

70564-4

70564-4

NO. 70564-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN STUM,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita J. Farris, Judge

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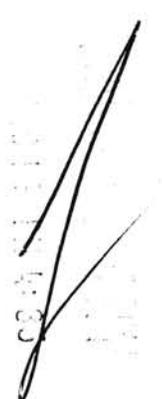
BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's Fifth Amendment right against self-incrimination was violated when the trial court failed to suppress his illegally obtained confession.

2. The trial court erred in not entering written findings of fact and conclusions of law to support its order admitting appellant's confession.

Issues Pertaining to Assignments of Error

1. Without the benefit of Miranda<sup>1</sup> warnings, appellant confessed in response to police interrogation. Did the trial court wrongly conclude appellant was not in custody for Miranda purposes when police interrogated him and, thus, err in admitting the confession?

2. The trial court was required to enter formal findings and conclusions as to the admissibility of the confession. As of the filing of this brief, it appears this had not happened. Was this error?

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

B. STATEMENT OF THE CASE

1. Procedural History

On April 15, 2013, the Snohomish County prosecutor charged appellant Benjamin Stum with one count of second degree burglary. CP 96-97. On June 14, 2013, the information was amended, with the prosecutor adding one count of first degree reckless burning. CP 81-82. A jury found Stum guilty as charged. CP 34-35. Stum was sentenced under a first-time-offender waiver to 90 days of incarceration and one year of community custody. He was also ordered to pay \$148,980.00 in restitution. CP \_\_ (sub no. 85, "Restitution Order").

2. Substantive Facts

In October 1998, Jodi Ferguson purchased a residence in Everett, with Wells Fargo Bank holding the mortgage. 2RP 161. In August 2010, she was unable to make her mortgage payments. 2RP161. Ferguson did not have the energy to deal with the bank and conceded foreclosure. 2RP 167.

A month later, she left the house and did not return. RP 162. While living elsewhere, Ferguson did no maintenance on the house except when the city of Everett required her to clean up garbage on the property and cut the grass. 2RP 162-63. She gave no one

permission to enter the house and did not rent it. 2RP 162, 164. Ferguson testified she felt a moral obligation not to go in the house, but she also recognized she was legally responsible for it. 2RP 170-71. Consequently, although she requested the utilities be turned off (only the water and gas were actually turned off), she maintained homeowner's insurance through Farmers Insurance Group. 2RP 166, 168.

At some point after Ferguson left the house, Ferguson's son told Stum he could use it since they no longer lived there. Stum was homeless and began staying in the house in early February 2013. 2RP 134.

On April 3, 2013, at approximately 10:00 a.m., there was a large explosion at Ferguson's residence. 2RP 90-91. The explosion burned the basement, blew out the house windows, knocked the front door off its hinges; and across the street, and badly destabilized the walls.<sup>2</sup> 2RP 93-116.

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<sup>2</sup> Eventually, the city demolished the house given the extent of the damage. 2RP 169. Under Ferguson's home-owner's policy, Farmers paid nearly \$150,000 to Wells Fargo. 2RP 168; CP \_\_ (sub nos. 77, 85). After receiving this payment, the bank agreed to a deed-in-lieu settlement, and Ferguson was finally able to walk away from the house. 2RP 169. This is why Ferguson only received \$250 dollars in restitution and the rest will go to Farmers. CP \_\_, \_\_ (sub nos. 77, 85).

Shortly thereafter, Detective Michael Atwood arrived on the scene, inspected the house, and interviewed neighbors who had seen a suspect run out of the back of the house. 2RP 92, 116, 174. He received a general description of the suspect. 2RP 117, 176. Afterward, Atwood parked his car in an alley behind Ferguson's house. 2RP 118. Atwood was talking to a neighbor when a man fitting the description (Stum) came down the alley. 1RP 9; 2RP 118.

Atwood was not in uniform, so he introduced himself as he approached Stum. 1RP 9, 12. Stum was carrying a sheathed hunting knife in one hand and open beer can in the other. 1RP 9. Atwood told Stum it was illegal to have an open beer in public. 1RP 13. He ordered Stum to set down the beer and give him the knife. 1RP 9. Atwood secured the knife in his police van, took Stum's identification, ran his name to confirm there were no warrants, and then handed the identification back. 1RP 9, 14, 20.

Atwood informed Stum that he believed the fire in the house was suspicious, and he said the beer Stum had been drinking was the same brand as the empty beer cans found in Ferguson's house. 1RP 13-14. Atwood asked where Stum slept the previous night. 1RP 13-14. When Stum did not confess to being in Ferguson's

house, Atwood applied the “Reid technique” for interrogation, suggesting it was time for Stum to be truthful in order to lighten his psychological burden. 1RP 17. Eventually, Stum started to cry and told the officer he had been staying in the house and had caused the explosion when, after attempting to remove copper pipes from the basement, he lit a cigarette. 1RP 18; 2RP 123.

At this point, Atwood read Stum his Miranda rights, asked him to clarify his confession, and obtained a written confession from Stum. 1RP 19.

Stum was crying and emotional when speaking with police. 2RP 150, 159. He explained he cut the pipe in the basement, went upstairs to get a cigarette, came back to the basement, lit the cigarette, saw a big puff of flame, and then the explosion occurred.<sup>3</sup> 1RP 18; 2RP 123; 2RP 151-53.

At trial, Atwood recalled only that Stum said he didn’t contemplate, when he lit the cigarette, that there would be any gas that might blow up the house. 2RP 142. However, another officer who was also on the scene testified Stum said he smelled gas, was suspicious there was a gas leak, had some reservations about

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<sup>3</sup> Remarkably, Stum was not hurt, although his facial hair was singed. 2RP 123,150.

lighting the cigarette, but figured “what the heck” and lit the cigarette anyway.<sup>4</sup> 2RP 152-53, 158.

After confessing, Stum expressed concern that he needed to retrieve some belongings from the house. 2RP 125. He was released at the scene but warned it was not safe to go inside. 2RP 126. Later, Stum attempted to re-enter the damaged house to collect his things and was arrested. 2RP 22.

At his trial, Stum challenged the admissibility of his confession on the ground that it was the product of custodial interrogation that took place prior to advisement of his Miranda rights. 1RP 26-29. The trial court ruled the confession was admissible, finding Stum’s statements were voluntary because he was free to leave at any time. 1RP 30-31.

To secure a conviction, the State offered Stum’s confession. 2RP 123; 2RP 151-53. It also offered the testimony of a neighbor who claimed Stum had talked to him later on the day of the incident. 2RP 192-93. The neighbor explained that Stum told him he had cut into a pipe, and it let out a small hiss of pressure; he left to let it drain, believing it was some residual water. 2RP 192. Stum explained that water had dribbled out of a pipe he previously cut.

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<sup>4</sup> Besides Atwood, there were two other officers on the scene. 1RP

2RP 191-92, 193. Stum said when he returned to the bottom of the basement stairs, he smelled something “fishy,” like stagnant water. 2RP 192. Stum explained he lit a cigarette and “a flame went through the air and it was like I stepped into the gates of hell.”<sup>5</sup> 2RP 194. Based on his conversation with Stum, the neighbor concluded: “I don’t think [Stum] honestly thought it was a gas line where he was at.” 2RP 192.

Defense counsel argued, although Stum may have been negligent and stupid, he had not acted recklessly because one must recognize a risk before he can disregard it. 3RP 73, 82-84, 90-91. Counsel explained that Stum never disregarded a known risk because he stupidly failed to recognize that there was gas in the room that might ignite when he lit his cigarette. Id.

The State argued Stum was aware of the risk and disregarded it, specifically relying on officer testimony regarding Stum’s confession. 3RP 70.

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<sup>5</sup> The neighbor testified he did not believe Stum was being overly dramatic but was just giving an accurate description of what happened. 2RP 195.

C. ARGUMENT

I. STUM WAS DENIED HIS FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION WHEN THE COURT FAILED TO SUPPRESS THE ILLEGALLY OBTAINED CONFESSION.

The Fifth Amendment to the United States Constitution commands "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The right against self-incrimination protects an accused from being compelled to provide the State with "testimonial or communicative" evidence. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

To preserve an individual's Fifth Amendment right against compelled self-incrimination, police must inform a suspect of his or her rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings." State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444. Statements elicited in noncompliance with this rule must not be admitted as evidence at trial. Id. at 444, 476-77. Additionally, any confession obtained subsequent to an initial, unconstitutionally obtained, involuntary confession, is inadmissible as "fruit of the poisonous tree," since the post-Miranda confession is tainted by the illegality of the pre-Miranda confession. State v. Lavaris, 99 Wn.2d at 851, 857-58, 664 P.2d 1234 (1993).

Under this record, the trial court's decision to admit Stum's confession was erroneous. Police did not read Stum his Miranda rights before questioning him. While the trial court correctly found Atwood's initial questioning amounted to interrogation (1RP 31), it's conclusion that Stum was not in custody and free to leave (1RP 31) is not supported the facts or law.

"Custodial interrogation" is questioning initiated by law enforcement officers after a person has been deprived of his or her freedom in any significant way. Miranda, 384 U.S. at 444. "Custodial" refers to whether the suspect's freedom of movement

was restricted at the time of questioning. Sargent, 111 Wn.2d at 649-50.

“Custody is a mixed question of fact and law.” Thompson v. Keohane, 516 U.S. 99, 112–13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). “The factual inquiry determines ‘the circumstances surrounding the interrogation.’” Thompson, 516 U.S. at 112. The legal inquiry for determining whether an individual is in custody for Miranda purposes is whether “a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.” Thompson, 516 U.S. at 112; State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004) (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). This is an objective test, which looks at “how a reasonable man in the suspect's position would have understood his situation.” Thompson, 516 U.S. at 112-13; Berkemer, 468 U.S. at 442; Lorenz, 152 Wn.2d at 37. Review is de novo. Id.

Applying the above stated law to the facts of this case, it is evident Stum was in custody when Atwood interrogated him. First, Atwood never told Stum he was free to leave. See, Tankleff v. Senkowski, 135 F.3d 235, 243–44 (2nd Cir. 1998) (explaining whether the defendant is told he or she is free to leave is a

recognized relevant factor in determining whether a defendant is “in custody”).

Second, when Atwood approached Stum, he told Stum it was illegal for him to be walking around with an open container of alcohol in public.<sup>6</sup> It is well-established that an officer is permitted to issue a notice where an infraction has occurred in his or her presence.<sup>7</sup> Given this, a reasonable person would not believe he is free to just walk away after an officer tells him he has committed an illegal act, as it would require the officer to chase after him in an effort to issue an infraction notice. See, State v. Duncan, 146 Wn.2d 166, 172-73, 43 P.3d 513 (2002) (officers testified that persons stopped for open-container violation were not free to

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<sup>6</sup> RCW 66.44.100 provides:

... no person shall open the package containing liquor or consume liquor in a public place. Every person who violates any provision of this section shall be guilty of a class 3 civil infraction under chapter 7.80 RCW.

Everett Municipal Code 10.42.020 provides:

Except as permitted by RCW Title 66 or ordinances of the city, no person shall open a package containing liquor or consume liquor in a public place. Violation of any of the provisions of this section is an infraction, and may be punished by a fine of fifty dollars, not including statutory assessments.

<sup>7</sup> RCW 7.80.050(2).

leave). Instead, a reasonable person would believe he was not free to leave until the officer either issued a citation or the officer affirmatively informed him that he would not issue a notice and he had permission to leave. Yet, there is no evidence Atwood ever did either. Hence, a reasonable person in Stum's position would not have felt free to leave.

Third, Atwood's confiscation of Stum's personal property also indicated Stum was not free to leave. Atwood confiscated Stum's knife and kept it on the front seat of his van while interrogating Stum. Case law establishes that when a person cannot leave without abandoning his personal items, that person is not free to leave. In United States v. McCain, 556 F.2d 253, 255 (5th Cir. 1977), the Court found that a woman was in custody for Miranda purposes when she could leave only by abandoning her luggage. The Court explained that forcing a person to choose between abandoning one's property and staying "is a sufficient restriction on one's freedom of action so as to trigger the giving of Miranda warnings before proceeding with any interrogation." Here, Stum would have to have abandoned his personal property to terminate the interrogation by leaving. Thus, this circumstance also supports a conclusion that Stum was not free to leave.

Finally, based on the content of Atwood's conversation with Stum, a reasonable person in Stum's position would know police suspected him of setting the fire. See United States v. Griffin, 922 F.2d 1343, 1348 (8th Cir.1990) (quoting United States v. Carter, 884 F.2d 368, 370 (8th Cir.1989) ("the fact that the individual has become the focus of the investigation is relevant 'to the extent that the suspect is aware of the evidence against him' and this awareness contributes to the suspect's sense of custody.")).

Atwood told Stum that he believed the fire was not naturally occurring. 1RP 14. Atwood also told Stum that the beer he was drinking was the same brand of the cans found in the house, thus, suggesting a link between Stum and the exploded house. 1RP 13. Atwood also questioned Stum about where he stayed, challenging Stum's claim that he was staying elsewhere. 1RP 14, 17-18. After this conversation, a reasonable person in Stum's position would believe he had become the focus of a criminal investigation – a fact indicating he is not free to leave.

This record suggests a reasonable person in Stum's position -- having been told by police that he was committing an alcohol infraction, having his person effects confiscated, having been informed of the link between himself and the suspicious fire

under investigation, having been vigorously questioned about his presence in the house, and never having been told he could leave – would not have felt free to leave. As such, the trial court erred when it concluded Stum was not in custody.

In response, the State may point to the trial court's conclusion that Stum was not in custody for Miranda purposes because this was nothing more than a Terry<sup>8</sup> stop. 1RP 30. This argument should be rejected. Although a genuine Terry stop is not custodial for the purposes of Miranda, as explained below, Atwood's detention of Stum went beyond a true Terry stop.

A genuine Terry stop is brief and less coercive than the police interrogation contemplated by Miranda. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). “[U]nlike a formal arrest, a typical Terry stop is not inherently coercive because the detention is presumptively temporary and brief, is relatively less ‘police dominated’, and does not easily lend itself to deceptive interrogation tactics.” State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992) (quoting Berkemer, 468 U.S. at 439). In such settings, a police officer may ask someone “a moderate number of questions to determine his identity and try to obtain information

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<sup>8</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

confirming or dispelling the officer's suspicions." Berkemer, 468 U.S. at 439.

To justify a warrantless Terry stop, the State must be able to point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped has been, or is about to be, involved in a crime. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). An investigative detention must be "reasonably related in scope to the justification for [its] initiation." Terry, 392 U.S. at 29.

In this case, Atwood testified that he had sufficient reasonable suspicion to detain Stum "because he was carrying a beer and a knife." 1RP 17. He specifically informed Stum about the alcohol infraction. 1RP 13. However, Atwood never issued a citation for the open-container violation and never told Stum he would not be issuing one. Thus, Atwood left the duration of the detention open-ended and unresolved while he proceeded to interrogate Stum about the fire. Under such circumstances, this encounter was not merely a Terry stop but, instead, resembled the degree of restraint associated with a custodial arrest and interrogation. State v. France, 129 Wn. App. 907, 909-10, 120 P.3d 654 (2005) (holding that where the duration of a seizure is left open-ended and the reason for the detention is left unresolved, the

encounter is not a true Terry stop in which Miranda warnings are not needed before investigation). As such, Atwood needed to give Miranda warnings before interrogating Stum.

In sum, the ultimate inquiry is whether there was a restraint on Stum's freedom of movement such that "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson, 516 U.S. at 112. That standard is satisfied under the circumstances of this case. As explained above, a reasonable person in Stum's situation would not believe he was at liberty to terminate the encounter with Atwood. As such, Stum was in custody, and Atwood should have given Miranda warnings prior to his interrogation.

Without these warnings, Stum's pre-Miranda confession to Atwood should have been suppressed. Additionally, his post-Miranda statements should have been suppressed because they were tainted by the illegality of the pre-Miranda confession. For these reasons, this Court should find the trial court erred in admitting Stum's confession and reverse his convictions because the confession was essential to the State's case against Stum.

II. THE TRIAL COURT ERRED WHEN IT FAILED TO ENTER WRITTEN FINDINGS AND CONCLUSIONS UNDER CrR 3.5.

CrR 3.5(c) imposes a duty on the court to make a record:

After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

As of the filing of this brief, it appears the trial court failed to comply with this rule. If the trial court fails to timely enter necessary findings, Stum asks this case be reversed. If the trial court enters written findings and conclusions after the filing of this brief, Stum asks this Court to consider whether these were “tailored to meet the issues presented” in this brief and, if so, reverse. See, State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004) (explaining reversal is appropriate if tailoring exists).

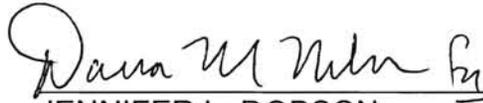
D. CONCLUSION

This Court should reverse appellant's convictions because they rested on Stum's illegally obtained confession.

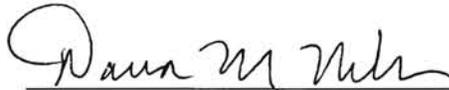
DATED this 16<sup>th</sup> day of December, 2013.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70564-4-1
	)	
BENJAMIN STUM,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16<sup>TH</sup> DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF DECEMBER 2013.

X *Patrick Mayovsky*

2013 DEC 16 PM 4:55  
SNOHOMISH COUNTY PROSECUTOR'S OFFICE