Supreme Court No. 90165-1

Court of Appeals No. 31224-1-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

EULOGIO CASTRO ROMERO, Petitioner

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner, Eulogio Romero Castro, asks this Court to accept review of the Court of Appeals decision terminating review, designated in part II of this petition.

II. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals decision filed March 13, 2014, which affirmed his conviction and sentence. A copy of the Court's unpublished opinion is attached as Appendix A. This petition for review is timely made.

III. ISSUE PRESENTED FOR REVIEW

Is An Appellant's Constitutional Right To Not Be Compelled To Incriminate Himself Violated When An ICE Agent Conducts A Custodial Interrogation To Acquire Information Directly Related To The State's Case Without Giving Advisement Of Miranda Rights?

IV. STATEMENT OF THE CASE

Eulogio Castro Romero worked full time, had a driver's license, papers to work, a home, and a social security card. He had lived in the United States for 23 years and had been dealing with immigration for the previous 16 years. (Vol. 5RP 315;334).

Based on information from Mr. Romero's estranged wife the Moses Lake Police Department (MLPD) obtained a search warrant for his home. (CP 5-6). Officer Bernard of MLPD contacted Immigration and Customs Enforcement (ICE) prior to execution of the warrant. (CP 6; Vol. 3RP 141-42).

Mr. Romero was advised of his Miranda rights as officers executed the warrant. (Vol. 1RP 24). The advising officer noted that Mr. Romero spoke in "broken" English. He did not ask Mr. Romero to sign a paper indicating he read and understood his rights. (Vol. 1RP 27-28). Mr. Romero made two statements to officers: "What you find in my house is not mine; you or someone planted it" and also that he lived in the home with his son. (CP 7; Vol. 1RP 25-26).

After officers executed the warrant, Officer Bernard again contacted ICE and learned, "[t]hey would be sending a 'detrainer' to the jail for Romero." (CP 8). On the afternoon of July 16, 2012, the day after the warrant was served, the court appointed counsel for Mr. Romero at his first appearance. (CP 121; Vol. 2RP 4).

That same day, ICE agent Jamie Waite went to the Grant County jail and spoke with Mr. Romero. Mr. Romero did not have an attorney with him during the interrogation. The record is unclear

as to whether the ICE agent interrogated Mr. Romero before or after an attorney had been assigned to him. (Vol. 1RP 46).

On July 24, defense counsel filed a demand for discovery, including "...any papers, documents...which the State intends to use at the hearing or trial, or which are in any way related to the defendant...or this case" and "to the extent request materials or information are not within the knowledge, possession or control of the prosecuting attorney, the defendant requests the assistance of the prosecuting attorney in obtaining the information or materials pursuant to CrR 4.7(d)..." (CP 124-25). At a hearing held August 21, the State averred it had provided the discovery required by CrR 4.7 to the defense. (CP 13).

At a hearing held on September 27, the State informed the court the ICE agent had prepared two reports on Mr. Romero's immigration status, discoverable under CrR 4.7. It did not, however, have copies of the reports. (Vol. 2RP 1). Defense counsel requested a dismissal of the charges because of late discovery, pointing out for the court that the forms/reports were not going to be given out without a subpoena approved by a federal court. (Vol. 2RP 16). The court declined to dismiss the charges and denied the State's motion for a continuance. (Vol. 2RP 16;20).

On September 19, the court held a CrR 3.5 hearing. Agent Waite testified he was assigned to conduct interviews in state and local jails. Once he established alienage, he would apprehend the individual and move the immigration enforcement process forward. (Vol. 1RP 36). He met Mr. Romero at the jail, asked him a series of questions about his citizenship, and recorded the answers on two agency forms, I-213 and I-826. (Vol. 1RP 37;40).

Agent Waite testified that under the rules of the Department of Homeland Security the documents he filled out were only to be used for immigration matters. For the release of the documents, a separate request form was required to be submitted for each form. (Vol. 1RP 39). The record was silent as to what steps were taken to request release of the form, but Agent Waite said, "...And what was agreed to by the legal staff was that I could be here present and I could testify as questions pertaining to those documents here..." (Vol. 1RP 39).

When asked under direct examination, "How were you intending to use the statements elicited from the defendant?" Agent Waite never answered the specific question, but rather, stated, "...during the interview on July 16 – there are a few sheets of paper we filled out. One of them is called the Form I-826, and it

is a notice of rights." (Vol. 1RP 37). The I-826 notice of rights form did not include Miranda rights.

Defense counsel objected because the interrogation elicited incriminating responses from Mr. Romero without the benefit of Miranda warnings. The State conceded that Agent Waite had not advised Mr. Romero of his Miranda rights prior to the custodial interview. (Vol. 1RP 62). Nevertheless, the State argued, "Miranda's not needed in this situation because of the purpose of the interrogation is not – it's not criminal – it's not to elicit an incriminating response; it's for an administrative proceeding." (Vol. 1Rp 45).

In a memo, the trial court ruled in pertinent part as follows:

> "...[T]he Defendant made the statement while he was in custody in response to questions Agent Waite put to him. The evidence establishes the statement was not the product of coercion and was made voluntarily. The evidence does not establish that Mr. Waite advised the Defendant of his Miranda rights. However, Officer [sic] read the Defendant his rights earlier that day. The authorities submitted by the State support the conclusion that this was sufficient. The State's motion to admit the second statement to Mr. Waite is therefore granted." CP 32.

That ruling was later memorialized in the court's findings of fact and conclusions of law. (CP 84-85).

At trial, Agent Waite testified that during his questioning, Mr. Romero told him that he had been born in Mexico, did not have papers to be in the United States, and did not currently possess a "green" card. (Vol. 3RP 135).

After a jury trial, he was found guilty of possession of a controlled substance, and alien in possession of a firearm without an alien firearm license. (Vol. 5RP 373). Mr. Romero appealed his convictions. (CP 109).

On appeal, Mr. Romero assigned error to the trial court's Finding of Fact 2.5:

"Agent Waite asked the Defendant some questions relating to his immigration status for the purpose of an upcoming immigration hearing." (CP 85);

and Conclusion of Law 3.1:

> "The Defendant's statements to Officer Bernard and Jamie Waite were admissible because they were made freely and voluntarily; furthermore, the statements were custodial statements in response to interrogation but made after the Defendant was informed of his Constitutional rights pursuant to *Miranda,* understood those rights and waived them." (CP 85).

In its unpublished opinion, the Court of Appeals affirmed the trial court, citing that the Miranda warnings given by the police

officer were effective when an ICE agent later interrogated Mr. Romero on a different matter 10 to 18 hours later. *Slip Opinion* at 4.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant discretionary review are set forth in RAP 13.4(b). Petitioner believes this Court should accept review of these issues because the decision of the Court of Appeals involves a significant question of law under the Constitution of the United States and the Washington State Constitution.

The Fifth Amendment of the United States Constitution applied to the states through the Fourteenth Amendment, provides that no person shall be compelled in any criminal case to be a witness against himself. Article I, section 9 of the Washington Constitution provides that no "person shall be compelled in any criminal case to give evidence against himself." Courts are to liberally construe both clauses to safeguard the right against self-incrimination. *State v. Easter,* 130 Wn.2d 228, 235-36, 922 P.2d 1285 (1996).

While the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation, accused persons must be informed of their right of silence and afforded a continuous opportunity to exercise it. *Miranda v. Arizona,* 384 U.S. 436, 490, 86 S.Ct. 1602, 1633, 16 L.Ed.2d 694 (1966). A Court determines applicability of the constitutional protections by an objective test: the belief of a reasonable person in the defendant's position. *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

This Court has already determined that *Miranda* applies not only to law enforcement officers, but to *any* state agent who testifies for the prosecution regarding a defendant's custodial statements. *State v. Heritage,* 152 Wn.2d 210, 216, 95 P.3d 345 (2004) (emphasis added). Custodial interviews by probation officers, court-appointed psychiatrists, and IRS investigators all qualify as custodial interrogations by an agent of the State, requiring advisement of constitutional rights. *State v. Willis,* 64 Wn.App. 634, 638, 825 P.2d 357 (1992). Mr. Romero argues the list of State agents also includes federal agents of immigration and custom enforcement.

Here, at the time the search warrant was executed, officers advised Mr. Romero of his constitutional right to not incriminate himself. Agent Waite represented, and the trial court made a finding, that the agent's questions were for gathering information for an immigration enforcement matter. However, the nature of the procedure during which a question is asked is not decisive; the nature of the question is. *In re Gault,* 387 U.S. 1, 47, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). This Court noted in *Wheeler,* "We recognize the potential for abuse by law enforcement officers under the guise of seeking 'objective' or 'neutral' information, deliberately elicit an incriminating statement from a suspect." *State v. Wheeler,* 108 Wn.2d 230, 239, 737 P.2d 1005 (1987). That is exactly the case here.

Despite the Agent's testimony that the questions about Mr. Romero's identity, place of birth, and papers regarding his authorization to be in the United States were for an administrative matter, his questioning amounted to custodial interrogation. Further, not only were the questions likely to and intended to elicit incriminating responses on the criminal charges, but the answers were promptly reported to the police.

The trial court and the Court of Appeals ruled, in this case, that Mr. Romero knowingly and intelligently waived his right to remain silent when he answered Agent Waite's questions. This is error. The key inquiry in determining whether a waiver is valid is whether the defendant knew of his rights during questioning and the consequences of waiving those rights. *State v. Medlock,* 86 Wn.App. 89, 100, 935 P. 2d 693 (1997)(citing *Patterson v. Illinois,* 487 U.S. 285, 293, 108 S.Ct. 2389, 101 .Ed.2d 261 (1988). The test is whether the suspect knew he had the right to remain silent. *State v. McDonald,* 89 Wn.2d 256, 264, 571 P.2d 930 (1977), *overruled on other grounds, State v. Sommerville,* 111 Wn.2d 524, 530-31, 760 P.2d 932 (1988).

At trial, Mr. Romero testified he had been dealing with immigration officials for the previous 16 years. At the time he was arrested, he was on bond from I.C.E. (Vol. 3RP 136-37). The question here is not whether Mr. Romero received his *Miranda* advisements when he was arrested on a criminal matter; rather, the question is whether he knew he had the right to remain silent when questioned by Agent Waite the following day on a seemingly unrelated matter. As the court noted in *Willis,* "It seems to us that an accused, whose essential obligation it is to "report to" and

"answer questions posed by a probation officer," is under even heavier psychological pressure to answer questions put by his probation officer, a figure of both authority and trust." *Willis,* 64 Wn.App. at 639 (internal citations omitted).

Similarly, Mr. Romero had a long history with I.C.E. and because he was on bond, felt obligated to answer questions. The Agent testified his assignment was to interview suspected criminals at jail regarding their alienage, was twice called by police to be involved in the case, and promptly reported the interrogation information to authorities working the criminal case. Under the guise of seeking answers to administrative questions, the Agent obtained information to shore up the criminal case.

Miranda warnings must be given when a suspect endures custodial interrogation by an agent of the state. *State v. Sargent,* 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). The law presumes that statements made by a suspect while in custody were compelled in violation of the privilege against self-incrimination. *State v. Corn,* 95 Wn.App. 41, 57, 975 P.2d 520 (1999). Mr. Romero was entitled to be advised he had the right to remain silent rather than answer the Agent's questions. His responses were not a product of a knowing and intelligent waiver of his rights.

Statements made by a suspect who does not know of the option to remain silent are not voluntarily given.

Failure to provide the required warnings and obtain a valid waiver requires exclusion of any statements obtained. *Missouri v. Seibert,* 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). For all these reasons the trial court should have suppressed Mr. Romero's custodial statements.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Romero respectfully asks this Court to accept review and reverse his conviction.

Respectfully submitted this 14th day of April 2014.

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APPENDIX A

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. EULOGIO CASTRO ROMERO, Appellant.	)	No. 31224-1-III UNPUBLISHED OPINION

Brown, J.—Eulogio Castro Romero appeals his convictions for possessing methamphetamine and possessing a firearm without an alien firearm license. He contends the trial court erred in admitting his custodial interrogation statements to a federal immigration agent and insufficient evidence supports his conviction for possessing a firearm without an alien firearm license. We affirm.

FACTS

Law enforcement executed a search warrant at Mr. Romero's residence on July 15, 2012 around 10:30 p.m. Moses Lake Police Officer Raymond Bernard read Mr. Romero his *Miranda*[1] rights from a department issued card. Mr. Romero responded that he understood and gave statements. The search results partly included methamphetamine on Mr. Romero's bedside table and a firearm under his mattress.

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

The next day, around 10 to 18 hours later, United States Immigration and Customs Enforcement Agent Jaime Waite took additional statements from Mr. Romero while he was in jail without giving fresh *Miranda* warnings. The trial court admitted these statements at trial after denying Mr. Romero's CrR 3.5 motion to suppress them. A jury found him guilty as charged of possessing methamphetamine and possessing a firearm without an alien firearm license. He appealed.

ANALYSIS

A. *Miranda* Warnings

The issue is whether the trial court erred in admitting Mr. Romero's custodial interrogation statements to Agent Waite. Mr. Romero solely contends his statements are inadmissible because Agent Waite obtained them without giving fresh *Miranda* warnings. We review the adequacy of *Miranda* warnings de novo. *State v. Campos-Cerna*, 154 Wn. App. 702, 708, 226 P.3d 185 (2010). We review CrR 3.5 factual findings for substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence supports a factual finding if "a sufficient quantity of evidence [exists] in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Generally, in addition to due process protections against use of coerced statements, the State may not admit as trial evidence any statements a suspect makes during custodial interrogation unless it proves, by a preponderance of evidence, the suspect received fully effective *Miranda* warnings and knowingly, intelligently, and

voluntarily waived his or her *Miranda* rights before making the statements.[2] *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Colorado v. Connelly*, 479 U.S. 157, 168, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Mr. Romero does not invoke due process protections here. The State does not dispute that his conversation with Agent Waite constituted custodial interrogation.[3]

"[C]ourts have generally rejected a *per se* rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners." *United States v. Andaverde*, 64 F.3d 1305, 1312 (1995) (citing *Wyrick v. Fields*, 459 U.S. 42, 49, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982)). Instead, courts evaluate the totality of the circumstances in determining whether law enforcement needed to give the suspect fresh *Miranda* warnings. *See, e.g., United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1128-30 (9th. Cir. 2005) (holding *Miranda* warnings were still effective after 16 hours); *Guam v. Dela Pena*, 72 F.3d 767, 769-70 (9th Cir. 1995) (holding *Miranda* warnings were still effective after 15 hours); *Puplampu v. United States*, 422 F.2d 870, 870 (9th Cir. 1970) (holding *Miranda* warnings were still effective after two days); *Maguire v. United States*, 396 F.2d 327, 331 (9th Cir. 1968) (holding *Miranda* warnings

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[2] At a minimum, *Miranda* warnings must inform a suspect "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him." 384 U.S. at 479.

[3] A suspect is in custody when law enforcement formally arrests the suspect or similarly restrains his or her freedom so that a reasonable person under the circumstances would not feel free to terminate the encounter and leave. *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). A suspect is subject to interrogation when law enforcement expressly questions the suspect or initiates some functional equivalent, including words or conduct that law enforcement

were still effective after three days); *State v. Blanchey*, 75 Wn.2d 926, 931, 454 P.2d 841 (1969) (holding *Miranda* warnings were still effective after four days).

Considering these judicial opinions, we conclude the original *Miranda* warnings were still effective 10 to 18 hours later, when Mr. Romero made his custodial interrogation statements to Agent Waite. A sufficient quantity of evidence exists in the record to persuade a fair-minded, rational person that Mr. Romero received fully effective *Miranda* warnings and knowingly, intelligently, and voluntarily waived his *Miranda* rights before making his statements. Substantial evidence supports the CrR 3.5 factual findings. The trial court did not err in admitting Mr. Romero's custodial interrogation statements to Agent Waite.

B. Evidence Sufficiency

The issue is whether sufficient evidence supports Mr. Romero's conviction for possessing a firearm without an alien firearm license. He contends the State did not prove he lacked the license.

The State must prove all essential elements of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient to support a guilty finding if "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). An evidence sufficiency

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should know are reasonably likely to elicit his or her incriminating response. *Rhode*

challenge "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the jury's assessment of witness credibility and evidence weight. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

A person is guilty of possessing a firearm without an alien firearm license if the person "carr[ies] or possess[es] any firearm," is not "a lawful permanent resident," and has not "obtained a valid alien firearm license." RCW 9.41.171. To apply for an alien firearm license, a person must provide "a copy of the applicant's passport and visa showing the applicant is in the country legally." RCW 9.41.173(4). Because Mr. Romero admitted he lacked any "papers" authorizing him to be in the country, a rational jury could reasonably infer he could not provide a copy of his passport and visa showing he was in the country legally. Report of Proceedings at 136. It was impossible for him to have obtained a valid alien firearm license because his immigration status categorically prohibited him from doing so. Therefore, the State produced sufficient evidence for the jury to find he lacked the license. In sum, sufficient evidence supports Mr. Romero's conviction for possessing a firearm without an alien firearm license.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

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Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Korsmo, C.J.

Culp, J.P.T.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Petitioner Eulogio Castro Romero, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid on April 14, 2014 to:

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Petition for Review

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