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Court of Appeals
Division II
State of Washington
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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

REPLY BRIEF OF APPELLANT

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ISSUES RAISED BY RESPONDENT'S BRIEF

I. Whether this Court should apply long-established legal precedent in making its decision in this case or whether the Court should reject Supreme Court case law to affirm the trial court.

II. Whether there is any evidence in the record of psychological coercion in this case and even if there were if that is a basis for excluding Johnson's statements to police.

III. Whether the trial court erred in excluding statements a defendant made to police when he was not in custody, when the statements were made voluntarily, and when the defendant's rights were not violated in any way.

ARGUMENT IN REPLY

Johnson's entire argument rests on the trial court and this Court ignoring settled Supreme Court case law and thus violating the doctrine of *stare decisis*. Stare decisis is a "doctrine developed by courts to accomplish the requisite element of stability in court-made law…." *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 6534, 466 P.2d 508 (1970)). In order to ignore past precedent, a prior decision must be found to be both incorrect and harmful. *Stranger Creek*, 11 Wn.2d at 653. The decisions which Johnson asks this Court to overturn have been long upheld and Johnson has not shown they are incorrect and harmful.

Johnson's argument also rests on the assumption that the police contact during which he made his statements was coercive. The trial court never made any findings of coercion or that the environment was inherently coercive. In fact, the trial court found that police *asked* Johnson if he wished to speak to them, and that Johnson, himself, directed police to the location in which the conversation took place. CP 26. It is clear from this finding, which is uncontested by Johnson, that Johnson was in control, that he understood that his participation in a discussion was voluntary, and that he was not coerced.

Johnson also raises the issue of police brutality and the danger associated with refusing police requests to argue that he was coerced into giving a statement to police. There is no evidence that police brutality was involved in this case, and in fact the findings show the exact opposite. There is no evidence that Johnson was worried about what the police would do if he did not cooperate. There is no finding, nor any evidence in the record, of duress, coercion, or fear. The findings by the trial court clearly indicate Johnson was not in custody, his conversation was voluntary, and he was free to leave. Johnson's claims that the mere presence of police at an individual's front door and in their driveway override any free will an individual may have, and is unduly coercive, is contrary to the established case law that our trial courts are required to

follow. Johnson's request to affirm the trial court's CrR 3.5 ruling is tantamount to overturning decades of precedent that has established that *Miranda* is only required when there is both custody and interrogation.

In *State v. Lorenz*, 152 Wn.2d 22, 93 P.3d 133 (2004) our Supreme Court addressed an issue of whether an individual's statements to police were admissible despite the lack of *Miranda* warnings when that suspect was not in custody, but was suspected of rape of a child, child molestation, and sexual exploitation of a minor. There, Lorenz was at her residence, when police knocked on the door to serve a search warrant. *Lorenz*, 152 Wn.2d at 27. Lorenz was asked to stand on the front porch; she was not arrested. *Id.* While on the porch, two officers questioned Lorenz after telling her she was free to leave. *Id.* Lorenz provided a written statement to police at that time. *Id.* at 27-28. The interview lasted five hours. *Id.* at 36. In reviewing the admissibility of the statements Lorenz made to police, the Supreme Court affirmed its prior holding that even if police have probable cause to arrest, a defendant need not be given *Miranda* if the defendant is not in custody. *Id.* at 37.

In holding that whether probable cause exists is not determinative of an individual's custodial status, the Supreme Court stated:

> It is irrelevant whether the officer's unstated plan was to take Lorenz into custody or that Lorenz was the focus of the police investigation. It is irrelevant whether Lorenz was in a coercive

> environment at the time of the interview. Thus it is, as the State contends, irrelevant whether the police had probable cause to arrest Lorenz (before or during the interview).

Id. (internal citations omitted).

In *State v. Sargent*, 111 Wn.2d 641, 762 P.2d 1127 (1988), cited to with approval by *Lorenz, supra*, the Supreme Court stated it is "freedom of movement, not the atmosphere or the psychological state of the defendant" that "is the determining factor in deciding whether an interview is 'custodial.'" *Sargent*, 111 Wn.2d at 649-50. The Court discussed that even in an "extremely intimidating" psychological atmosphere, *Miranda* is not required prior to an interview if the individual is free to leave and his freedom of movement is not limited. *Id.*

This principle has been upheld as recently as this month by Division I of this Court. In the unpublished opinion of *State v. Sakawe*, 2018 WL 3738185 (August 6, 2018),[1] Division I stated in determining whether a suspect is in custody for purposes of *Miranda*, that the "'critical inquiry' is 'not the psychological state of the defendant, but simply whether his freedom of movement was restricted.'" *Sakawe*, slip op. at 7 (quoting *Sargent*, 111 Wn.2d at 649). Division I reaffirmed the standard of determining custody as "'whether a reasonable person in a suspect's

[1] GR 14.1 allows for citation to unpublished opinions of the Court of Appeals that were issued after March 1, 2013. This opinion is not binding and may be accorded such persuasive value as this Court sees fit.

position would have felt that his or her freedom was curtailed to the degree associated with formal arrest.'" *Id.* (quoting *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) and *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)).

Thus, even if there had been factual findings by the trial court as to Johnson's psychological state (of which there are none), our established precedent shows that would be irrelevant to the determination of whether Johnson's statements are admissible at trial. There is no argument as to the basic principles involved here. The trial court found that Johnson was *not* in custody. CP 26. The trial court found that Johnson was free to leave. *Id.* The trial court found that Johnson's statements were made voluntarily. *Id.* The trial court clearly overlooked years of Supreme Court and Court of Appeals precedent to find that anytime an individual is subjected to police interrogation, whether they're in custody or not, that *Miranda* is required. The trial court clearly erred and its CrR 3.5 findings should be reversed.

In order to accept Johnson's arguments, this Court would have to rely on facts not in evidence, and come to different conclusions than the trial court did as to the facts presented. There was no evidence of psychological pressure, or even argument at the trial court level from Johnson as to such. There was no evidence of intimidation, nor any argument from Johnson as to such. Johnson did not assign error to the trial court's findings of fact

and thus those are verities for purposes of this appeal. And, this Court limits its review of findings of fact following a suppression motion solely to the facts to which error was assigned. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). It would be improper for this Court to draw additional factual conclusions not found by the trial court and on the subject of which the trial court received no evidence. Johnson's argument that the intimidation of police rendered his statements involuntary and thus inadmissible is without any factual support in the record and should not be considered.

The law is clear: *Miranda* is required when an individual is both in custody and subject to interrogation, not simply one or the other. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). This long-standing precedent should be affirmed and applied to this case. The trial court erred in finding *Miranda* was required and that the statements are inadmissible at trial.

CONCLUSION

This is a simple case of a trial court misunderstanding the law and applying an incorrect standard at a CrR 3.5 hearing. 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. Johnson acknowledges the trial court's erroneous conclusion in his response brief, yet argues this Court should disregard long-standing legal precedent and find that when an individual is a suspect in a serious crime like child molestation, that any discussion with police is so coercive as to render the individual in custody, no matter what the physical constraints are, the location of the interview, or any other circumstances. This argument is in direct opposition to established Supreme Court precedent. *See Lorenz, supra*. The trial court's ruling suppressing the CrR 3.5 findings should be reversed and the matter remanded with directions to allow the State to present the statements Johnson made to police in its case in chief.

DATED this 30th day of August, 2018.

Respectfully submitted:

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