not subject to “custodial interrogation,” his statements are admissible at trial.

II. Johnson was not “in custody” during police questioning

The trial court properly found that Johnson was not “in custody” during his conversation with police as Johnson was standing outside his residence, in a location he chose, was not restrained in any way, and was not coerced or threatened into making statements. As Johnson’s freedom was not curtailed in any way associated with formal arrest, Johnson was not “in custody,” and therefore the trial court’s ruling that Johnson’s statements were inadmissible in the State’s case-in-chief was erroneous.

The first requirement to invoke the need to inform a suspect of the *Miranda* warnings is custody. In *Miranda*, the U.S. 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.” *Miranda*, 384 U.S. at 444. To determine whether a situation is “custodial” as that word was intended in *Miranda*, the U.S. Supreme Court developed an objective test to apply: whether a reasonable person in a suspect’s position would have felt that his or her freedom was curtailed to the degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *Heritage*, 152 Wn.2d at 218. Our State adopted this objective test in *State v. Short*, 113 Wn.2d 35, 775 P.2d 458 (1988). Our courts examine the totality of the circumstances to

determine whether a suspect was in custody. *U.S. v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008).

Both the U.S. Supreme Court and our own state Supreme Court have found situations where an individual is not free to leave do not necessarily rise to the level of “custody” for purposes of *Miranda*. We are reminded that *Miranda* was intended to inform a suspect of his or her rights when they are in the “coercive environment of police custody.” *Heritage*, 152 Wn.2d at 214. For example, *Terry* stops are not “custodial” as that term is defined for purposes of *Miranda*. *Berkemer*, 468 U.S. at 439-40; *State v. Hilliard*, 89 Wn.2d 430, 432, 435-36, 573 P.2d 22 (1977). In *Heritage*, our Supreme Court found that a defendant, a minor, was not in “custody” for *Miranda* purposes, when she was stopped by park security guards and asked questions. *Heritage*, 152 Wn.2d at 219. The Court found that a reasonable person in the defendant’s position would not have believed her freedom was curtailed to a degree analogous to arrest. *Id.*

In *Grogan*, the defendant was interrogated at a police station. In determining whether the defendant was in “custody” for *Miranda* purposes, the Court considered that the defendant came to the police station voluntarily, he was not handcuffed or arrested, and was allowed to leave. *Grogan*, 147 Wn.App. at 517-18. The Court found the defendant

was not in “custody” as there was no “formal arrest or restraint of the defendant to a degree consistent with a formal arrest.” *Id.* At 518 (quoting *State v. Rehn*, 117 Wn.App. 142, 69 P.3d 379 (2003)). As the defendant was not in “custody,” no *Miranda* warnings needed to be given. *Id.* The Court specifically stated, “[e]ven though [the defendant] responded to police interrogation, he was not in custody. Thus, no *Miranda* warnings were required.” *Id.*

“Custody” also does not occur any time police contact an individual who is suspected of a crime or is the focus of a criminal investigation. *Beckwith v. U.S.*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976). *Miranda* warnings are not required “simply because the questioning takes place at the station house, or because the questioned person is one whom the police suspect.” *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

In *State v. Posenjak*, 127 Wn.App. 41, 111 P.3d 1206 (2005), Division 3 of this Court held that a defendant who voluntarily exited a garage on his property to speak with a police officer was not in “custody” for *Miranda* purposes. There, the officer was investigating a possible poaching of an elk. *Id.* at 46. Information led the officer to the defendant’s residence; the officer drove down the defendant’s driveway and parked outside of a garage where the defendant was skinning an elk. *Id.* Upon the

officer's arrival, the defendant exited the garage and approached the officer and spoke with the officer about the elk. *Id.* The conversation was cordial and noncoercive and afterwards the defendant returned to his garage. *Id.* at 46-47. In analyzing whether the defendant's statements during this conversation were properly admitted at trial, the appellate Court found that the defendant was not in "custody" for *Miranda* purposes and was not in any way deprived of his freedom of action. *Id.* at 53.

An officer who approaches a suspect in public, detaining him for a *Terry* stop, and questions him about a crime does not put that suspect in "custody" for *Miranda* purposes. In *State v. Marshall*, 47 Wn.App. 322, 737 P.2d 265 (1987), an officer on patrol saw a man matching the description of a suspect in a rape investigation. *Marshall*, 47 Wn.App. at 323. The officer contacted the suspect and detained him for an investigatory stop, asking him a few questions. *Id.* The officer took the suspect's driver's license during the contact. *Id.* On appeal, Division 1 of this Court considered whether the suspect was in "custody" at the time that he made statements to the police officer who detained him for the investigatory stop. *Id.* at 325. Generally, *Terry* stops are not subject to the dictates of *Miranda* because they are comparatively nonthreatening in nature. *Id.* (citing *Berkemer*, 468 U.S. at 440; *State v. Bockman*, 37 Wn.App. 474, 682 P.2d 925, *rev. denied*, 102 Wn.2d 1002 (1984); *State v.*

Sinclair, 11 Wn.App. 523, 523 P.2d 1209 (1974). In finding the officer in *Marshall* properly stopped and detained the defendant for a short period of time, within the confines of a permissible *Terry* stop, the Court found that the defendant was not subjected to the “coercive pressures” associated with formal arrest, and he was therefore not “in custody” when he spoke with the officer. *Id.* at 326.

Further, whether a police officer has probable cause to arrest, or an unstated plan to arrest or detain a suspect, has no bearing on whether the suspect was in “custody” for purposes of *Miranda*. See *Lorenz*, 152 Wn.2d. It is irrelevant to a “custody” analysis whether an officer’s unstated plan is to take a suspect into custody after speaking with him or her; it is also irrelevant to a “custody” analysis whether the person interrogated is the focus of a police investigation at the time of the interrogation. *Lorenz*, 152 Wn.2d at 37. Instead, our Supreme Court stated that “[i]n order for there to be custody, a reasonable person in [the defendant’s] position would have to believe that he or she was in police custody with the loss of freedom associated with a formal arrest.” *Id.* A suspect’s psychological state is not the critical inquiry in a “custody” analysis. *Sargent*, 111 Wn.2d. Instead, the critical inquiry focuses on whether a reasonable person in the suspect’s position would have felt that

his or her freedom was curtailed to the degree associated with formal arrest. *See Heritage*, 152 Wn.2d at 218.

Johnson was standing outside his residence, on his driveway, a location of his choosing, while in public with two police officers. RP 4-5. Johnson was not in handcuffs and he voluntarily agreed to speak with police about their investigation. RP 4-5. Johnson's freedom of movement was not curtailed in any way; he was free to leave. RP 4-5. Based on all the case law available to the trial court, and made known to the trial court, it is clear that Johnson was not in custody for purposes of *Miranda*. And in that vein, the superior court properly found Johnson was not in custody and was not subject to custodial interrogation. Thus it is clear that the trial court's conclusion that Johnson was not in "custody" was proper. The trial court's error rests in its conclusion that noncustodial interrogation still requires suppression of a defendant's statements if *Miranda* warnings were not given prior to questioning.

III. The trial court erred in applying the exclusionary rule, thus excluding the statements Johnson made to police

As discussed above, the defendant's statements are admissible at trial pursuant to ER 801(d)(2) when offered by the State, subject to a court determination that any statements made to police were voluntarily made. If evidence is obtained in violation of a defendant's constitutional rights,

the exclusionary rule requires suppression of that evidence. *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011); *State v. Gibbons*, 118 Wn. 171, 203 P. 390 (1922). The exclusionary rule is intended to protect individual privacy against unreasonable governmental intrusion, and to deter police from acting unlawfully while also preserving the dignity of the judiciary. *Eserjose*, 171 Wn.2d at 913 (citing *State v. Bonds*, 98 Wn.2d 1 653 P.2d 1024 (1982)).

However, application of the exclusionary rule is inappropriate when a defendant's constitutional rights were not violated and there was no unlawful conduct on the part of law enforcement. The trial court improperly excluded the defendant's statements to law enforcement under the incorrect belief that interrogation of an individual alone violates a defendant's constitutional rights unless that defendant has been informed of the *Miranda* warnings. Legal precedent is clear that exclusion of a defendant's statements to law enforcement is only proper when a defendant has been subject to *custodial* interrogation without having been informed of the *Miranda* warnings.

In order for *Miranda* to be required prior to police questioning, the suspect must be subjected to a custodial interrogation by a police officer or agent of the State. All three "elements" must be present to require a police officer inform a suspect of the *Miranda* warnings prior to questioning.

Grogan, 147 Wn.App. at 517. Given the significant case law that the trial court necessarily ignored in finding that an officer must give *Miranda* warnings to a defendant who was not in “custody,” it is clear the superior court erred. The trial court subtracted an element from “custodial interrogation” in issuing its ruling in this case.

The State and the superior court agree that 1) Johnson was not in custody; 2) Johnson was subject to interrogation by a police officer; and 3) Johnson’s statements were voluntary. *See* CP 27. Thus on all the elements of “custodial interrogation,” the State and the superior court agree, yet the State disagrees on the result these facts have on the admissibility of Johnson’s statements at trial. Despite finding Johnson was *not* subject to “custodial interrogation,” and despite finding Johnson’s statements were voluntary, the trial court suppressed them because the officers did not inform Johnson of the *Miranda* warnings prior to questioning him. CP 27. In reaching this result, the trial court reasoned that any time police engage in conversation with an individual that is likely to elicit incriminating statements, the police must first inform the individual of the *Miranda* warnings if those statements are to be admissible at trial. CP 27. This reasoning and the result it led to are simply contrary to the law.

Police must inform an individual of *Miranda* warnings “when a suspect endures (1) custodial (2) interrogation (3) by an agent of the

State.” *Heritage*, 152 Wn.2d at 214. (citing *Sargent*, 111 Wn.2d (citing *Miranda*, 384 U.S. at 444)). By finding that the defendant here was *not* in custody, but that the statements he made were suppressed because he was subjected to police interrogation, the superior court removed an element from the *Miranda* analysis and has held that police must give *Miranda* warnings any time a defendant is under (1) interrogation (2) by an agent of the State. The trial court failed to follow established jurisprudence when it removed an element from this analysis. The custody portion of “custodial interrogation” is a necessary element that must be present before police are required to inform an individual of the *Miranda* warnings. Johnson was not subject to custodial interrogation. He was not in “custody,” and his statements were voluntary.

The trial court’s ruling ignores the element of “custody” in the definition of “custodial interrogation,” and finds that “interrogation” alone requires *Miranda* warnings. This is error. No case has ever held that interrogation by police absent custody requires *Miranda*. The State does not dispute that Johnson was interrogated, as that term has been defined in case law, by police officers. It is clear, from a review of the facts in this case and the appropriate legal standard that Johnson was not in “custody” and therefore was not subject to “custodial interrogation.” His statements were found to be voluntary and because he was not in “custody,” his

statements are admissible at trial. The trial court therefore erred in applying the exclusionary rule in this situation, as law enforcement did not violate Johnson's constitutional rights in obtaining his statements. This Court should reverse the trial court's ruling on the CrR 3.5 hearing excluding Johnson's statements to law enforcement.

IV. This Court should reverse the trial court's order excluding the statements Johnson made to police and direct the superior court to allow the State to offer the statements in its case-in-chief.

As demonstrated above, the trial court's order excluding the statements Johnson made to law enforcement at a time when he was not in custody was erroneous. The statements Johnson made should be allowed to be admitted in the State's case-in-chief as Johnson's constitutional rights were not violated and he freely and voluntarily spoke with police. The State requests this Court reverse the trial court's order excluding the statements and remand the case for trial with direction to the superior court to allow admission of Johnson's statements. *See State v. Davis*, 79 Wn.App. 355, 901 P.2d 1094 (1995) (finding evidence that trial court had suppressed should have been admitted and remanding for trial in a State's appeal).

CONCLUSION

The police lawfully obtained Johnson's statements without violating his constitutional rights. As Johnson was not subject to "custodial interrogation," his statements are admissible at trial. The State respectfully requests this Court find the trial court erred in suppressing Johnson's statements and reverse its suppression order, thereby remanding for trial where the State will be permitted to admit Johnson's statements to police.

DATED this 12 day of April, 2018.

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April 12, 2018 - 4:30 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51461-3
Appellate Court Case Title: State of Washington, Appellant v Jeffrey Jerome Johnson, Respondent
Superior Court Case Number: 16-1-00944-1

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