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Division III
State of Washington
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NO. 358127-I-III

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

THE STATE OF WASHINGTON

Respondent

v.

ALEJANDRO ESCALANTE

Petitioner/Appellant

BRIEF OF RESPONDENT

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2. The trial court’s determination that border officials were not required to give Mr. Escalante *Miranda* warnings before asking him about ownership of a backpack, violated his rights under the Fifth Amendment to the United States Constitution and Const. art § 91

3. The silver platter doctrine is not applicable under the facts and circumstances of Mr. Escalante’s case.1

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2. Did the border patrol officer’s failure to provide Mr. Escalante with his *Miranda* warnings deprive him of the protection against self-incrimination under the Fifth Amendment to the United States Constitution and Const. art 1 § 9?1

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court's determination that Alejandro Escalante was not in custody when he was seized at the Frontier border crossing on August 15, 2017 is contrary to the Findings of Fact entered following a stipulated facts trial.
2. The trial court's determination that border officials were not required to give Mr. Escalante *Miranda* warnings before asking him about ownership of a backpack, violated his rights under the Fifth Amendment to the United States Constitution and Const. art 1, § 9.
3. The silver platter doctrine is not applicable under the facts and circumstances of Mr. Escalante's case.

II. ISSUES PRESENTED

1. Was Mr. Escalante in custody when he was placed in the secure (locked) lobby of a border patrol station, his documents held by a border patrol officer, and the driver and one (1) other passenger of the van in which he was riding placed in detention cells?
2. Did the border patrol officer's failure to provide Mr. Escalante with his *Miranda* warnings deprive him of the protection against self-incrimination under the Fifth Amendment to the United States Constitution and Const. art 1 § 9?
3. Does the silver platter doctrine have any application under the facts and circumstances of Mr. Escalante's case?

III. STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case. However, the following additional information is relevant with respect to this appeal. Border patrol officers described the lobby in question as being approximately 11 x 14 feet. RP at 14. The room has chairs and other reading materials. *Id.* During the course of a vehicle search it is not uncommon that families with little children will be in the lobby, waiting for their vehicle to be searched. *Id.* at 17. The Customs Officers also described the jail/detention cells. *Id.* at 18. These were described as being 6 x10, having a metal bench, and a steel door. *Id.* During the time period that the vehicle was being searched two individuals, Mr. Grieve and Mr. Torres, were removed from the lobby and placed into the holding cells. *Id.* at 43 - 44. Mr. Escalante was allowed to remain in the lobby with other travelers. *Id.*

IV. ARGUMENT

1. Mr. Escalante was not in custody when he was placed in the secure (locked) lobby of a border patrol station, his documents held by a border patrol officer, and the driver and one (1) other passenger of the van in which he was riding placed in detention cells.

Mr. Escalante was not in custody during the period of time that he spent at the Frontier Border Crossing. It is well recognized that special

rules apply at the border. *United States v. Leasure*, 122 F.3d 837 (9th Cir.1997). Detention and questioning during routine searches at the border are considered reasonable within the meaning of the Fourth Amendment. *United States v. Espericueta-Reyes*, 631 F.2d 616, 622 (9th Cir.1980). "During such a search, some period of detention for these persons is inevitable. Nevertheless, so long as the searches are conducted with reasonable dispatch and the detention involved is reasonably related in duration to the search, the detention is permissible under the Fourth Amendment." *Id.*

"Custody" means: The suspect has been placed under arrest, or the suspect's freedom of action or movement has been curtailed to a degree associated with formal arrest. *State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986). A *Terry* detention is a seizure, but not an arrest. A person who is only subjected to a *Terry* routine investigative stop need not be given *Miranda* warnings prior to questioning. *State v. Phu v. Huynh*, 49 Wn. App. 192, 201, 742 P.2d 160 (1987). Even the fact that a suspect is not "free to leave" during the course of a *Terry* or investigative stop does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992).

Whether a seizure that triggers the requirement for *Miranda* warning occurs does not turn upon the officer's speculation that he would

have arrested a suspect who decided to leave an interview. A police officer's "unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time." *State v. Solomon*, 114 Wn. App. 781, 790, 60 P.3d 1215 (2002) citing *Berkemer v. McCarty*, 468 U.S. 420 at 442, 104 S.Ct. 3138 (1984). Whether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer. *State v. O'Neill*, 148 Wn.2d 564, 575, 62 P.3d 489, 495 (2003) citing *State v. Knox*, 86 Wn. App. 831, 839, 939 P.2d 710 (1997) (subjective intent of police is irrelevant to the question whether a seizure occurred unless it is conveyed to the defendant). The nature of the officer's subjective suspicion is generally irrelevant to the question whether a seizure has occurred. *O'Neill* at 495. "There is no constitutional right to be arrested." *Hoffa v. United States*, 385 U.S. 293, 310, 87 S.Ct. 408, 417, 17 L.Ed.2d 374 (1966).

In *United States v. Leasure* the defendant entered the United States from Mexico at a point of entry in California. 122 F.3d 837, 838 (9th Cir. 1997). Discrepancies regarding the vehicle were noted by customs officials. *Id.* The defendant was questioned by customs officials regarding the vehicle at her trip to Mexico. *Id.* at 839. A narcotics canine alerted on the vehicle, the defendant was instructed to exit the vehicle, and the defendant was escorted to a secondary inspection area. *Id.* The defendant

was questioned more by customs officials regarding the vehicle and her trip to Mexico. *Id.* When the vehicle was searched marijuana was recovered. *Id.* The defendant was then placed under arrest and advised of her *Miranda* warnings. *Id.* The defendant challenged the admissibility of her statements. *Id.* at 839. In ruling that the statements were admissible held,

This court has on several occasions considered the problem of *Miranda* warnings in the context of border searches. *See United States v. Manasen*, 909 F.2d 1357, 1358 (9th Cir.1990); *United States v. Duncan*, 693 F.2d 971, 979 (9th Cir.1982); *United States v. Estrada-Lucas*, 651 F.2d 1261, 1265 (9th Cir.1980). Those cases have all held that *Miranda* warnings need not be given in a border crossing situation unless, and until, the questioning agents have probable cause to believe that the person has committed an offense. The results of those cases remain good law but for reasons somewhat different than advanced in them. In *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994), the Court directs the reviewing court to look to the objective circumstances of the interrogation, not to the subjective view harbored by either the suspect or the interrogating officers to determine whether the defendant is in custody. *Id.* 511 U.S. at 324, 114 S.Ct. at 1529. Stops and routine questioning are the norm at the border in the primary inspection areas. In most cases, the earliest that a person could be in custody is at the point when she is moved into a secondary inspection area and asked to exit her vehicle while it is searched.

Id. at 840

In *United States v. RRA-A* the 9th Circuit addressed a situation where a juvenile was detained in a security office while the vehicle she had

been travelling was searched. 229 F.3d 737 at 743 (9th Cir. 1999). While the juvenile was being detained in the office the vehicle she was travelling was searched and marijuana was recovered. *Id.* at 743. The court was asked to determine the moment in time the juvenile placed under arrest. In reaching its conclusion the court held:

...the parties dispute when the arrest occurred. The standard for making this determination is when “a reasonable person would have believed that [RRA–A] was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). The government has more latitude to detain people in a border-crossing context, *see United States v. Ogbuehi*, 18 F.3d 807, 812–13 (9th Cir.1994), but such detentions are acceptable only during the time of extended border searches, *see, e.g., id.* (detained and searched soon after crossing border); *United States v. Caicedo–Guarnizo*, 723 F.2d 1420, 1422 (9th Cir.1984) (detained and x-rayed after entering United States by plane).

Based on this case law, the district court properly determined the time of arrest as when RRA–A was handcuffed. RRA–A claims that she was arrested at the time of her detention in the security office, prior to the agents discovering the marijuana and handcuffing her. RRA–A's argument fails, however, to address the fact that this court allows lawful detention during border searches, *see Ogbuehi*, 18 F.3d at 812–13; *Caicedo–Guarnizo*, 723 F.2d at 1422, and that she believed herself free to go at that time. Although frisking RRA–A in a security office certainly constituted a detention, the government's actions did not rise to the level of an arrest until she was handcuffed.

The government's contention that RRA–A was not arrested until she was formally told she was under arrest and read her *Miranda* rights is similarly flawed. RRA–A was handcuffed after the inspector discovered the narcotics in the vehicle, separating that detention from the search itself. A reasonable

person handcuffed for four hours in a locked security office after a narcotics search “would have believed that [s]he was not free to leave.” *Mendenhall*, 446 U.S. at 554, 100 S.Ct. 1870. Given the totality of circumstances, then, we conclude that RRA–A’s handcuffing was the clearest indication that she was no longer free to leave and therefore find it to be the point of arrest.

Id. at 743

In *United States v. Doe* the 9th Circuit Court of Appeals reviewed yet another situation involving a border detention. 219 F.3d 1009 (9th Cir. 2000). In that case the defendant stopped at the border and the vehicle he was travelling was directed toward a secondary inspection due to unusual vehicle features the customs officials observed on the vehicle. *Id.* at 1012. The juvenile was directed to exit the vehicle, was searched, and was told to sit on a bench while the vehicle was searched. *Id.* After the vehicle was searched and narcotics were discovered the juvenile was placed in a detention cell. *Id.* The court concluded that the juvenile was not in custody when he was told to sit on the bench while the vehicle was being searched. *Id.* at 1014. The court concluded that he was “in custody” when he was placed into the locked cell. *Id.*

The 9th Circuit Court of Appeals revisited this issue again in *United States v. Butler*. 249 F.3d 1094 (9th Cir. 2001). In *Butler* the defendant was also travelling back from Mexico. *Id.* at 1094. When the defendant

arrived at the border he interacted with a customs official. *Id.* Based on suspicions which were aroused during this interaction the defendant was directed to a secondary inspection point. *Id.* at 1097. At the secondary inspection point more questioning occurred. *Id.* The defendant was asked to exit the vehicle, was escorted to the foyer of the security office and frisked. *Id.* The defendant was then placed in an “open-screen” cell, his vehicle was searched, and marijuana was discovered. *Id.* The court ultimately upheld the trial court’s ruling that the defendant was not in custody until he was placed in the locked cell. *Id.* at 1100.

Given the totality of the circumstances it is evident that Mr. Escalante was not “in custody.” He was detained, but that detention did not rise to the degree associated with formal arrest. What transpired can be likened to a *Terry* detention. Mr. Escalante and his companions were travelling from Canada into the United States. By virtue of their path of travel they were subject to a detention at the border and were not free to leave while customs officials carried out their duties. It is clear from the case law that such a detention is authorized. While the search of the vehicle was occurring Mr. Escalante and his companions were placed in a secure lobby. During this time other travelers and their families would have been coming and going from the lobby. Ultimately two of the individuals that were in the vehicle with Mr. Escalante were placed in

detention cells. At no point in time was Mr. Escalante handcuffed, he was not placed in a cell, and he was not told he was under arrest.

A reasonable individual faced with the same set of circumstances would have not believed they were under arrest. They would have believed that they were simply waiting for their vehicle to be searched so that they could continue on their journey. A reasonable individual would have concluded that Mr. Torres and Mr. Grieve were under arrest. They had been removed from the lobby, separated, and placed in cells. This did not occur to Mr. Escalante.

The discovery of the drugs in the backpack did not change the situation. At the point in time law enforcement found the suspected LSD they had reason to believe that someone who had been travelling in the van was in possession of narcotics. They did not have information at that point in time that the drugs were Mr. Escalante's. Probable cause did not exist at that point to arrest him. There was no identifying information in the backpack that would have established who owned it. Even assuming that law enforcement did have probable cause it would not have triggered a requirement that *Miranda* warnings be read.

2. The border patrol officer's failure to provide Mr. Escalante with his *Miranda* warnings did not deprive him of the protection against self-incrimination under the Fifth

Amendment to the United States Constitution and Const.
art 1 § 9?

Mr. Escalante's right against self-incrimination was not violated. *Miranda* warnings are only applicable when an individual is subject to a custodial interrogation. As stated above an individual is in custody if his or her freedom of movement is restricted to "the degree associated with a formal arrest." *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172, amended by 118 Wn.2d 596, 837 P.2d 599 (1992). As stated above, Mr. Escalante was not in custody while the vehicle he was travelling in was being searched. He was likewise not in custody when the border patrol officer asked who the black back pack belonged to.

3. The Silver Platter doctrine does have applicability under the facts and circumstances of Mr. Escalante's case.

The Silver Platter doctrine is applicable to what transpired in this case. This doctrine holds that, even though it would not be legal for local law enforcement officials to gather evidence in the same manner, evidence gathered by agents of a foreign jurisdiction (tribal, federal, or other state) is admissible in Washington courts if: (1) there was no participation from local officials; (2) the agents of the foreign jurisdiction did not gather the evidence with the intent that it would be offered in state court rather than in their jurisdiction; and (3) the agents of the foreign jurisdiction complied

with the laws governing their conduct. *See generally, State v. Brown*, 132 Wn.2d 529, 586-87, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). However, when federal officers are working with and assisting state officials, the federal officers must comply with the Washington constitution. *State v. Johnson*, 75 Wn. App. 692, 700, 879 P.2d 984 (1994).

When an individual crosses a border they are subjected to procedures that would otherwise not be constitutionally permissible if they occurred in a location other than an international border. 19 C.F.R. 162.6 grants customs and border officers with the ability to search individuals and items at the border without a warrant. It provides in pertinent part, "All persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer." Customs officials are likewise able to detain vehicles. 19 C.F.R. 162.5 provides, "A customs officer may stop any vehicle and board any aircraft arriving in the United States from a foreign country for the purpose of examining the manifest and other documents and papers and examining, inspecting, and searching the vehicle or aircraft." Though not expressly stated, along with the ability to question an individual and search their vehicle these provisions allow customs officials to detain an individual while they go about their work. It is

logical to conclude that an individual is detained and not free to go while all of this occurs.

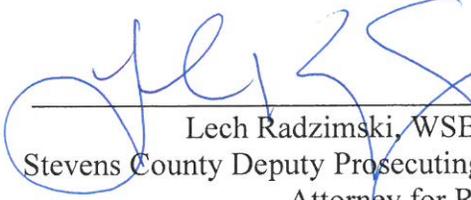
Customs officials are granted the ability to engage in conduct what would be otherwise impermissible for their state counterparts. Mr. Escalante takes issue with some of these actions. The customs officials in this case followed their procedures and protocols. There was no involvement from state law enforcement officials and were not contacted until after the drugs have been located. Since federal officials were able to engage in the conduct at issue then anything they obtained, including Mr. Escalante's statements is admissible.

V. CONCLUSION

For the above stated reasons, the State respectfully requests that this court deny the relief sought by Mr. Escalante.

Respectfully submitted this 26th day of September, 2018

Tim Rasmussen, WSBA # 32105
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Stevens County Deputy Prosecuting Attorney
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Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and mailed a true and correct copy to Dennis Morgan, P.O. Box 1019, Republic, WA 99166 on September 26, 2018.



Michele Lembcke, Legal Assistant
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STEVENS COUNTY PROSECUTOR'S OFFICE

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