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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 37064-0-III

STATE OF WASHINGTON, Respondent,

v.

WAYNE BERT SYMMONDS, Appellant.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. ARGUMENT.....1

II. CONCLUSION.....10

CERTIFICATE OF SERVICE11

AUTHORITIES CITED

Federal Cases

Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).....9

In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955).....6

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....2, 3

Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 109, 522 L. Ed. 2d 311 (1969).....3

Thompson v. Keohane, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).....6

State Cases

In re Swenson, 158 Wn. App. 812, 214 P.3d 959 (2010).....6

State v. Cloud, 7 Wn. App. 211, 498 P.2d 907 (1972).....4

State v. Creach, 77 Wn.2d 194, 461 P.2d 329 (1969).....4

State v. Dennis, 16 Wn. App. 417, 558 P.2d 297 (1976).....3, 4

State v. Falk, 17 Wn. App. 905, 567 P.2d 235 (1977).....9

State v. Gray, 3 Wn. App. 146, 473 P.2d 189 (1970).....4

State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975).....7

State v. Hensler, 109 Wn.2d 357, 745 P.2d 34 (1987).....3

State v. Hilliard, 89 Wn.2d 430, 573 P.2d 22 (1977).....4

State v. Jones-Tolliver, 11 Wn. App. 2d 1050, 2019 WL 6876818 (2019).....8

State v. Noguiera, 32 Wn. App. 954, 650 P.2d 1145 (1982).....7

State v. Richmond, 65 Wn. App. 541, 828 P.2d 1180 (1992).....3

State v. Sargent, 111 Wn.2d 641, 762 P.2d 1127 (1988).....7

State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002).....3

State v. Weyrauch, 153 Wn. App. 1029, 2009 WL 4646222 (2009).....8

Constitutional Provisions

U.S. Const. Amend. VI.....6

Wash. Const. art. I, § 22.....6

Wash. Const. art. 4 § 28.....6

Court Rules

CrR 3.5.....1, 2, 6, 7

ER 404(b).....2

GR 14.1.....8

Other Sources

Adam M. Gershowitz, Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct, 42 U.C. DAVIS L. REV. 1059 (2009).....1

Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii (2015).....1

I. ARGUMENT

The State concedes no error in sabotaging Wayne Symmonds’s trial. Instead, it justifies sandbagging the court and defense counsel by proffering a novel theory that the prosecuting attorney may unilaterally decide whether a defendant is entitled to the protections of CrR 3.5. This theory is contrary to basic notions of due process and should be squarely rejected by this court.

The State begins by complaining about the term “prosecutorial misconduct” and the elicitation of Prosecutor Owens’s history of such in the public records of this State. *Respondent’s Brief*, at 5-11. But it is sadly the case that “there are disturbing indications that a non-trivial number of prosecutors — and sometimes entire prosecutorial offices — engage in misconduct that seriously undermines the fairness of criminal trials.” Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xii (2015). Because the reviewing court serves in a supervisory role, it is important for courts to have accurate information about the records of the attorneys appearing before it. *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1101-03 (2009).

Contrary to the State's objection, such information is not an "ad hominem" attack but is important evidence for the court to consider in evaluating whether misconduct is flagrant and willful or shocking to the conscience, as well as whether a deterrent sanction is called for. *See* Appellant's Brief, at 18-20. Incidents of prior misconduct are probative evidence of intent, knowledge, and absence of mistake and are properly considered for that purpose. *See* ER 404(b). Indeed, it is for this very reason that Prosecutor Owens repeatedly ignoring the limitations established in the trial court's rulings *in limine* are pointed out as well as the CrR 3.5 violation. *See* Appellant's Brief, at 24.

As to that violation, the State denies any fault in failing to advise the parties and the court that it intended to elicit Symmonds' statements to police without a CrR 3.5 hearing on the grounds that the State does not believe the statements were custodial. *Respondent's Brief*, at 18-20. Certainly, none of the cases cited by the State support its interpretation that the prosecutor may unilaterally decide whether a hearing is required.

Questioning by police is custodial, and therefore must be preceded by *Miranda* warnings, when it occurs "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed.

2d 694 (1966). Such a circumstance “contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.” *Id.* at 467.

Nevertheless, a precise definition of when a law enforcement encounter ripens into a custodial interrogation is elusive. *State v. Hensler*, 109 Wn.2d 357, 362, 745 P.2d 34 (1987). Consequently, courts focus on whether the totality of the circumstances are such that a reasonable person would not feel free to terminate the encounter and leave. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002). The location of the encounter is not inherently significant, as a police may sufficiently restrict a person's liberty as to require *Miranda* warnings in the person's own home. *Orozco v. Texas*, 394 U.S. 324, 326, 89 S. Ct. 109, 522 L. Ed. 2d 311 (1969); *State v. Richmond*, 65 Wn. App. 541, 544, 828 P.2d 1180 (1992); *State v. Dennis*, 16 Wn. App. 417, 421-22, 558 P.2d 297 (1976) (“Here, even though the conversation took place in the defendant's own apartment, neither Dennis had been placed under arrest, and the officer avowed they were free to leave at any time, the atmosphere was nevertheless dominated by the officer's unwelcome presence and his insistence on remaining in a position where he could monitor and thus restrict the occupants' freedom of movement within their home.”).

However, the existence of probable cause to arrest is a highly relevant, and potentially dispositive, factor. *State v. Creach*, 77 Wn.2d 194, 198, 461 P.2d 329 (1969), *abrogated on other grounds by State v. Russell*, 125 Wn.2d 24, 60, 882 P.2d 747 (1994); *Dennis*, 16 Wn. App. at 422; *State v. Gray*, 3 Wn. App. 146, 148, 473 P.2d 189, *review denied*, 78 Wn.2d 995 (1970) (where defendant only answered routine questions and police did not yet have probable cause to focus suspicion on him, questioning was not custodial). As the Court of Appeals has described, the defining characteristic of a “custodial” encounter with police is the targeting of the defendant as a criminal suspect:

It envisions that inquiry has acquired the taint of inquisition, that the satisfaction of curiosity has led to comprehension that a crime may have been committed by the answeror. When this corner is turned, the desire to understand becomes a hunt converging on the answeror. It is then, as a suspect, that he must be informed of his right to remain silent and to have a lawyer present.

State v. Cloud, 7 Wn. App. 211, 214, 498 P.2d 907, *review denied*, 81 Wn.2d 1005 (1972). *See also State v. Hilliard*, 89 Wn.2d 430, 434-36, 573 P.2d 22 (1977) (where police questioning was of a routine investigatory nature and suspicion of defendant did not rise to the level of probable cause, no custodial interrogation occurred).

Applying these principles, even the limited record available provides ample reason to regard the encounter with Symmonds as custodial. Police responded to a trespassing complaint at a specific property by a specific individual. CP 5-6. They knew who Symmonds was and saw him still at the store. CP 6. They had probable cause to arrest him for trespassing. CP 5. Moreover, the video surveillance recording of the incident shows the police exiting the store, where they confirmed that the manager wanted Symmonds to leave, and approaching Symmonds and positioning themselves at angles to him, blocking his exit route. CP 6; Ex. 5 at 0:05 - 0:15. When, within one minute, Symmonds attempted to leave by walking around the officer positioned further from the door, the officer did not allow it and physically restrained him. Ex. 5 at 1:10 – 1:14.

The encounter bears all the indicia of the targeted inquisition described by the *Cloud* court and none of the circumstances associated with an investigatory encounter whose sole purpose is to acquire information to determine whether a crime has been committed and, if so, who did it. Police had probable cause to arrest Symmonds for trespassing, and they did. When they approached him, they knew who he was, they knew he had been asked to leave the property, and they knew he was still there. When he attempted to leave, they did not let him. Ample reason

exists to squarely reject the State’s conclusory and self-serving assertion that “Mr. Symmonds cannot be deemed to have been “in custody” within the meaning of CrR 3.5.” *Respondent’s Brief*, at 19.

Moreover, the State’s characterization of a CrR 3.5 hearing surrounding these circumstances as “pointless and wasteful” manifests both the State’s lack of regard for Symmonds’ rights and its arrogation of the judicial role to itself. Whether a police encounter constitutes a custodial interrogation is a legal conclusion for the court to make. *Thompson v. Keohane*, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). In a CrR 3.5 hearing, the court takes evidence concerning the historic events, resolves disputed questions of fact, and draws legal conclusions based on its determination of what transpired. *Id.*; CrR 3.5(a), (c). As an elementary matter of due process, the State does not get to perform these functions itself. *See* U.S. Const. Amend. VI (entitling the accused to an impartial fact-finder); Wash. Const. art. I, § 22 (entitling the accused to an impartial fact-finder); Wash. Const. art. 4 § 28 (requiring judges to take an oath of impartiality); *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”); *In re Swenson*, 158 Wn. App. 812, 818, 214 P.3d 959 (2010) (“Criminal defendants have a due process right to a fair trial by an impartial judge.”).

Ironically, the State reaches this conclusion by contending, “There is no evidence in the record that the voluntariness of his statements was ever at issue in any phase of the case.” *Respondent’s Brief*, at 19. But custodial statements to police made without the benefit of *Miranda* warnings are presumed to be involuntary. *State v. Sargent*, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). In any event, the deficiency in the record is entirely due to the State’s unilateral decision to appoint itself the judge of Symmonds’s custodial status. The State has no way of knowing Symmonds’s position on the arrest because it deprived him of his opportunity to testify about the encounter outside of the presence of the jury. CrR 3.5(b). Yet, the State now asks to be rewarded with a finding that it has met its burden to establish that Symmonds’s statements were “freely given and untainted by coercive influence” when it proceeded in such a way as to insulate its version of events from any meaningful adversarial testing. *State v. Noguiera*, 32 Wn. App. 954, 955-56, 650 P.2d 1145 (1982).

Nor do any of the cases cited by the State support its conduct in this case. *State v. Harris*, 14 Wn. App. 414, 422, 542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976) involves statements made to non-law enforcement witnesses. In this case, the State far exceeded this limit

when it deliberately elicited Symmonds's statements to police at the time of his arrest.

In *State v. Jones-Tolliver*, 11 Wn. App. 2d 1050, 2019 WL 6876818 at *1 (2019) (unpublished)¹, the CrR 3.5 hearing was held. In *State v. Weyrauch*, 153 Wn. App. 1029, 2009 WL 4646222 at *3-4 (2009) (unpublished), the defendant specifically waived a CrR 3.5 hearing. Here, not only did defense counsel not waive a hearing, but the record reflects that both counsel and the trial court were surprised when the State elicited Symmonds's statements to police without holding a CrR 3.5 hearing or providing any notice that it intended to do so. RP (Bartunek) 119-24. Indeed, the State's assertion here that defense counsel somehow conceded that Symmonds' statements were not custodial simply because he pointed out that the proper place for raising such arguments is in a CrR 3.5 hearing is particularly disingenuous. *Respondent's Brief*, at 20; RP (Bartunek) 121 ("That's a great argument for a 3.5 hearing the State's just given. But we didn't have a 3.5 hearing to rule that these statements were admissible.") To the contrary, defense counsel advised the court that Prosecutor Owens had explicitly indicated the State would not offer statements, and the

¹ Pursuant to GR 14.1, unpublished cases are not binding precedent and are cited here only to respond to the State's argument that they should have persuasive authority.

omnibus order contradicts the claim that Symmonds stipulated the statements were not custodial. RP (Bartunek) 122, CP 17.

Lastly, in *State v. Falk*, 17 Wn. App. 905, 906-09, 567 P.2d 235 (1977), the statements were offered in rebuttal to the defendant's testimony, were not discovered and confirmed by the State until the day they were introduced, and the trial was delayed to give the defendant an opportunity to "marshal his defenses" against the surprise testimony. The defendant in *Falk* chose not to request a CrR 3.5 hearing, perhaps because the statements were offered to impeach the defendant's testimony and were admissible for that purpose even if they were obtained in violation of *Miranda*. *Harris v. New York*, 401 U.S. 222, 225-26, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

None of these cases involve or excuse the type of ambush tactics employed in this case. If, as the State now suggests, it merely sought in good faith to navigate the line surrounding a novel legal issue, it would have exercised candor toward the court and the defense by advising them of its intentions, providing briefing to guide the decision-making, and affording the defense an opportunity to respond. Instead, it allowed the defense and the court to reach nearly the conclusion of trial before making its intentions evident by simply eliciting the statements, while providing

no legal authority for its position in response to the defense objection. *See* Respondent's Brief, at 10. As the State acknowledges, it knew of the statements since the inception of the case and the filing of the probable cause affidavit. *Respondent's Brief*, at 19. It is not now the victim on appeal because of its own choices to conceal its intentions and treat its own opinion about legal questions as controlling.

II. CONCLUSION

For the foregoing reasons, Symmonds respectfully requests that the court REVERSE his convictions and DISMISS the case.

RESPECTFULLY SUBMITTED this 28 day of May, 2020.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 28 day of May, 2020 in Kennewick, Washington.


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