FILED
12-15-15
Court of Appeals
Division I
State of Washington

NO. 73422-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAHROD JIMMA,

Appellant.

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

APPELLANT'S OPENING BRIEF

MICK WOYNAROWSKI
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT……1

B. ASSIGNMENTS OF RROR……2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR……3

D. STATEMENT OF THE CASE……...4

E. ARGUMENT…….....8

1. **The Trial Court Violated Mr. Jimma's Fifth Amendment Right To Remain Silent By Admitting His Self-Incriminatory Statement Given To Law Enforcement During A Custodial Interrogation Without The Benefit Of Miranda Warnings**……8

   a. Police officers must provide Miranda warnings prior to subjecting a suspect to a custodial interrogation…….8

   b. Mr. Jimma was 'in custody' for Miranda purposes because a reasonable person in his position would not have felt free to terminate the interrogation……..12

   c. The erroneous admission of the unwarned statement was not harmless, and the conviction should be reversed…….....18

2. **The Trial Court Wrongfully Denied Mr. Jimma's Suppression Motion Where The Record Fails To Establish The Arresting Officer Had The Requisite Individualized Suspicion To Justify Detaining Mr. Jimma**……19

   a. Warrantless seizures are presumptively unlawful……..19

   b. Vehicle passengers retain their privacy rights when the vehicle in which they travel is lawfully stopped for a traffic infraction…….....21

c. In the absence of individualized suspicion, Officer Miller subjected Mr. Jimma to an unlawful detention for a criminal investigation unrelated to the original traffic stop of the driver……22

d. Mr. Jimma's convictions should be reversed.....29

F. CONCLUSION……...30

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997).....23

State v. Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997) 9

State v. Brown, 154 Wn.2d 787, 117 P.3d 336 (2005).....21

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010).....21

State v. Duncan, 146 Wn.3d 166, 43 P.3d 513 (2002) 20, 27, 29

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009) 20

State v. Grande, 164 Wn.2d 135, 187 P.3d 248 (2008).....25, 27, 28

State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004).....passim

State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980) 20

State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002).....20

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999).....29

State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004) 9

State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999).....22, 26

State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009) 20

State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004) 21, 23, 26

State v. Rife, 133 Wn.2d 140, 943 P.2d 266 (1997).....29

State v. Thompson, 93 Wn.2d 838, 613 P.2d 525 (1980). 28

State v. Young, 135 Wn.2d 498, 957 P.2d 681 (1998)…….23

Washington Court of Appeals Decisions

State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011) 24

State v. Adams, 144 Wn. App. 100, 181 P.3d 37, rev. denied, 164 Wn.2d 1033 (2008) 22, 30

State v. Barwick, 66 Wn. App. 706, 833 P.2d 421 (1992) 22

State v. Cormier, 100 Wn. App. 457, 997 P.2d 950 (2000) 24

State v. Ellwood, 52 Wn. App. 70, 757 P.2d 547 (1988) 25

United States Supreme Court Decisions

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) 18

Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) 20

Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) 10, 16

Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 2403, 168 L. Ed. 2d 132 (2007) ..... passim

Chandler v. Miller, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997) 28

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 18, 19

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) 20

Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) 18

Maryland v. Wilson, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) 22

Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) 9

Pennsylvania v. Bruder, 488 U.S. 9, 109 S. Ct. 205, 102 L. Ed. 2d 172 (1988) 10

Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) 9

United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1970, 64 L.Ed.2d 497 (1980) 19

Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)28

Federal Court of Appeals Decisions

United States v. Craighead, 539 F.3d 1073 (9th Cir. 2008) 9, 13, 17

Washington Constitutional Provisions

Article I, Section 7 ..... 1, 2, 7, 20, 30

Federal Constitutional Provisions

U.S. Const. amend. 5 ..... passim

U.S. Const. amend. 4 ..... passim

Other Authorities

Floyd v. City of New York, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013) 28

People v. Patel, 730 N.E.2d 582 (Ill. App. Ct. 2000) 16

State v. Hackett, 944 So. 2d 399 (Fla. Dist. Ct. App. 2006) 15

A. SUMMARY OF ARGUMENT

Jahrod Jimma was a passenger in a car whose driver was stopped for speeding. The police officer took advantage of the initial seizure and commenced an unrelated criminal investigation against the driver and three passengers. The officer wanted to build a marijuana possession case against someone in the car, so he pressured everyone in it. Mr. Jimma succumbed and admitted he was carrying the contraband. When he turned over some marijuana to the officer, he was arrested, and when he was searched, a handgun was discovered.

Because the officer conducted a custodial interrogation without administering Miranda[1] warnings, the use of the confession at trial violated Mr. Jimma's Fifth Amendment rights. The warrantless seizure of Mr. Jimma, made in the absence of individualized suspicion that he was committing a criminal law violation, violated his Article I, Section 7 privacy rights and Fourth Amendment right to be free of unreasonable seizures.

The ensuing convictions should be reversed.

---

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

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Jimma'S Fifth Amendment privilege against self-incrimination by admitting a confession that law enforcement elicited during a custodial investigation but without providing Miranda warnings.

2. The trial court erred in concluding that under State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004), Officer Miller's questioning of Mr. Jimma was not a custodial interrogation that required Miranda warnings. (Conclusion of law #4.)

3. The trial court erred in concluding that Mr. Jimma was "properly seized and questioned." (Conclusion of law #5.)

4. The trial court erred in concluding that Officer Miller's "actions were within the bounds allowed." (Conclusion of law #3.)

5. In refusing to grant the defense CrR 3.6 motion to suppress, and finding that Officer Miller did not exceed the scope of his authority, the trial court erred and violated Mr. Jimma's rights under the Fourth Amendment and Article I, Section 7. (Conclusions of law #3, #4, #5.)

6. The trial court erred in failing to make a factual finding that Officer Miller seized all of the car's occupants by his show of

authority, including the use of his patrol vehicle emergency lights, a spot light, "takedown lights," and then by directly shining a bright flashlight into the vehicle. CP 26-27.

7. The trial court erred in failing to make a factual finding that Officer Miller told Mr. Jimma and others about his past experience in narcotics detection to let them know he thoughT they were lying when they denied his first command to reveal the location of the marijuana. 1RP 57-58.

8. The trial court erred in failing to make a factual finding that Officer Miller testified that he has in other similar roadside encounters pressured citizens to incriminate themselves by telling them he has sufficient information to pursue a warrant and that he may have also done that here. 1RP 56.

9. The trial court erred in denying the CrR 3.5 and CrR 3.6 motions to suppress. CP 109-112.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person is in custody for purposes of Miranda if he reasonably feels deprived of his freedom of action in any significant way, such that he would not believe he is free to terminate the interrogation. Where a police officer stopped the car that Mr. Jimma

was a passenger in and without Miranda warnings twice commanded the occupants to disclose "where the marijuana was," did the trial court violate Mr. Jimma's Fifth Amendment rights by admitting his self-incriminating response?

2. Article I, section 7 of the Washington Constitution protects individuals' privacy rights and the Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures. Police officers cannot detain an individual without specific facts that create a reasonable suspicion the individual is engaged in criminal activity. Here, Officer Miller indiscriminately detained all four of the occupants of the car in which Mr. Jimma was a passenger, even though the officer did not know whether it was the driver, or one of the three passengers, who was in possession of marijuana. Did the officer violate Mr. Jimma's state constitutional right to privacy and the Fourth Amendment by detaining him in the absence of individualized suspicion that he was the one committing a criminal offense?

D. STATEMENT OF THE CASE

Jahrod Jimma appeals his convictions for unlawful possession of a firearm in the first degree and possession of marijuana. CP 151-61. The following facts were presented at a pretrial hearing on defense

motions to suppress statements and evidence under CrR 3.5 and CrR 3.6. See CP 1-55; 60.

On Halloween night 2013, City of Kent Police Department Officer Miller pulled over a speeding car. 1RP 24, 26. He used his patrol car emergency lights to command the driver to stop. 1RP 27, 53. He walked up to her and asked that she produce her license, registration, and proof of insurance. 1RP 27. He then took hold of the driver's identification card. 1RP 34, 60. Officer Miller was in uniform and his gun was at his side. 1RP 53. It was dark and he also used an "extremely bright" flashlight to illuminate the interior of the car and its three passengers. 1RP 28-29, 53.

The driver's identification card showed she was nineteen and the passengers appeared about the same age. 1RP 28, 29. Officer Miller "thought they were in their late teens, early twenties." 1RP 63. They were all quiet and no one was acting suspiciously. 1RP 54-55.

Officer Miller smelled unburnt marijuana in the car. 1RP 30. He did not see any marijuana or drug paraphernalia, and had no reason to believe anyone in the car had recently consumed the drug. 1RP 54. Based on what he smelled, he decided to investigate if there was someone in the car of age to legally possess marijuana. 1RP 31. Officer

Miller asked the passengers if any of them were twenty-one and they said no. 1RP 31-32, 55.

Officer Miller asked the four occupants of the car "where the marijuana was at." 1RP 32, 56. He expected answers from the driver and the passengers. 1RP 56. When first questioned, "all four denied having marijuana." 1RP 32.

At that point, Officer Miller suspected someone in the car was lying to him, but he did not know who. 1RP 57-58. He told the four occupants that he "had been doing the job for quite a while… been a narcotic canine handler… knew what the smell of marijuana was… knew that there was marijuana in the vehicle." 1RP 33, 56. He said this to let those he had detained know he thought they were lying to him. 1RP 57-58. To get them to stop denying that there was marijuana in the car, he may have gone as far as to say he had authority to get a search warrant. 1RP 56. He had done so in past similar situations: "I may have said it, I may not have, I don't know." 1RP 56.

Having challenged the driver's and passengers' denials that any of them had marijuana, Officer Miller asked about the substance "a second time." 1RP 33, 58. This time, Mr. Jimma admitted he had some and handed over a baggie to Officer Miller. 1RP 33, 58. At the officer's

directive, Mr. Jimma then produced a driver's permit showing he was twenty years old. 1RP 33-34. Officer Miller arrested Mr. Jimma for unlawful possession of marijuana by a minor. 1RP 59. Searching him pursuant to this arrest, he found a handgun. 1RP 59. Officer Miller did not read Miranda warnings to Mr. Jimma until after he was placed in the back of the patrol car. 1RP 39.

Mr. Jimma argued that Officer Miller's conduct violated the Fourth Amendment and Article I, Section 7. CP 1-55; 1RP 67-70. The State conceded that Mr. Jimma had been seized, but argued that Officer Miller had conducted a lawful Terry[2] detention. 1RP 71. Mr. Jimma argued that both his admission and the act of handing the marijuana to the officer should have been suppressed because Officer Miller had conducted a custodial interrogation without providing the Miranda warnings. CP 60.

In a single set of written findings of fact and conclusions of law, the trial court denied both of Mr. Jimma's motions. CP 109-112. The trial court concluded that the seizure did not exceed what is authorized under Terry. Relying on State v. Heritage, the trial court also concluded

[2] Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

that Mr. Jimma was not 'in custody,' as to trigger the requirement that he receive Miranda warnings. 1RP 146.

At trial, the State introduced into evidence: a) Mr. Jimma's statements admitting ownership of the marijuana, b) the drug itself, and c) the handgun recovered after the search incident to arrest for possession of marijuana. 2RP 44, 54-55; 85. The jury acquitted Mr. Jimma of resisting arrest and possession with intent to deliver a controlled substance. CP 108, 105. The jury convicted on the lesser-included offense of possession of marijuana while under the age of 21. CP 107. The jury also convicted Mr. Jimma of unlawful possession of a firearm in the first degree. CP 106.

E. ARGUMENT

1. The Trial Court Violated Mr. Jimma's Fifth Amendment Right To Remain Silent By Admitting His Self-Incriminatory Statement Given To Law Enforcement During A Custodial Interrogation Without The Benefit Of Miranda Warnings.

a. Police officers must provide Miranda warnings prior to subjecting a suspect to a custodial interrogation.

The Fifth Amendment provides, "No person … shall be compelled in any criminal case to be a witness against himself…." U.S. Const. amend. V. A suspect must be advised of his Fifth Amendment rights before a custodial interrogation. Miranda v.

Arizona, 384 U.S. at 444-45. In this case, it is undisputed that the officer asked incriminating questions – "where is the marijuana" – and the issue is whether Mr. Jimma was in custody during the interrogation. Even though this questioning occurred at the roadside and not in a police station, the trial court erred in ruling he was not in custody.[3]

An individual is considered to be in custody for purposes of Miranda not only when he is formally arrested, but any time "the defendant's movement was restricted at the time of questioning." State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Warnings are required when the suspect is "in custody at the station or otherwise deprived of his freedom of action in any significant way." Orozco v. Texas, 394 U.S. 324, 327, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969) (quoting Miranda, 384 U.S. at 477) (emphasis in original).

A person is in custody if, under the totality of the circumstances, a reasonable person would "have felt he or she was not at liberty to terminate the interrogation and leave." United States v. Craighead, 539 F.3d 1073, 1082 (9th Cir. 2008) (citing Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)). The question is

[3] This Court reviews the trial court's determination of the custodial question *de novo*. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

"whether a reasonable person in [the defendant's] position would have felt deprived of his freedom of action in any significant way, such that he would not have felt free to terminate the interrogation." Id.; State v. Heritage, 152 Wn.2d at 218.

It is true that "[a] detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of Miranda" and "Washington courts agree that a routine Terry stop is not custodial for the purposes of Miranda." Id. at 218. In general, ordinary traffic stops of a driver are "presumptively temporary and brief," do not leave the motorist "completely at the mercy of the police," and consequently do not place the driver 'in custody' for the purposes of Miranda. Berkemer v. McCarty, 468 U.S. 420, 437, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

However, "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Id. at 440; see also Pennsylvania v. Bruder, 488 U.S. 9, 10 n. 1, 109 S. Ct. 205, 102 L. Ed. 2d 172 (1988) (per curiam) (noting Berkemer did not announce an absolute rule for all

motorist detentions and admonishing lower courts to be vigilant in ensuring that police do not "delay formally arresting detained motorists, and ... subject them to sustained and intimidating interrogation at the scene of their initial detention.")

Although police-motorist encounters are a common occurrence, it was relatively recently that the United States Supreme Court declared that when a police officer makes a traffic stop, both the driver and passenger are seized within the meaning of the Fourth Amendment. Brendlin v. California, 551 U.S. 249, 251, 127 S. Ct. 2400, 2403, 168 L. Ed. 2d 132 (2007). In reversing the California Supreme Court's decision that Brendlin was not seized, the Supreme Court asked "whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself" and answered its own question in the negative:

> We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission. A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road…

551 U.S. at 256-57 (internal citation omitted) (emphasis added).

The Supreme Court emphasized that in a roadside traffic stop, it is "reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety." Id. at 258. This "societal expectation of 'unquestioned [police] command" is "at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission." Id. at 258 (internal citations omitted).

While Brendlin is a Fourth Amendment case, the Supreme Court's recognition of police domination over a passenger in a roadside encounter speaks to Mr. Jimma's experience and validates his Fifth Amendment claim that he was subjected to custodial interrogation complete with Miranda protections.

b. Mr. Jimma was 'in custody' for Miranda purposes because a reasonable person in his position would not have felt free to terminate the interrogation.

In reaching the erroneous conclusion that Officer Miller did not conduct a custodial interrogation, the trial court relied heavily on the Washington State Supreme Court's analysis in State v. Heritage. The case is factually inapposite, especially when analyzed in terms of where the interrogation occurred, who conducted it, and how it transpired.

In Heritage, two unarmed public park security officers, dressed in shorts and "Security Officer" t-shirts, rode their bikes up to a group of youths they suspected to be smoking marijuana. 152 Wn.2d 212. "They did not physically detain or search anyone" and "[t]hey immediately made it clear that they did not have the authority to arrest." Id. at 219 (emphasis added). They asked one of the juveniles if the marijuana pipe they saw belonged to him, but he denied ownership. The officers then "addressed the entire group" with "Whose marijuana pipe is it?" and "We're Park Security, let's move it along." Id. at 213. This is when Heritage confessed: "It's my pipe." Id.

The setting of Mr. Jimma's encounter with Officer Miller suggests this was not a situation a reasonable person would have felt at liberty to terminate and leave. One certainly need not be handcuffed or physically restrained to be "restrained" for purposes of the custody analysis. Craighead, 539 F.3d at 1086. Unlike Heritage, who was in an open public park, Mr. Jimma was traveling at night in a private motor vehicle. Heritage was free to ignore the security officers as they cycled toward him and could have easily moved elsewhere, but Mr. Jimma was far less free. For as long as Officer Miller detained the driver, Mr. Jimma would be stuck at the side of the road. For him, to avoid Officer

Miller's interrogation, Mr. Jimma would have had to abandon the security of his chosen mode of travel and start walking along a darkened roadway. As Brendlin makes clear, the reasonable societal expectation of the power dynamic in a citizen's roadside encounter with the police is that the police dictate if, and when, the encounter will end. 551 U.S. at 258. Indeed, when Officer Miller questioned Mr. Jimma, he was still holding onto the driver's identification, while Heritage and his companions were not asked for identification until after the confession. 1RP 34**;** Heritage, at 213.

The interrogators who stopped Heritage were unarmed t-shirt clad security officers on bikes. Id. at 219. Mr. Jimma and his companions were detained by a police officer whose show of power included a uniform, sidearm, patrol car, and intrusive lights. Officer Miller even made it a point to let Mr. Jimma and his fellow travelers know that he was no rookie, but a veteran drug crime fighter who would not be fooled. And, Mr. Jimma did not initiate this contact. "[W]hen the confrontation between the suspect and the criminal justice system is instigated at the direction of law enforcement authorities, rather than the suspect, custody is more likely to exist." United States v. Griffin, 922 F.2d 1343, 1351 (8th Cir. 1990).

Indeed, the manner in which Mr. Jimma was interrogated stands in stark contrast to what happened in Heritage, where no custodial interrogation occurred. Officer Miller pressed the car's occupants with stories of his drug detection abilities (and may have even claimed to be in the position to get a warrant) in order to compel them to abandon their denial of possession of contraband. Given that approach, a reasonable person in Mr. Jimma's shoes would not have felt free to terminate the interrogation. The security officers who detained Heritage, on the other hand, admitted to her group they had limited power over her: "any doubts she might have had about the security guards' authority were eliminated by the guards' assurances, before questioning, that they could not arrest her." Id. at 219. That is not how Mr. Jimma was treated. "[T]he absence of police advisement that the suspect is not under formal arrest, or that the suspect is at liberty to decline to answer questions, has been identified as an important indicium of the existence of a custodial setting." Griffin, 922 F.2d at 1350.

Other courts reached this conclusion regarding other police-passenger encounters with strikingly similar fact patterns. For example, in State v. Hackett, 944 So. 2d 399, 400 (Fla. Dist. Ct. App. 2006), the

police arrested a driver for criminal possession of drug paraphernalia, saw a bag of cocaine in the car, and questioned two passengers as to whose bag it was. The passengers were deemed to have been subjected to a custodial interrogation requiring Miranda warnings. Likewise, in People v. Patel, 730 N.E.2d 582 (Ill. App. Ct. 2000) a police officer made a routine traffic stop which led to the driver's arrest. Next, the officer requested that Patel, an underage passenger like Mr. Jimma, show him his driver's license. In the process, the officer detected "signs of [illegal for Patel] alcohol consumption." With this knowledge – of a criminal matter irrelevant to Patel's driver's stop – Officer Rivkin asked Patel to tell him how much he had to drink, much like Officer Miller asked, twice, "who has the marijuana."

The Illinois court held that a reasonable person in Patel's position would not believe that he was free to leave and his confession should have been suppressed because no Miranda warnings had been given. Id. at 585.

> [O]nce the driver of the vehicle was taken into custody, the basis for the initial traffic stop ceased. Officer Rivkin's decision to question the passenger of the detained vehicle regarding matters not germane to the initial traffic stop transformed this situation into a custodial interrogation outside the ambit of Berkemer.

Id. at 605-06.

Here too, the answer to the question of "whether a reasonable person in [Mr. Jimma's] position would have felt deprived of his freedom of action in any significant way, such that he would not have felt free to terminate the interrogation," is a resounding yes. Craighead, 539 F.3d at 1082. Mr. Jimma was in custody for purposes of Miranda and his Fifth Amendment rights were violated when the officers subjected him to a custodial interrogation without the required warnings, and when the trial court admitted his statements notwithstanding the omission. As the Eighth Circuit recognized:

> The application of the rule of Miranda is not a process to be avoided by law enforcement officers. Custody should not be a mystical concept to any law enforcement agency. We see no reason why doubts as to the presence or absence of custody should not be resolved in favor of providing criminal suspects with the simple expedient of Miranda warnings.
> …
> The constant reluctance of law enforcement to advise suspects of their rights is counterproductive to the fair administration of justice in a free society. … Such practices protect the integrity of the criminal justice system by assuring that convictions obtained by means of confessions do not violate fundamental constitutional principles.

Griffin, 922 F.2d at 1356.

Mr. Jimma's convictions, which relied on the unlawful interrogation, violate fundamental constitutional principles and must be reversed.

c. The erroneous admission of the unwarned statement was not harmless, and the conviction should be reversed.

Miranda is a constitutional requirement. Dickerson v. United States, 530 U.S. 428, 438, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). As such, the State bears the burden of proving that the admission of a statement obtained in violation of Miranda was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In other words, the State must show that the admission of the confession did not contribute to the convictions. Fulminante, 499 U.S. at 296 (citing Chapman, 386 U.S. at 26).

The State cannot meet this heavy burden here. The State proved the marijuana possession case through Mr. Jimma's unwarned confession and the testimonial act of surrendering the drugs. The State cannot show that this probative and damaging evidence did not

contribute to the conviction.[4] The State cannot show that the improper admission of Mr. Jimma's confession was harmless beyond a reasonable doubt. Accordingly, the conviction should be reversed and remanded for a new trial. Chapman, 386 U.S. at 24.

2. The Trial Court Wrongfully Denied Mr. Jimma's Suppression Motion Where The Record Fails To Establish The Arresting Officer Had The Requisitendividualized Suspicion To Justify Detaining Mr. Jimma.

a. Warrantless seizures are presumptively unlawful.

The Fourth Amendment of the United States Constitution guards against unreasonable seizures of persons and effects absent a warrant. United States v. Mendenhall, 446 U.S. 544, 550, 100 S.Ct. 1970, 64 L.Ed.2d 497 (1980). Article I, section 7 of the Washington Constitution's prohibition against governmental intrusion into individuals' private affairs absent authority of law provides even stronger privacy protection than the United States Constitution. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002) ("It is well settled that

[4] State v. Lozano, 76 Wn. App. 116, 117, 882 P.2d 1191(1994) (Fifth Amendment remedy for Miranda violation limited to suppression of admission and testimonial act of surrendering the drugs, but not the contraband itself).

article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment.”).

Warrantless searches and seizures are “per se unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution.” State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Although there are a few “jealously and carefully drawn” exceptions to the warrant requirement, these are not intended to undermine the warrant requirement. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979)); State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). The State bears a “heavy burden” to show a seizure falls within the scope of one of the exceptions to the warrant requirement, and must do so “by clear and convincing evidence.” State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

A Terry stop—a brief investigatory seizure of an individual—is one of the exceptions to the warrant requirement. A police officer is only permitted to conduct a Terry stop and infringe on an individual’s private affairs if she has a “well-founded suspicion that the defendant

engaged in criminal conduct." State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). The State must show the Terry stop was reasonable by pointing to specific and articulable facts that "show by clear and convincing evidence that the Terry stop was justified." Id. "Terry requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime." State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513, 516 (2002) (noting that "proximity and evidence of temporary handling [of contraband] may be insufficient to establish constructive possession.") Id. at 182.

b. Vehicle passengers retain their privacy rights when the vehicle in which they travel is lawfully stopped for a traffic infraction.

Under Article I, section 7, "[i]ndividual constitutional rights are not extinguished by mere presence in a lawfully stopped vehicle." State v. Parker, 139 Wn.2d 486, 498, 987 P.2d 73 (1999). The stop must be limited to the driver's traffic infraction; law enforcement officers are thus prohibited from asking a passenger for identification based only upon the vehicle stop. State v. Brown, 154 Wn.2d 787, 796, 117 P.3d 336 (2005); State v. Rankin, 151 Wn.2d 689, 698-99, 92 P.3d 202 (2004); see State v. Barwick, 66 Wn. App. 706, 709, 833 P.2d 421

(1992) (passengers are not required to carry identification). Similarly, an officer may not search a passenger or his belongings based upon the arrest of the driver or another occupant. Parker, 139 Wn.2d at 502-03; State v. Adams, 144 Wn. App. 100, 107, 181 P.3d 37 (violation of art. I § 7 to conduct pat down search of passenger in stolen car), rev. denied, 164 Wn.2d 1033 (2008); State v. Mendez, 137 Wn.2d 208, 219-20, 970 P.2d 722 (1999) (officer cannot order a passenger to exit or remain in the car without first articulating "an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens").

In contrast, under the Fourth Amendment, the officer may order a passenger out of the car as a precautionary measure, without a reasonable suspicion that the passenger poses a safety risk. Brendlin v. California, 551 U.S. at 257-58. Maryland v. Wilson, 519 U.S. 408, 414-15, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997).

c. In the absence of individualized suspicion, Officer Miller subjected Mr. Jimma to an unlawful detention for a criminal investigation unrelated to the original traffic stop of the driver.

A seizure occurs when "an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of

authority." Rankin, 151 Wn.2d at 695. In determining at what point a person is seized, the actions of the police officer are viewed objectively. State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). A person is seized when they are stopped by a police officer for investigatory reasons. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).[5]

Here, the illegality of the seizure arose when Officer Miller refused to take no for an answer and continued to press the car's occupants after they denied having marijuana in the car. 1RP 56-58. At that point, Officer Miller was exercising his authority to keep the car occupants under his control and to press them into giving an incriminating statement. He did not have a reason to believe that the driver had consumed marijuana. 1RP 54. Officer Miller chose to press on even though he lacked individualized suspicion with respect to any one of the car's occupants. This course of action against Mr. Jimma was illegal.

The police have no authority to effectuate a Terry stop or frisk in the absence of "reasonable, articulable, and individualized suspicion." State v. Abuan, 161 Wn. App. 135, 141, 257 P.3d 1 (2011)

[5] A passenger is also seized when the police effectuate a traffic stop of the driver. Brendlin. v. California, supra.

(emphasis added). Abuan was a passenger in a car whose driver was initially stopped for expired registration tabs and then arrested for driving with a suspended license. When the police arrested the driver, they also asked Abuan to come out of the car so it could be searched. The police then told Abuan "that he was not under arrest but that [they] wanted to search Abuan for weapons." Id. at 143. When Abuan disclosed he had marijuana on him, he was handcuffed, and placed under arrest for possession of marijuana. On appeal, the Court reversed Abuan's multiple convictions because the pat-down search was a violation of Abuan's state constitutional rights:

> Absent a reasonable, articulable, and individualized suspicion that a passenger is armed and dangerous or independently connected to illegal activity, the search of a passenger incident to the arrest of the driver is invalid under article I, section 7.

Id. at 146-47, citing State v. Jones, 146 Wn.2d at 336 (emphasis added).

Mr. Jimma was not frisked, but he was certainly seized. "Where an officer commands a person to halt or demands information from the person, a seizure occurs." State v. Cormier, 100 Wn. App. 457, 460-61, 997 P.2d 950 (2000) (emphasis in original); State v. Gleason, 70 Wn. App. 13, 17, 851 P.2d 731 (1993) (holding person seized when police officer called out "can I talk to you a minute?"); State v. Ellwood, 52

Wn. App. 70, 73-74, 757 P.2d 547 (1988) (finding seizure occurred when police officer told defendant to "wait right here").

The trial court did not understand that Officer Miller's actions toward Mr. Jimma required individualized suspicion: "So, doesn't the suspicion have to be directed towards somebody, or is it just the general somebody?" 1RP 72, 80, 83. In State v. Grande, 164 Wn.2d 135, 187 P.3d 248 (2008), our Supreme Court made clear that when a police officer notices the odor of marijuana coming from a car, he does not have probable cause to arrest everyone in it: "article I, section 7 of the Washington Constitution requires individualized probable cause for each occupant of the vehicle." 164 Wn.2d at 138 (emphasis added).

Like Mr. Jimma, Grande was a passenger in a car stopped for a traffic infraction and found himself under arrest when the officer smelled marijuana. On appeal, the unanimous Supreme Court affirmed the personal and individualized nature of our constitutional privacy rights:

> Each individual possesses the right to privacy, meaning that person has the right to be left alone by police unless there is probable cause based on objective facts that the person is committing a crime.

Id. at 140.

There is a long line of cases confirming this fundamental notion, including State v. Rankin, which held that vehicle passengers may not be seized "unless the officer has an articulable suspicion that that person is involved in criminal activity." 151 Wn.2d at 699 (emphasis added). Accord State v. Mendez, 137 Wn.2d 208 (police must have a basis to believe that their safety is at risk to order passengers out of the car or to remain in the car); State v. Parker, 139 Wn.2d at 498 (arrest of a driver does not provide authority of law to search personal belongings of nonarrested passengers).

Officer Miller may have been interested in finding out if there was illegally possessed marijuana in the car, but that did not give him the authority of law to detain everyone in it. The occupants were not obligated to prove their innocence – or confess their guilt – as the officer wished them to do.

> Our state constitution protects our individual privacy, meaning that we are free from unnecessary police intrusion into our private affairs unless a police officer can clearly associate the crime with the individual…
>
> Unless there is specific evidence pinpointing the crime on a person, that person has a right to their own privacy and constitutional protection against police searches and seizures.

Grande, 151 Wn.2d at 145-46 (emphasis added).

Grande was a probable cause to arrest case – not a reasonable suspicion to detain case – but the difference is in the quantity of evidence required for the intrusion and a Terry stop must also be predicated on individualized suspicion. Grande controls because even in a Terry detention, the officer must have had a well-founded and articulable suspicion, supported by objective facts that the individual is or has been involved in criminal activity. State v. Duncan, 146 Wn.2d at 172 ("Terry requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime.") (emphasis added).

The Fourth Amendment too requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S. Ct. 447, 451, 148 L. Ed. 2d 333 (2000) (sweeping drug interdiction checkpoints violated Fourth Amendment) citing Chandler v. Miller, 520 U.S. 305, 308, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). Ybarra v. Illinois, 444 U.S. 85, 92, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) (constitutional protections against illegal search and seizure are "possessed individually.")

Mere proximity to others independently suspected does not justify a police stop. State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). In fact, indiscriminate warrantless seizures of the many – predicated on the theory that one among them may be a criminal – are unconstitutional. Floyd v. City of New York, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013), appeal dismissed (Sept. 25, 2013) (ruling that New York City Police Department's stop-and-frisk program that "lacke[ed] individualized reasonable suspicion" was unconstitutional and that the City was liable for violating the plaintiffs' Fourth and Fourteenth Amendment rights, due to the police department's widespread practice of suspicion-less targeting of African-American and Latino suspects).[6]

In focusing on what it labeled the officer's "right to investigate" the trial court erred. 1RP 130. The analytical focus should have been on Mr. Jimma's "right to be left alone." Grande at 140. This is not to say that Officer Miller could do nothing at all when he came to believe the underage driver was transporting marijuana in her car. He, like the officer in Grande, did not have to "walk away;" he could have pursued a search warrant because "he had probable cause to search the vehicle."

[6] Since 2002, the NYPD stop-and-frisk program at issue in Floyd subjected nearly 4 million of innocent New Yorkers to police stops and street interrogations. See http://www.nyclu.org/content/stop-and-frisk-data (last accessed December 14, 2015).

Id. at 146. However, it was unlawful for him to continue to detain and question Mr. Jimma and to do so without letting him know that he could leave without incriminating himself.

d. Mr. Jimma's convictions should be reversed.

The exclusionary rule serves to protect individual privacy rights, deter law enforcement from violating those rights by illegally gathering evidence, and preserve the dignity of the courts. State v. Rife, 133 Wn.2d 140, 148, 943 P.2d 266 (1997). "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." Garvin, 166 Wn.2d at 254 (quoting State v. Duncan, 146 Wn.3d at 176). When an unconstitutional search or seizure occurs, "all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

The officer's unjustifiable detention of Mr. Jimma led to his arrest for marijuana which in turn led to the officer's discovery of a handgun on Mr. Jimma's person. The order denying Mr. Jimma's motion to suppress the evidence and his convictions for possession of marijuana and unlawful possession of a firearm should be reversed. State v. Adams, 144 Wn. App. at 107.

F. CONCLUSION.

Officer Miller's custodial interrogation of Mr. Jimma should have been preceded by Miranda warnings. The roadside seizure – effectuated in the absence of individualized suspicion – violated Mr. Jimma's article I, section 7 right to privacy and was also unreasonable under the Fourth Amendment.

Without the evidence obtained as a result of the unwarned interrogation and unconstitutional seizure, no evidence supports his convictions for possession of marijuana or unlawful possession of a firearm. Both convictions should be reversed.

DATED this 15th day of December, 2015

Respectfully submitted,

s/ *Mick Woynarowski*

_____

Mick Woynarowski – WSBA 32801
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73422-9-I
v.	)	
	)	
JAHROD JIMMA,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] JAHRON JIMMA 382428 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF DECEMBER, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710