

**FILED**

**APR 28 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 295931

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

JAKE GANN,  
Defendant/Appellant

---

BRIEF OF APPELLANT

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Law Office of Tony DiTommaso, P.S.

Tony DiTommaso, WSBA #15106  
Attorney for Respondent

Law Office of Tony DiTommaso, P.S.  
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23 South Wenatchee Avenue, Suite 201  
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(509) 665-8776

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### **A. ASSIGNMENTS OF ERROR**

1. The Appellant assigns error to the conclusions of law set forth in the Stipulated Facts for Trial; namely that Mr. Gann unlawfully possessed a controlled substance, Methadone.

2. The Appellant assigns error to the trial courts finding that *Miranda* was not implicated in this case.

3. The trial court erred in not finding that Officer Brown told the Defendant that he knew he was just involved in a drug transaction and that he could either go to jail immediately or work with him.

4. The trial court erred in not finding that Mr. Gann believed that at the time he had no option other than to work with the police or be placed in jail.

5. The trial court erred in not suppressing the evidence, namely Methadone pills that were taken from Mr. Gann's person on the date of the arrest.

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

1. Was Defendant's Fifth Amendment privilege against self incrimination violated because:

a. The evidence was compelled by a custodial

interrogation; and

- b. The production of the evidence was in itself a testimonial response which should have been preceded by Miranda warnings?

2. Did the trial court err in concluding that no reasonable person would believe that they could not leave under the circumstances presented to the court, namely:

- a. The Defendant was confronted at his own home and in his front yard by two officers and told they knew he was just involved in a drug transaction;
- b. That the officer showed the Defendant a picture of the person with whom he was involved in a drug transaction and said that he could either go to jail immediately or work with him; and
- c. That the officer demanded the Defendant give him the drugs that were in his pocket.

3. Did the trial court error in not suppressing the evidence, namely the Methadone pills, as an improper self-incriminating statement prohibited by Fifth Amendment?

### **C. STATEMENT OF THE CASE**

#### **1. Procedural History and Summary of Facts.**

On April 15, 2010 Mr. Gann was charged in Okanogan County Superior Court with possession of a controlled substance pursuant to RCW 69.50.4013, specifically Methadone. CP 57-58. After a motion to suppress and dismiss was filed and testimony was heard, the Superior Court found Mr. Gann guilty of unlawfully possessing a controlled substance based upon a stipulation of facts for the purposes of allowing the Defendant to appeal the denial of his motion to suppress. CP 20-21. Subsequently the Superior Court sentenced him to jail, probation, and fines. CP 6-16.

The motion to suppress was brought on for hearing on October 4, 2010. RP 1-34. That motion was denied and is the subject of this appeal.

Although the facts are slightly different depending on whether or not you believe the testimony of the Defendant or the officer in this case, the basic events that took place on March 22, 2010 are as follows:

Officer Brown was advised by Trooper Goodall that he believed Mr. Gann and another unidentified male were involved in a drug transaction at the

Okanogan Chevron. CP 17. That man was later identified as Mr. Schaler and a photo of him was shown to Mr. Gann at his home by Officer Brown. RP 5-8; CP 45. Detective Brown told Mr. Gann that Trooper Goodall had observed him buying drugs. CP 18.

There is a dispute as to what happened next. Detective Brown indicates at one point that he told the Defendant you are either going to work with me or end up in jail if you keep using drugs. CP 18. Another version by Officer Brown, in his actual report, is that he told the Defendant "I told the subject he had an opportunity to help himself out otherwise he would end up in jail if he continued to purchase drugs". CP 45. Mr. Gann stated in his testimony that Officer Brown told him he had "option one is go to jail and option two is work with him," and the Defendant said those were his "exact words". RP 21. At this point Detective Brown asked the Defendant "are you going to give me those drugs" and the Defendant took pills out of his pocket and handed them to Detective Brown. Officer Brown's report indicates that he said "I asked Mr. Gann if you were going to give me the drugs or not." CP 25. The pills were later tested and found to be Methadone. CP 18, 21.

Mr. Gann felt that he had no choice but either to work with

the officer (meaning become an informant) or go to jail. RP 21. Mr. Gann also testified that Officer Brown was aggressive when he contacted him. RP 22.

It is undisputed that no *Miranda* warnings were read to Mr. Gann. CP 18, RP 16. It is also undisputed that when Officer Brown told Mr. Gann that he could help himself out and not go to jail he told him he could do three things: Testify in court, be willing to buy drugs, and wear a body wire vest to do so. RP 11. At some point later Mr. Gann actually performed a drug buy for Officer Brown. He did not wear a body wire nor testify, but he was not asked to wear a body wire or to testify. RP 17.

#### **D. ARGUMENT AND AUTHORITIES**

1. **The production of the evidence was in itself a testimonial response which should have been preceded by Miranda warnings.**

In *State v. Dennis*, 16 Wn.App. 417 (1976), the Court of Appeals Division Two found that the production of the evidence was in itself a testimonial response which should have been preceded by Miranda warnings. In that particular case two officers had a warrant to search a described premises belonging to the defendant. However, upon arriving at the apartment complex it

was determined that the warrant identified the wrong apartment number. *Dennis* at 418 and 419. Because of that, one of the officer's left to get the warrant corrected and the other officer remained. The officer that remained believed that the defendant would be alerted to their presence and the pending search and therefore, went to the apartment where the defendant was located and knocked on the door. *Id.* at 419. The Officer identified himself as a policeman and he said he wished to speak to the defendant and according to Mrs. Dennis he inserted his foot into the door jam and then entered without invitation; however, the officer testified that he was granted him permission to enter. *Id.*

At about this time the defendant appeared and the officer identified himself and seated himself at the table which permitted him a view of the kitchen and the refrigerator where it was anticipated the drugs would be located. *Id.* After everyone took a seat at the table the officer told them he knew of the narcotic sale and that there was a supply of drugs in their refrigerator. *Dennis* at 419. After some general conversation the officer told the defendant to save him the trouble of searching and voluntarily hand over the drugs. The defendant then apparently requested whether or not he had a search warrant and the officer replied that he either had one

or that one was on the way. *Dennis* at 419. The officer then renewed his request for the defendant to produce the drugs and the defendant thereafter went to the refrigerator and removed several packages of cocaine and placed them on the table. *Dennis* at 419.

There was a dispute at the hearing on defendant's motion to suppress as to when or if the officer read the defendant's Miranda rights. The officer testified he read the rights to the defendants as soon as he identified himself but the defendants said only after the defendant had placed the drugs on the table where the Miranda warnings given. *Id* at 420. At no time did the officer place anybody under arrest or tell them they could not leave and neither party requested permission to leave. *Id* at 420. (Compare to this court's findings. CP18.)

The Court of Appeals Division II relying upon the United States Supreme Court decisions of *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964) and *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966), stated that the investigative process becomes accusatorial and the need for warnings is triggered at the moment the "inquiry focuses" on the accused in custody and the questioning is intended to elicit an incriminating response. *State v. Dennis*, at 421.

To be admissible statements elicited by questioning of a suspect who is in custody or has been deprived of freedom in any significant way must be preceded by the familiar *Miranda* warnings. This rule not only applies to the traditional jail setting but also has been extended to include questioning within the suspect's own home. *State v. Dennis*, at 421, (citations omitted emphasis added).

In the *Dennis* case the fact that the defendants were in their own home and the officer said they could leave at any time did not persuade the Appellate Court. The atmosphere was dominated by the officer's presence and in order to elicit an incriminating response the officer made it clear he believed the defendant was involved in criminal activity. *Dennis* at 422. Also significant to the Appellate Court was the fact that the officer had information from a reliable informant that narcotics had been sold in the apartment that day and that the refrigerator contained a further supply of those narcotics. *Id.* Thus, when the officer confirmed the fact that the defendant resided in the apartment he had probable cause to believe defendant was guilty of unlawful possession and could not have been expected to permit defendant to leave. At that point the situation became custodial and the defendant should have been

warned of his rights. *State v. Dennis*, at 422.

At that point the act of taking the drugs from their hiding place and placing them on the table itself constituted an admission. *Dennis*, at 423. The drug itself was all that is necessary in order to make out a prima facie case of illegal possession. The defendant's response was therefore testimonial in nature and served to incriminate him and the evidence should have been suppressed. *Dennis* at 424.

This is exactly the situation in Mr. Gann's case. In response to Officer Brown's demand "are you going to me the drugs or not," Mr. Gann took the pills out of his pocket and handed them to the Officer. CP 18,21, 25. The act of handing the pills in response to his demand is a testimonial act; Mr. Gann did not place them anywhere else so as to require circumstantial evidence of possession. See *State v. Spotted Elk*, 109 Wn.App. 253, 259, 34 P.3d 906, (Div III 2001).

And, as discussed below, because the series of questions by Officer Brown went beyond the scope of a precautionary inquiry or an explanation of his activities, the questions reflected a measure of compulsion beyond that

inherent in custody and thus sufficiently coercive to constitute an interrogation for Miranda purposes. *Spotted Elk*, at 259-260 citing *State v. Birnel*, 89 Wn. App. 459, 467, 949 P.2d 433 (1998).

2. The trial court erred in not finding that Officer Brown's questioning was not merely an investigative encounter but within the meaning of *Miranda* it was a custodial interrogation.

The *Miranda* warnings apply when an interview or an examination is 1) custodial, 2) an interrogation and 3) by a state agent. *State v. Sargent*, 111 Wn.2d 641, 647-653, 762 P.2d 1127 (1988). In most cases the term custodial refers to whether a suspects freedom of movement was restricted at the time of questioning. *Id* at 649-650.

As argued to the trial court, Officer Brown's questioning was not merely an investigative encounter but was an interrogation of the Defendant based upon a crime that Officer Brown believed had already been committed. CP 30.

The case of *State v. Moreno*, 21 Wn.App. 430, 585 P.2d 481 (1978) is on point. There, the detective received an anonymous tip from an informant who told him that the defendant would arrive at the Spokane airport and would be carrying 3 ounces of cocaine.

*Moreno* at 431. The caller also described the physical appearance of the defendant. Based on that tip two officers went to the airport and observed the passengers deplaning from the Los Angeles flight that was identified by the anonymous informant. *Moreno* at 431. Once the defendant got off the plane one of the officers identified himself and asked Mr. Moreno for his identification.

At this point the testimony of that defendant and the police officers in *Moreno* diverged. The officers testified that he asked Mr. Moreno to return to the airport security office which Moreno agreed to do and that he touched him in the small of his back in order to guide along the way. *Moreno* at 432. The defendant testified that the officers said "come with me" and then put a finger through one of his belt loops and walked him to the security office. *Id.* The security office was a small room with dimensions of approximately 5 by 10 feet and at this point one of the detectives stood by the door while the other detective stated to Mr. Moreno "do you have something you shouldn't?" Mr. Moreno responded "what?" and the lieutenant put his finger to his nose and said "snorting stuff". *Moreno* at 432. The defendant responded by producing a packet of three baggies of cocaine from his person at which point he was arrested and for the first time read his constitutional rights. *Moreno*

at 432.

The Court of Appeals when analyzing the case stated that while an officer may stop a person on the basis of a well founded suspicion and request that the suspect identify himself and explain his activities the officers can not proceed with specific questions designed to elicit incriminating statements without being adjudged to have been made a formal arrest. *State v. Moreno*, 21 Wn.App. at 434 citing *State v. Gluck*, 83 Wn.2d 424, 425, 518 P.2d 703 (1974).

The court determined that the questioning of the officer went beyond the general request of the defendant to explain his activity, i.e., his presence in the airport, what he was there for. Rather, the questions and suspicions focused on the suspect and his questions were designed to elicit incriminating statements. "This is precisely the situations to which the Miranda warnings are designed to apply." *Moreno* at 434.

Division III of the Court of Appeals also determined that the act of handing over the contraband in the *Moreno* case clearly was protected by the Fifth Amendment. Citing *State v. Dennis*, 16 Wn.App. 417, 558 P.2d 297 (1976). Noting, that the act of handing over contraband serves more graphically than words to convey the

incriminating fact that he knew of the presence and precise location of the substance. *State v. Moreno*, 21 Wn.App. 433 citing *State v. Dennis*, at 423. The defendant's production of a controlled substance, standing alone, is incriminating and, therefore, testimonial. *Id.* at 433.

Likewise in this case, Officer Brown claimed that he had been informed from another officer that a drug transaction had already occurred between Mr. Gann and Mr. Schaler. RP 5-8. In fact, Officer Brown approached Mr. Gann with a picture of Mr. Schaler and not only asked him what he was doing with Mr. Schaler but also stated that he knew he was just involved with a drug transaction with this person. CP 45. In addition, Officer Brown was not alone when interrogating Mr. Gann. He also had another officer with him, Officer Rubio. They were both standing in close proximity to Mr. Gann. RP 9.

Officer Brown then said, "I told the subject he then had an opportunity to help himself out, otherwise he would end up in jail if he continued to purchase drugs." CP 45. Officer Brown then stated, "are you going to give me those drugs or not." CP 45.

He therefore, subjectively had a well founded suspicion to stop Mr. Gann and request that he explain his activities. See

*Moreno*, 21 Wn.App. at 434. Like *Moreno*, Officer Brown's questioning went beyond general requests that the Defendant explain his activities, such as why he was talking to Mr. Schaler and in what context he knew Mr. Schaler, but instead were designed to elicit incriminating statements. Officer Brown stated that he knew that Mr. Gann was involved in a drug transaction and that he better work with him or he would be going to jail if he continued to purchase drugs. CP.17 and 45.<sup>1</sup>

Clearly at this point the questions were designed to elicit incriminating statements, "precisely the situation which *Miranda* warnings are designed to apply." *State v. Moreno*, at 434; and *State v. Dennis*, at 422. The trial court clearly erred in finding that *Miranda* is not "implicated in this situation." CP 18.

#### E. CONCLUSION

For the reasons set forth above, the trial court erred in not suppressing the evidence and dismissing the case. Consequently, this court should reverse the trial court's order of suppression and remand this case for an entry of an order suppressing the evidence,

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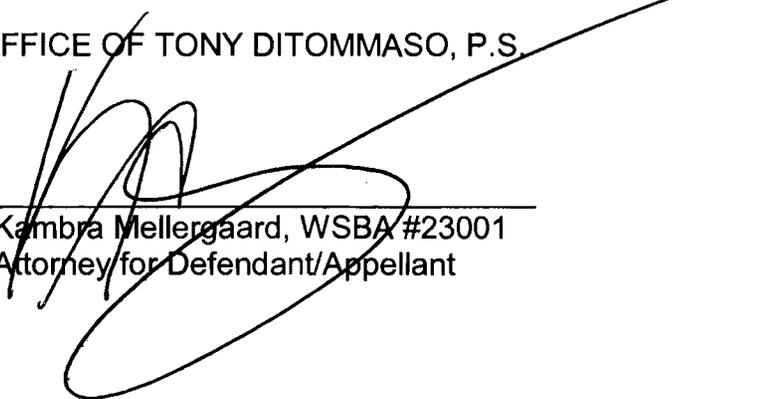
<sup>1</sup> The findings that were entered with the Court however state that Detective Brown told the Defendant you are either going to work with me or end up in jail if you keep using drugs. CP 18. The transcript of proceeding was not available until after the findings were entered.

dismissing the case, and vacating the Defendant's sentence.

DATED this 27<sup>th</sup> day of April, 2011.

Respectfully submitted,

LAW OFFICE OF TONY DITOMMASO, P.S.



By: Kambra Mellergaard, WSBA #23001  
Attorney for Defendant/Appellant

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

STATE OF WASHINGTON, )  
)  
Plaintiff/Respondent, ) No. 295931-0-III  
)  
vs. )  
)  
JAKE GANN, ) AFFIDAVIT OF  
) MAILING  
)  
Defendant/Appellant, )  
\_\_\_\_\_)

STATE OF WASHINGTON )  
) ss  
County of Chelan )

The undersigned, being first duly sworn upon oath,  
deposes and says:

That affiant is a citizen of the United States of  
America and of the State of Washington, over the age of twenty-  
one years, not a party to the above-entitled proceeding and  
competent to be a witness therein; that on the 27<sup>th</sup> day of April,  
2011, affiant deposited in the United States mail a properly

Law Office of Tony DiTommaso, P.S.  
Morris Building  
23 S. Wenatchee Avenue, Suite 201  
Wenatchee, WA 98801  
(509) 665-8776

1 stamped and addressed envelope directed to:

2 JENNIFER RICHARDSON  
3 OKANOGAN CO. PROSECUTING ATTORNEY  
4 PO BOX 1130, 149 N 3<sup>rd</sup> AVE  
5 OKANOGAN, WA 98840  
6

7 JAKE GANN  
8 1022 - 7<sup>th</sup> St  
9 WENATCHEE, WA 98801  
10

11 Said envelope containing a copy of:

- 12 - BRIEF OF APPELLANT
- 13 - AFFIDAVIT OF MAILING

14  
15 *Lisa Kodzpatrick*  
16  
17

18  
19 SUBSCRIBED AND SWORN TO BEFORE ME this 27<sup>th</sup> day  
20 of April, 2011.

21  
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*Kandra Kamra*  
\_\_\_\_\_  
Notary Public in and for the State of  
Washington, commission expires  
My commission expires *10-29-11*