No. 44840-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDREW M. STEELE,

Appellant.

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

The Honorable James R. Orlando

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Mr. Steele's pre-warning custodial statements and tainted post-warning statements were wrongly admitted.

a. Mr. Steele was in custody from the moment he met the officers.

For purposes of *Miranda*,[1] Mr. Steele was in custody and not free to leave when he met the officers in the parking lot. A person is "in custody" any time was "the defendant's movement restricted at the time of questioning." *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). *Miranda* warnings are required whenever the suspect is "in custody *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). "[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." *United States v. Griffin*, 922 F.2d 1343, 1350 (8th Cir. 1990); *accord United States v. Craighead*, 539 F.3d 1073, 1082, 1087 (9th Cir. 2008).

The State finds significance in Mr. Steele's familiarity with his rights. Br. of Resp. at 18-19. However, the State does ot cite any

[1] *Miranda v. Arizona*, 364 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

authority for the proposition that the obligation to give *Miranda* warnings varies depending upon the presumed sophistication of the suspect.

Mr. Steele, agreed to meet the officers in a public location only after the officers' repeated attempts to contact him, he was frisked before he went into the patrol car, he was not let out of the patrol car or left alone while the officers searched the truck stop, and he was never informed that he did not have to respond to the questioning or that he was free to leave. RP 36-40, 53, 55-57, 59-60. Under the totality of the circumstances outlined above, it strains credulity to believe the Mr. Steele was free to terminate the contact and that he would not have been arrested had he refused to cooperate.

The State argues Mr. Steele was not in custody because he voluntarily accompanied the officers to the truck stop. Br. of Resp. at 17. Whether a person is "in custody" is based on "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarthy*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); *accord State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). Here, Mr. Steele, a known felon, knew the officers were searching for a fellow officer's stolen firearm and badge, he saw the other police cars in the area, he knew the officers believed that he had possession the firearm, however briefly, and he knew he was not allowed to possess a firearm.

Accordingly, a reasonable person in Mr. Steele's position would have understood that he was not free to terminate the contact and that his freedom of action was curtailed to the degree associated with a formal arrest, even though he did not physically resist or vocally complain.

b. Mr. Steele was subject to unwarned custodial interrogation.

The State concedes Mr. Steele was subject to interrogation without the benefit of *Miranda* warnings. Br. of Resp. at 20. This concession is well-taken. Whenever questions are asked that are likely to elicit an incriminating response and are not necessary to serve an independent purpose, such as booking questions, *Miranda* warnings must be given. *State v. Sargent*, 111 Wn.2d 641, 652, 762 P.2d 1127 (1988). Here, starting with the initial contact in the parking lot and continuing until the officers took Mr. Steele to the police station and finally advised Mr. Steele of his rights, the detectives repeatedly asked him about his knowledge of and involvement with the stolen firearm and badge. These questions were overt interrogation of Mr. Steele prior to advising him of his rights.

c. The proper remedy is reversal.

Mr. Steele's statements to the police officers, both before and after he was advised of his *Miranda* rights, were inadmissible. As discussed, his initial unwarned statements were the product of custodial

interrogation. Thus, his post-warning statement at the police station was tainted by the pre-warning interrogation. *See Missouri v. Seibert*, 542 U.S. 600, 617, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). Because one of the primary defense theories was the lack of evidence to establish Mr. Steele actually possessed the stolen firearm, the State cannot show that Mr. Steele's incriminating statements did not contribute to his convictions. The error was not harmless and reversal is required.

2. The court's categorical denial of a DOSA for any offender with an offender score above '9,' on the grounds such offenders did not deserve "the benefits of leniency," was an abuse of discretion.

The trial court abused its discretion when it categorically refused to consider Mr. Steele's request for a Drug Offender Sentencing Alternative (DOSA) based on the court's "personal creed" that defendants with an offender score above '9' do not deserve a DOSA. The court stated:

> Well, everyone has a sort of personal creed that they need to follow. I have a creed that I believe people can change you, but I also believe that people who have offenders [sic] that exceed nine shouldn't get the benefits of leniency.

RP 391. "[W]here a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." *State v. Grayson*, 154

Wn.2d 333, 342, 111 P.3d 1183 (2005); *accord State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 994 P.2d 1104 (1997). Therefore, the court failed to exercise its discretion when it categorically refusal to entertain a DOSA request for offenders such as Mr. Steele who had an offender score above '9.'

The State argues the court "quite reasonably" noted that offenders with scores above '9' should not get the benefit of leniency. Br. of Resp. at 25. However, the Legislature did not tie eligibility for a DOSA to a defendant's offender score. Moreover, in at least one published opinion, the State recommended a DOSA for a defendant with an offender score above '9.' *See State v. Waldenberg*, 174 Wn. App. 163, 166, 301 P.3d 41 (2013).

The State further argues that Mr. Steele's failure to address his substance abuse problem and the present criminal conviction supported the court's conclusion that a DOSA would not "benefit both the offender and the community." Br. of Resp. at 26. But the court here did not make that conclusion. Rather, that was a consideration of the court in *State v. White*, after it reviewed the defendant's record of infractions and use of drugs while in prison after completing a treatment program. 123 Wn. App. 106, 114, 97 P.3d 34 (2004).