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Court of Appeals
Division III
State of Washington

34208-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL R. SAVINO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court erred in finding Mr. Savino's post-arrest statements admissible at trial in the absence of timely *Miranda* warnings.

B. ISSUES

1. Does law enforcement violate a suspect's right to remain silent by conducting a search of the suspect's person, and confronting the suspect with the fruits of the search, which the officer immediately recognizes as probable contraband, prior to administering the warning required under *Miranda*?
2. Was admission into evidence of the defendant's statements, which implicitly acknowledged his awareness that the item found in a search of his person was contraband, harmless error?

C. FACTS

Deputy Daren Schaum was dispatched to the home of Wendy Savino after she reported that her son had broken a garage door window. (RP 11, 19) After talking with her he believed the facts provided probable

cause to support arresting her son, Daniel Savino, on a charge of domestic violence, malicious mischief. (RP 11, 24-25) In the course of a search incident to that arrest he found in Mr. Savino's pants pocket a package containing what he "immediately recognized to be methamphetamine." (RP 12) In response to this discovery Mr. Savino said "that it wasn't his pants" and "that if he would have known that it was there, he would have gotten rid of it . . . ." (RP 26)

The State charged Mr. Savino with possession of methamphetamine. (CP 1) Before trial the court ruled his statement to Deputy Schaum was not the product of interrogation and would be admissible at trial. (RP 17) A forensic chemist testified that the package indeed contained methamphetamine. (RP 47, 55) The jury found Mr. Savino guilty and the court imposed a sentence within the standard range. (RP 83, CP 42-43)

D. ARGUMENT

1. THE COURT ERRED IN ADMITTING INTO EVIDENCE MR. SAVINO'S CUSTODIAL STATEMENTS TO DEPUTY SCHAUM.

a. Mr. Savino Was Entitled To Be Advised Of His Constitutional Right To Remain Silent Before Deputy Schaum Engaged In Conduct That Was Reasonably Likely To Elicit An Incriminating Response.

The Fifth Amendment to the United States Constitution guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Griffin v. California*, 380 U.S. 609, 619, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). "The right against self-incrimination is liberally construed." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

The State may not use custodial statements of a defendant at trial absent proof that the defendant's privilege against self-incrimination was adequately protected by warnings set out in *Miranda v Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966). Custodial statements made without proper *Miranda* warnings are presumed to be involuntary. *State v. Sargeant*, 111 Wn.2d 641, 647-48, 762 P.2d 1127 (1988).

A statement is custodial for *Miranda* purposes not only when there has been an arrest, but whenever a person's freedom of movement has been significantly restrained. *United States v. Berkemer*, 468 U.S. 420,

441, 82 L. Ed. 317, 104 S. Ct. 3138 (1984). Warnings must be given whenever a person has been deprived of his freedom in any significant way. *Miranda*, 384 U.S. at 444.

It was undisputed that Mr. Savino was placed under arrest when the deputy handcuffed him and escorted him to a patrol car, and that no *Miranda* warnings were given. (RP 16) The State argued, and the court agreed, there was no interrogation (RP 16-17)

Interrogation takes place whenever state agents engage in conduct likely to elicit incriminating statements from a defendant:

> That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Rhode Island v. Innis, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980); *see State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988); Annot., What Constitutes "Custodial Interrogation" Within Rule of *Miranda v. Arizona* Requiring That Suspect Be Informed of His Federal Constitutional Rights Before Custodial Interrogation, 31 A.L.R.3d 565, § 28[a], at 672-73 (1970). An officer who undertakes to search the pockets of a person whom he has arrested should know there is a reasonable likelihood he may find incriminating evidence and that,

should he remove any suspicious object he encounters on the suspect's person, such conduct is likely to elicit an incriminating response.

The officer's intent in asking questions is irrelevant; the issue is whether the defendant would believe the state agent was seeking information that would be incriminating. *See State v. Willis*, 64 Wn. App. 634, 637, 825 P.2d 357 (1992). A reasonable person who had been arrested, handcuffed and searched, then confronted with a package containing what appeared to be a controlled substance found in his pocket, would understand the deputy's conduct as an accusation, intended to elicit an incriminating response, whether that would be in the form of an admission or an explanation for the presence of the substance.

The trial court was apparently under the impression that an officer's conduct would not be interrogation unless it involved an oral request for information. But confronting the accused with incriminating evidence is a recognized form of interrogation. *See Innis*, 446 US at 299-300; *Henry v. Dees*, 658 F.2d 406, 410 (5th Cir. 1981); *State v. Uganiza*, 702 P.2d 1352, 1355 (Haw. 1985); *People v. Savory*, 105 Ill.App.3d 1023, 1030, 435 N.E.2d 226 (1982). Had the court examined the evidence to determine whether a reasonable person in Mr. Savino's situation would have believed the officer was seeking to elicit

incriminating information, the court would have excluded Mr. Savino's statements as the product of unlawful custodial interrogation.

b. Admitting The Statements Into Evidence At Trial Was Not Harmless Error.

Admission of a confession obtained in violation of *Miranda* is subject to harmless error analysis. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177, *review denied*, 118 Wn.2d 1006, 822 P.2d 288 (1991). To find an error affecting a constitutional right harmless, the reviewing court must find the error harmless beyond a reasonable doubt. *State v. Cervantes*, 62 Wn. App. 695, 701, 814 P.2d 1232 (1991). If the untainted evidence is so overwhelming it necessarily leads to a finding of guilt, the error is harmless beyond a reasonable doubt. *Id.*

The majority of the State's case consisted of a detailed description of why and how police officers came to be at Mr. Savino's home, incorporating repeated references to allegations Mr. Savino was suspected of, and arrested for, domestic violence. None of this evidence was particularly relevant to the crime with which Mr. Savino was later charged. Apart from Mr. Savino's statements reflecting his awareness of the controlled substance in his pants pocket, the only evidence from which a reasonable trier of fact could infer Mr. Savino's guilt was Deputy

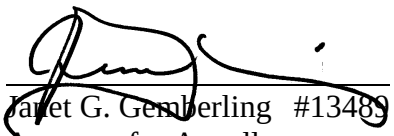
Schaum's testimony he found drugs in Mr. Savino's pocket in the course of the search incident to arrest.

E. CONCLUSION

This court should reverse Mr. Savino's conviction.

Dated this 14th day of November, 2016.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 34208-5-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
DANIEL R. SAVINO,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on November 14, 2016, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on November 14, 2016, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on November 14, 2016.

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