70564-4-I

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NO. 70564-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN STUM,

Appellant.

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

The Honorable Anita J. Farris, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. APPELLANT'S SELF-INCRIMINATING STATEMENTS SHOULD HAVE BEEN SURPRESSED.

In his opening brief, appellant Benjamin Stum asserts he was denied his Fifth Amendment right against self-incrimination when the Court failed to suppress an illegally obtained confession. Brief of Appellant (BOA) at 8-16. A central aspect of Stum's argument is that when Officer Atwood began his encounter with Stum, the officer informed Stum it was illegal to be in public with an open container of alcohol. BOA at 11-12. As explained in Stum's opening brief, given that Stum was carrying an open container of beer at that time, a reasonable person in Stum's experience would not have felt at liberty to terminate the encounter until the officer either issued a notice of infraction or indicated he would not do so. BOA at 11-12.

In response, the State fails to address the fact that Atwood told Stum that his possession of the open container of beer was illegal. Brief of Respondent (BOR) at 6-9. The State left this fact out of its statement of the facts and made no mention of it in argument. BOR at 4, 6-9. Simply ignoring this fact, however, does not make it go away. As argued in detail in appellant's opening

brief, the officer's verbal charge that Stum was committing an illegal act is central to determining whether a reasonable person in Stum's position would have felt unable to terminate the encounter. BOA at 11-12, 15.

When the proper legal standard is applied to all the facts of this case, the record shows that Stum was subjected to custodial interrogation before he was provided Miranda warnings. 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 v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995); State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004).

Essentially, the State's argument that a reasonable person in Stum's position would have felt free to terminate the encounter boils down to this: "The defendant was not handcuffed, was not told he could not leave, and was not patted down" and "There was not an overwhelming police presence and the defendant left the scene." BOR at 8. While these facts are true, when viewed in light of the total record, they do not support the State's position.

First, even though Stum was not handcuffed, he was told by Officer Atwood that he had committed an illegal act, was asked to produce his identification, and had his property taken away from him. Second, while Officer Atwood did not tell Stum he could not leave, he also did not tell Stum he could leave – a fact that was particularly important given the noted alcohol infraction. Third, although Stum was not patted down, Officer Atwood took Stum's weapon from him. Fourth, while there was not an overwhelming police presence, Atwood asserted his official authority by: introducing himself as an officer; taking Stum's knife; noting the alcohol infraction; verbalizing his suspicions about the explosion; and employing honed police interrogation techniques to pressure Stum into talking. Finally, although Stum ultimately was permitted to leave the scene, Stum did not know this would happen until the end of the encounter. Thus, that fact is irrelevant as to whether a reasonable would have felt free to leave during the actual encounter. See, BOA at 10-13.

Finally, the State suggests the encounter was merely an investigatory Terry stop. However, Officer Atwood detained Stum on the apparent ground that Stum had committed an alcohol infraction. Atwood did not issue a notice of infraction or inform

Stum that he would not be doing so. Thus, the detention remained open-ended and unresolved while Atwood proceeded to interrogate Stum about the fire. As such, the encounter exceeded the scope of either a legitimate detention for a civil infraction or a Terry stop. State v. France, 129 Wn. App. 907, 909-10, 120 P.3d 654 (2005).

For the reasons stated above, and in appellant's opening brief, this Court should find was Stum was subjected to custodial interrogation prior to being mirandized and should hold the trial court erred when it failed to suppress those statements.

2. APPELLANT ASSIGNS ERROR TO THE LATE-ENTERED FINDINGS AND CONCLUSIONS AND CLARIFIES FACTUAL STATEMENTS.

Although an appellant is usually required to assign error to 3.5 findings and conclusions in his opening brief, that was not possible here because the findings had not yet been entered into the record. BOA at 17; BOR at 6. Consequently, appellant now assigns error to the following findings of fact and conclusions of law:

- "Detective Atwood explained in testimony that it is an infraction to carry an open can of beer..." CP 127 at lines18-19.[1] To the extent

[1] Because the Findings of Fact are not formatted in a manner which lends itself well to appellate review (CP 126-31), appellant will

that this statement suggests Atwood did not inform Stum that this was an illegal act at the time of their encounter, this finding is in error. Compare, 1RP 13.

- "Mr. Stum had no issue placing his beer down, handing over his knife, and chatting with Detective Atwood." CP 127 at lines 23-24. Stum did not testify at the 3.5 hearing. Thus, there was no factual basis for determining whether or not he had an issue with these events.
- Appellant assigns error to all conclusions of law specific to this case. CP 129-30.[2] In other words, appellant does not assign error to those findings that merely set forth the correct legal standard, but assigns error to all other conclusions.

Appellant also takes this opportunity to acknowledge the State is correct that appellant had inadvertently misstated that the water and gas were turned off in the house (BOA at 3). It was the water and electricity that had been turned off. Additionally, appellant inadvertently forgot to include to specifically cite where in the record it states that Ferguson's son had told Stum he could be in the house. BOA at 3. That fact is supported at 3RP 116.

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quote the specific statement and reference the line number where the error is found.

[2] Again, the irregular formatting of the 3.5 conclusions makes it difficult to assign error in the customary manner.

B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this court should reverse Stum's conviction.

DATED this 12th day of March, 2014.

Respectfully submitted,

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BENJAMIN STUM,	)	
	)	
Appellant.	)	

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 12TH DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF MARCH 2014.

X Patrick Mayovsky