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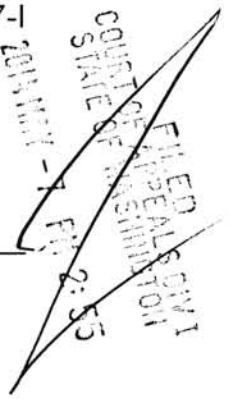


COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

KIEL DENT,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

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**BRIEF OF RESPONDENT**

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## A. ISSUES PRESENTED

1. Miranda[1] warnings must precede police questioning only when a suspect is in custody to the degree associated with formal arrest. Where a suspect is merely detained temporarily such that a reasonable person would not believe he had been formally arrested, statements made in response to non-coercive police questions are admissible. Taking the facts found by the trial court as true -- that Dent was seated on a bench, unhandcuffed, in an outdoor public location outside a drug store for a brief period of time while an officer sorted out a prescription-forgery complaint -- was Dent in custody to the degree associated with formal arrest when questioned by Redmond Police Officer D'Amico?

2. If the defendant's statements were improperly admitted, was the error harmless in light of overwhelming circumstantial evidence that Dent knew the prescription was forged or false?

## B. STATEMENT OF THE CASE

### 1. PROCEDURAL FACTS

Defendant Kiel Dent was charged by Amended Information with Violation of the Uniform Controlled Substances Act – Forged

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

Prescription -- and Identity Theft in the Second Degree. CP 6-7. Both offenses were alleged to have occurred simultaneously on May 11, 2012. CP 6-7.

After a CrR 3.5 hearing in which Redmond Police Officer Natalie D'Amico testified, the trial court admitted statements made by the defendant to D'Amico and issued written Findings of Fact and Conclusions of Law. CP 87. The court found 27 "Undisputed Facts," and concluded that all the statements were admissible because "Miranda was not applicable as the defendant was not in custody to the degree associated with formal arrest. These statements were voluntary." CP 88-91.

During a four-day trial, the State presented a copy of the forged prescription along with five witnesses: Officer D'Amico; Sung Kim, a mailbox business owner; Rite-Aid pharmacy technicians Kevin Christoph and Margaret Lyons; and Dr. Andrew Graustein. RP 92-214. The defense presented one witness: a pharmacy technician from a different store who testified that a woman had tried to pass a similar forged prescription from the same doctor a month earlier. RP 223-35. The parties stipulated that the defendant's handwriting was not on the prescription. RP 270. The jury found Dent guilty on both counts. CP 31-32. The court granted

the State's motion to vacate Count II, Identity Theft. CP 86. Dent received a sentence of 120 days in jail, with 90 days convertible to Community Center for Alternative Programs (CCAP). CP 62.

Dent timely appealed.

## 2. SUBSTANTIVE FACTS

On May 11, 2012, at about 1:10 p.m., Redmond Police Officer D'Amico was dispatched to a Rite-Aid drug store in Redmond, King County, Washington. CP 88. The 911 caller had reported that a person who identified himself as Kiel Dent was possibly passing a forged prescription. RP 12.[2] The 911 caller described the person specifically. RP 12-13. Officer D'Amico arrived a few minutes later and entered the store, where an employee pointed out Dent. RP 13; CP 88. Dent was on his phone and heading toward the exit. RP 12; CP 88. He matched the caller's description -- a 5-foot-11-inch black man in a white shirt -- and responded when the officer called out "Mr. Dent." RP 13, 150; CP88. Dent put down his phone, and Officer D'Amico asked Dent to step outside the store and to sit on a park-style bench just

[2] The Record of Proceedings in this case is divided into several volumes based on date, but the pages are sequentially numbered. The State is simply using "RP" to refer to all volumes of the record, with the corresponding page numbers.

outside the front doors, and Dent cooperatively did so. RP 13, 151. Dent was not handcuffed, and the officer's patrol car was parked about 15 feet away. RP 14. Officer D'Amico was standing while Dent was sitting on the bench. RP 15.

Officer D'Amico asked Dent for identification, and he provided a state ID card, which was returned to him. RP 15, 20. Officer D'Amico then asked Dent about seven or eight questions, including why he was at the store, why he needed Oxycodone, what injuries he had, the location of his pain, where he got the prescription and whether it was from a doctor, the name of the person who gave him the prescription and who his current doctor was. RP 15-19, 151-54; CP 88-89. Dent replied that he was there to fill a prescription for Oxycodone that he needed for injuries from a car accident, but he was unable to provide details of the accident or the injuries. RP 15-19, 151-54; CP 88-89. He said he received the prescription from a family friend whom he thought was a doctor, but he did not know the name of that person and did not know the name of his current physician. RP 15-19, 151-54; CP 88-89. Dent volunteered that he received the prescription from someone at a house between Burien and White Center. RP 17, 154; CP 89.

Another Redmond officer arrived and Officer D'Amico went inside the store while the officer stood next to Dent[3]. RP 20. Officer D'Amico spoke to a pharmacy technician, Kevin Cristoph, who said he had noticed irregularities with the prescription, including that Oxycodone was misspelled and the doctor on the prescription was flagged in the system requesting direct contact before filling the prescription. RP 155. Officer D'Amico made a brief telephone call to the doctor, Dr. Andrew Graustein, who said he did not know the defendant and had not written the prescription, and he did not have a clinic by the name listed on the slip. CP 88; RP 20.

Upon ending her call with Dr. Graustein, Officer D'Amico went back outside, where she handcuffed Dent and told him he was under arrest. RP 21.

During Dent's trial, Officer D'Amico testified about the statements Dent made to her and what the pharmacy technician told her. RP 150-55. In addition, the owner of a private mailbox business in Seattle, Sung Kim, testified that though his address was listed as the location of the clinic on the prescription slip, his business was not a clinic or doctor's office and never had been. RP 92-95. Pharmacy technician Christoph testified that the

[3] There is no indication in the record that the second officer spoke to Dent.

prescription slip looked suspicious because Oxycodone was misspelled and it called for an unusually large quantity and dosage. RP 139-40. Christoph also told the jury that the doctor on the prescription was flagged for possible forgery and that he called Dr. Graustein, who said the prescription was forged. RP 141-43. Another pharmacy technician, Margaret Lyons, also testified that the prescription was a "red flag" because of the misspelling and the high dosage and quantity. RP 107-12. Finally, the State presented Dr. Graustein, who testified that he had been getting frequent calls about forged prescriptions in his name, and that he never met Dent, never treated Dent and never prescribed any medication to him. RP 209-14.

## C. ARGUMENT

At the time Dent made his statements to Officer D'Amico -- while seated without handcuffs on a park bench outside an open drug store in the middle of the day -- nothing about that reasonable detention and limited questioning would have led a reasonable person to believe he had been formally arrested. Thus, his statements all were admissible at trial. Even if they were not, there was so much other circumstantial evidence that Dent knew of the

falsity of the prescription that the error was harmless beyond a reasonable doubt.

### 1. THE STATEMENTS WERE ADMISSIBLE BECAUSE THE DEFENDANT WAS NOT IN CUSTODY TO THE DEGREE ASSOCIATED WITH FORMAL ARREST.

Miranda warnings must be given whenever a suspect is subject to custodial interrogation by police. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). A person is in "custody" if, after considering the circumstances, a reasonable person would feel that his freedom was curtailed to a degree associated with formal arrest. Id. at 218. A routine Terry stop is not "custody" for purposes of determining whether statements made during the stop are admissible under Miranda, even though a suspect may not be free to leave when the statements are made. Id. at 218; State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). That is because an investigative encounter is not inherently coercive in that the detention is presumptively temporary and brief and relatively less "police dominated." State v. Cunningham, 116 Wn. App. 219, 228, 65 P.3d 325 (2003); Walton, 67 Wn. App. At 130. "Thus, 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." Heritage, 152 Wn.2d at 218.

The denial of a motion to suppress is reviewed by determining whether substantial evidence exists to support the trial court's findings of fact, and whether those findings support the trial court's conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298, 300 (2001). Unchallenged findings of fact are accepted as verities upon appeal and will not be reviewed by the appellate court. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). Instead, appellate review of unchallenged factual findings is limited to a de novo determination of whether the trial court derived proper conclusions of law from its unchallenged factual findings. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (citing Hill, 123 Wn.2d at 647). The appellate court is not limited to the reasons articulated by the trial court and may affirm the trial court on any basis that is supported by the record. State v. Henderson, 34 Wn. App. 865, 870-71, 664 P.2d 1291 (1983).

Here, there simply were none of the trappings of a formal arrest that would have given any reasonable person the belief that he had been formally arrested. And there was nothing about the

officer's limited questioning of Dent that could possibly be interpreted as coercive.

In this case, the officer encountered the defendant in a suburban drug store in the middle of the day. She asked him to step outside and to sit on a bench immediately outside the doors in a wide-open public place. See State v. Warner, 125 Wn.2d 876, 886, 889 P.2d 479, 483 (1995) ("Miranda warnings are intended [t]o dissipate 'the overbearing compulsion ... caused by isolation of a suspect in police custody'") (quoting Minnesota v. Murphy, 465 U.S. 420, 429-30, 104 S. Ct. 1136, 1143 (1984)); see also Archer v. United States, 393 F.2d 124 (5th Cir.1968) (Miranda evinces concern for a suspect "cut off from the outside world"). Dent was not handcuffed at any point during his questioning, and his ID card was handed back to him. In fact, there is no indication in any of the record that the officer ever touched Dent at any time prior to the time she finally returned from inside the store and then announced he was under arrest. Further, he was not placed in a police car, but was at least five yards away from a police car that was parallel parked. Moreover, Officer D'Amico walked away from Dent and went into the store while he remained outside -- un-handcuffed --

and apparently was not interrogated or even spoken to by the assisting second officer.

Nor was the questioning unreasonable or even slightly coercive. The record shows that Officer D'Amico asked Dent only about seven or eight focused questions, all of which were limited to what Dent was doing, why he needed Oxycodone, and whether the prescription was legitimate. Dent readily answered without pressure, and the officer did not repeat her questions or tell the defendant she didn't believe his answers. Dent implies that the officer was looming or threatening simply because the officer was standing while Dent was seated. Nothing in the record supports this notion. Dent also invites the court to conclude that the Terry detention was unreasonably long because the record does not provide a precise duration. The record does not support this notion either. Again, the record shows that the officer asked Dent only about seven or eight questions, then went inside. There, she spoke to the pharmacy technician only long enough to learn the basic facts. Moreover, the trial court specifically found that Officer D'Amico's phone call to Dr. Graustein was "brief." CP 90. It is also important to point out that even if Officer D'Amico's time in the drug store somehow converted the detention into a custodial arrest, her

questioning of Dent occurred before she went inside. In fact, she interviewed Dent before she even spoke to the complaining witnesses.

Thus, the trial court correctly concluded from the undisputed facts that the defendant was not in custody to the degree associated with formal arrest, and properly admitted all his statements to Officer D'Amico.

## 2. EVEN IF THE STATEMENTS WERE IMPROPERLY ADMITTED, THE ERROR WAS HARMLESS.

Admission of a statement obtained in violation *of* Miranda can be harmless. State v. Reuben, 62 Wn. App. 620, 814 P.2d 1177 (1991). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Under the "overwhelming untainted evidence" test employed in Washington, the reviewing court looks at only the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426. Circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d

634, 638, 618 P.2d 99 (1980) (citing State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975)).

Here, even without the defendant's statements, the jury was presented with overwhelming evidence to conclude beyond a reasonable doubt that the defendant knowingly and intentionally used the false prescription to obtain Oxycodone. In fact, the record shows that Dent's statements were not the strongest evidence of his guilt, but were mere icing on a very strong case.

First, it is important to note that none of Dent's statements were confessions. Dent maintained that he thought the person who gave him the prescription was a doctor, and he never said he knew the prescription was forged. Thus, the State could not rely on his statements alone to persuade the jury that he knowingly and intentionally used a forged prescription.

Instead, the State presented testimony – and the prescription itself – showing that the prescription slip was facially and obviously false. The name of the drug was spelled wrong; the amount and dosage was unrealistically high; and there was no such clinic as was stated on the slip. The jury also heard that the doctor's name was used in other recent forgeries. But perhaps most damning, the doctor himself testified that he had never seen Dent

before, much less ever treated him or prescribed Oxycodone to him. Any reasonable jury could conclude that Dent knew that a prescription in his name from a doctor he had never seen was false and forged.

Thus, even if this Court were to find that Dent's statements were erroneously admitted, it should hold that the error was harmless beyond a reasonable doubt.

## D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Dent's conviction and sentence.

DATED this 6TH day of May, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kevin March, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KIEL DENT, Cause No. 70666-7-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name

05-07-14
Date

Done in Seattle, Washington