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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 APR 16 PM 3:57

NO. 70666-7-I

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

REC'D  
APR 16 2014  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

KIEL DENT,

Appellant.

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

The Honorable John P. Erlick, Judge

BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>INTRODUCTION</u> .....	1
B. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	2
C. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Charges and motion to suppress</u> .....	2
2. <u>Suppression hearing testimony</u> .....	3
3. <u>Court’s ruling on suppression motion</u> .....	5
4. <u>Convictions, sentence, and arrest of judgment</u> .....	6
D. <u>ARGUMENT</u> .....	7
<u>DENT WAS SUBJECTED TO CUSTODIAL     INTERROGATION THAT ENTITLED HIM TO MIRANDA     WARNINGS</u> .....	7
E. <u>CONCLUSION</u> .....	14

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Armenta</u> 134 Wn.2d 1, 948 P.2d 1280 (1997).....	13
<u>State v. Ruem</u> 179 Wn.2d 195, 313 P.3d 1156 (2013).....	11
<u>State v. Sargent</u> 111 Wn.2d 641, 762 P.2d 1127 (1988).....	7
<u>State v. Walton</u> 67 Wn. App. 127, 834 P.2d 624 (1992).....	10
<u>State v. Watkins</u> 53 Wn. App. 264, 766 P.2d 484 (1989).....	10
 <u>FEDERAL CASES</u>	
<u>Berkemer v. McCarty</u> 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).....	8, 10, 11
<u>California v. Beheler</u> 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983).....	8
<u>Miranda v. Arizona</u> 383 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..	1-3, 5-8, 10-12, 14
<u>Schmerber v. California</u> 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).....	7
<u>Terry v. Ohio</u> 392 U.S. 1, 99 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	10, 11
<u>Thompson v. Keohane</u> 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).....	8

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 3.1 .....	5, 9
RCW 69.50.403 .....	12
U.S. Const. Amend V .....	3, 7

A. INTRODUCTION

When Redmond Police Officer Natalie D'Amico stopped Kiel Noel Dent in a Rite Aid in relation to a forged prescription investigation, moved him to a bench outside, and asked him multiple questions, she was required to inform Dent of his Miranda<sup>1</sup> rights. Her failure to do so requires suppression of Dent's incriminating statements. As these statements provided the sole evidence to prove Dent's state of mind to satisfy the mens rea element of violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, this court must reverse Dent's conviction and remand with instructions to dismiss this matter with prejudice.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting all of Dent's statements to Officer D'Amico, as these statements were obtained through custodial interrogation that required Miranda warnings.

2. The trial court erred in entering conclusions of law (a)(i)–(ix), which admitted each of Dent's specific statements. CP 90-91.

3. The trial court erred in concluding that Miranda was not applicable because Dent was not in custody to a degree associated with formal arrest. CP 91.

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<sup>1</sup> Miranda v. Arizona, 383 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

4. The trial court erred in concluding that Dent's statements were voluntary. CP 91.

Issues Pertaining to Assignments of Error

1. When an investigating officer controls and restricts the physical movement of a suspect and questions a suspect to a degree that a reasonable person in the suspect's position would not feel free to leave, has liberty been curtailed to a degree associated with formal arrest and is the suspect in custody?

2. When a suspect is in custody and is subjected to interrogation, must officers provide Miranda warnings to protect the suspect's right against self-incrimination?

3. Can a suspect make voluntary statements to officers even though the suspect may be unaware of his right not to speak with officers?

4. When the State cannot prove the offense charged because all evidence supporting one of the elements of the offense was unconstitutionally obtained and therefore inadmissible, must a defendant's conviction be reversed and must the charge be dismissed with prejudice?

C. STATEMENT OF THE CASE

1. Charges and motion to suppress

The King County Prosecutor initially charged Dent with one count of Violation of the Uniform Controlled Substances Act for attempting to obtain

Oxycodone by means of a false or forged prescription. CP 1. Thereafter, the State amended its charges to include a count for second degree identity theft. CP 6-7.

Dent moved to suppress his incriminating statements, arguing these statements were obtained in violation of the Fifth Amendment to the United States Constitution and Miranda. CP 11-12.

2. Suppression hearing testimony

Officer<sup>2</sup> D'Amico was the sole witness who testified at the suppression hearing. 1RP<sup>3</sup> 9-31.

On May 11, 2012, Officer D'Amico responded to a possible forgery in progress at a Redmond Rite Aid. 1RP 12. The caller identified Dent by name. 1RP 12. When Officer D'Amico arrived, a Rite Aid employee pointed to Dent, prompting Officer D'Amico to make contact. 1RP 13. Dent, on a phone call, got off the phone as Officer D'Amico asked him to exit the Rite Aid and sit on a bench outside the store. 1RP 13. Officer D'Amico's patrol car was parked 15 feet from the bench. RP 14.

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<sup>2</sup> This brief refers to D'Amico as Officer D'Amico, as she was not a detective at the time of Dent's alleged crimes or arrest. 1RP 10.

<sup>3</sup> This brief will cite 1RP to refer to the consecutively paginated five-volume verbatim report of trial proceedings that occurred on June 26 and 27, 2013 and July 1, 2, and 3, 2013. 2RP will refer to the verbatim report of sentencing proceedings that occurred on July 19, 2013.

Officer D'Amico asked for identification; Dent complied by providing a Washington Identification Card. 1RP 15. Officer D'Amico questioned Dent about why he was there; Dent responded that he was there to pick up a prescription for Oxycodone. 1RP 15-16. Dent also indicated he needed the medication because he had been injured in a recent car collision. 1RP 16. Despite Officer D'Amico's questions, Dent did not provide any details regarding the car accident or his injuries. 1RP 16.

Officer D'Amico continued questioning Dent about where he had obtained the prescription. 1RP 17. Dent responded that he got the prescription from a friend of the family whom he thought was a doctor. 1RP 17, 27. Though not specific, Dent said he obtained the prescription somewhere between Burien and White Center. 1RP 17. Dent did not or could not provide the name of the doctor who wrote the prescription. 1RP 18-19.

Following this questioning, Officer D'Amico awaited another patrol officer so that she could reenter the Rite Aid to talk to witnesses. 1RP 19. When the other patrol officer arrived, Officer D'Amico returned Dent's identification card to Dent. 1RP 20. Officer D'Amico spoke to the 911 caller inside the Rite Aid. 1RP 20. Officer D'Amico also spoke on the telephone with the doctor whose name appeared on the prescription Dent presented. 1RP 20-21.

Officer D'Amico then went back outside and placed Dent under arrest for prescription forgery. 1RP 21. Officer D'Amico handcuffed Dent and informed him of his rights under CrR 3.1.<sup>4</sup> 1RP 21-22. Officer D'Amico did not interrogate Dent further and Dent made no other statements. 1RP 23.

3. Court's ruling on suppression motion

The trial court issued written findings of fact and conclusions of law that generally conform to the foregoing recitation. CP 87-91. The court concluded that the following statements were admissible:

i. The defendant stated that he went to the Rite Aid pharmacy to fill his prescription for Oxycodone.

ii. The defendant stated that he was in a car collision and needed the medication for pain.

iii. The defendant stated that he could not provide a description of the injuries he sustained in the car collision.

iv. The defendant stated that he could not describe where his pain was located.

v. The defendant stated that he received the prescription from "a friend of the family."

vi. When asked whether the friend was a doctor, the defendant stated "I thought so."

vii. The defendant stated that he did not know the name of the person he received the prescription from.

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<sup>4</sup> CrR 3.1(c) provides that all persons taken into custody must be immediately advised of their right to a lawyer. However, CrR 3.1, unlike Miranda, does not require advisement of the right to remain silent.

viii. The defendant stated that he did not know the name of his current doctor.

ix. The defendant stated that he received the prescription from someone at the house between “Burien and White Center.”

CP 90-91. The trial court also concluded that the “pre-arrest statements are admissible because Miranda was not applicable as the defendant was not in custody to a degree associated with formal arrest. These statements were voluntary.” CP 91.

4. Convictions, sentence, and arrest of judgment

After trial, the jury returned guilty verdicts on both charges. CP 31-32; 1RP 314-17. The State subsequently moved to vacate the conviction for second degree identity theft, which the trial court granted. 2RP 2; CP 60, 86.

The trial court sentenced Dent to 120 days of confinement. CP 62. Following 30 days in jail, the court permitted Dent to serve the remaining 90 days in the King County Community Center for Alternative Programs, which required a drug and alcohol evaluation and engagement in recommended treatment. CP 62, 65. The trial court also imposed legal financial obligations in the amount of \$600. CP 61.

Dent timely appeals. CP 92.

D. ARGUMENT

DENT WAS SUBJECTED TO CUSTODIAL INTERROGATION THAT ENTITLED HIM TO MIRANDA WARNINGS

The Fifth Amendment to the United States Constitution provides, “No person . . . shall be compelled in any criminal case to be a witness against himself.” This right against self-incrimination protects an accused from being compelled to provide testimonial or communicative evidence to the State. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

To honor a person’s Fifth Amendment rights, police must inform a suspect of his or her rights before a custodial interrogation takes place. Miranda, 384 U.S. at 444. “[S]elf-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege. The requirement that the waiver be knowing necessitates the Miranda warnings.” State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” Miranda, 384 U.S. at 444. Statements elicited

that fail to comply with this rule are not admissible as evidence at trial. Id. at 444, 476-77.

“It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (per curiam)). The question of custody is a mixed question of law and fact: “first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).

Considering the circumstances of this case, Officer D’Amico placed Dent into custody when she stopped him in Rite Aid. Officer D’Amico, in police uniform, approached and contacted Dent, prompting him to end his phone call. RP 13. Officer D’Amico told Dent that she was investigating a prescription forgery and asked him to come with her outside the store. RP 13, 28. Officer D’Amico seated Dent on a bench directly outside the store within 15 feet from her police vehicle. RP 13-14. Officer D’Amico, standing directly in front of Dent, proceeded to ask Dent several questions regarding the prescription he had and his injuries, eliciting incriminating

responses. RP 15-19, 28. Officer D'Amico testified that Dent was not free to leave. RP 18. During this period, Officer D'Amico also had possession of Dent's Washington Identification Card. RP 15, 19.

Officer D'Amico kept Dent on the bench while she waited for another officer to arrive. RP 19. When the other officer did arrive, Officer D'Amico gave Dent back his identification and reentered Rite Aid to conduct further investigation. RP 19-20. The other officer remained standing in front of the bench on which Dent sat while Officer D'Amico interviewed witnesses in the Rite Aid pharmacy and made telephone calls. RP 20-21. Officer D'Amico then exited the Rite Aid, placed Dent in handcuffs, and read Dent his CrR 3.1 rights. RP 21-22.

Officer D'Amico curtailed Dent's actions to a degree associated with formal arrest. A reasonable person in Dent's position would not have understood from the moment of the original contact that he could terminate Officer D'Amico's questioning and leave. Officer D'Amico controlled the entirety of Dent's movements and actions. Dent was moved from the store to the bench outside. Dent was asked various questions about the prescription and his injuries and was never informed that he could refuse to answer. Officer D'Amico testified that Dent was not free to cease

questioning and leave.<sup>5</sup> A reasonable person in Dent's position surely could not have understood that he or she could refuse to speak with Officer D'Amico and leave the scene. Accordingly, Dent was entitled to Miranda warnings to honor his right against self-incrimination. Because Officer D'Amico failed to inform Dent of his Miranda rights, Dent's statements must be suppressed.

The fact that Officer D'Amico testified she did not believe Dent was under arrest or in custody is not dispositive. See RP 18-19. Indeed, "the only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his [or her] situation." Berkemer, 468 U.S. at 442; see also State v. Watkins, 53 Wn. App. 264, 274, 766 P.2d 484 (1989).

Nor did Dent's detention qualify as a Terry<sup>6</sup> stop rather than a custodial interrogation. "[U]nlike a formal arrest, a typical Terry stop is not inherently coercive because the detention is presumptively temporary and brief, is relatively less 'police dominated,' and does not easily lend itself to deceptive interrogation tactics." State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992) (citing Berkemer, 468 U.S. at 439). An investigative detention under Terry must be "reasonably related in scope to the justification for [its] initiation." Terry, 392 U.S. 1, 29, 99 S. Ct. 1868, 20 L.

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<sup>5</sup> It is unclear from the record whether Officer D'Amico specifically told Dent that he was not free to go.

<sup>6</sup> Terry v. Ohio, 392 U.S. 1, 99 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Ed. 2d 889 (1968). Here, the record is completely devoid of any reference to the duration of Officer D'Amico's initial stop. Officer D'Amico asked Dent multiple questions regarding the prescription he attempted to use, his recent car collision, his injuries, and his physician. RP 15-19. There is simply no indication from the suppression hearing testimony that this questioning was brief. Moreover, Officer D'Amico stood over Dent while he was confined to a bench and questioned him. Officer D'Amico's actions ensured that Dent at least implicitly understood that he could not leave and had to respond to questioning. Because the duration of the stop is unknown and because Officer D'Amico created a police dominated scenario from the time of her initial contact with Dent, Dent's detention does not qualify as a Terry stop. To the contrary, Dent was "entitled to the full panoply of protections prescribed by Miranda." Berkemer, 468 U.S. at 440.

Finally, in its written conclusions, the trial court ruled that Dent's "statements were voluntary." CP 91. This is not so. Dent was never informed of his right not to speak with Officer D'Amico. "Consent—to enter a contract, to have one's home searched, or for anything else—has no meaning unless the consenting party has realistic alternatives available. Therefore, consent is not voluntary unless the consenting party knows that he or she has the option to refuse." State v. Ruem, 179 Wn.2d 195, 210, 313 P.3d 1156 (2013) (Wiggins, J., concurring in result). An average person in

Dent's circumstances—approached by a uniformed, armed police officer, asked to relocate to a specific place, and then questioned—has no meaningful opportunity to refuse police questioning. Without knowledge of the right to refuse to answer police questions, any statement a suspect makes simply cannot be a voluntary one. This court should reject the legal fiction in which the trial court engaged. Dent's involuntary statements obtained in violation of Miranda must be suppressed.

Without the unconstitutionally elicited statements, the State cannot prove every element of a violation of the Uniform Controlled Substances Act under RCW 69.50.403(1)(c).

RCW 69.50.403(1) provides,

It is unlawful for any person knowingly or intentionally: . . .

(c) To obtain or attempt to obtain a controlled substance, or procure or attempt to procure the administration of a controlled substance, (i) by fraud, deceit, misrepresentation, or subterfuge; or (ii) by forgery or alteration of a prescription or any written order . . . .

Dent's various statements regarding his recent car collision, his inability to describe the car collision or his resulting injuries, his receipt of the prescription from a family friend, and his inability to name his current physician all go to whether Dent acted knowingly or intentionally, which is the mens rea element of RCW 69.50.403. The State presented no other evidence of Dent's state of mind. Indeed, during closing arguments, the

State acknowledged, “This case boils down to the Defendant’s actions and what *he said or didn’t say on that date.*” RP 301-02 (emphasis added). The State proceeded to comment, “if [Dent] obtained it legally, and it was something that [he] thought was valid, why wouldn’t [he] volunteer that information? Why wouldn’t [he] tell the detective or officer, yeah, I got it from this doctor, a family friend who I thought was a doctor.” RP 302. The State’s arguments reflect that Dent’s incriminating statements formed the sole proof of his knowledge or intent to commit prohibited acts under RCW 69.50.403.

In such circumstances, this court must reverse Dent’s conviction and remand for dismissal of the charges with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

E. CONCLUSION

Dent was subjected to custodial interrogation when he was stopped, moved to a bench, and questioned by a police officer. The officer failed to inform Dent of his Miranda rights. Dent's incriminating statements were thus unconstitutionally obtained and must be suppressed. Because these unlawfully elicited statements formed the sole proof that Dent acted with the requisite knowledge or intent, the State cannot prove every element of forging a prescription. Accordingly, this court must reverse Dent's conviction and remand for dismissal of this prosecution with prejudice.

DATED this 16th day of April, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'Kevin A. March', written over a horizontal line.

KEVIN A. MARCH  
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Attorney for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70666-7-1
	)	
KIEL DENT,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 16<sup>TH</sup> DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KIEL DENT  
1212 SW HOLDEN STREET, NO. 3  
SEATTLE, WA 98118

**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF APRIL 2014.

X Patrick Mayovsky