71094-0

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NO. 71094-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN STOLTMAN,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

A. ARGUMENT IN REPLY

1. OFFICER OLSON WAS REQUIRED TO INFORM STOLTMAN OF HIS RIGHT AGAINST SELF-INCRIMINATION AS PRESCRIBED BY MIRANDA[1]

Officer Olson exceeded the scope of a permissible Terry[2] stop when he twice transferred Stoltman from the boat he was on to a police vessel and questioned Stoltman in isolation. Because Officer Olson subjected Stoltman to full custodial interrogation, Miranda warnings were required. The absence of Miranda warnings requires suppression of Stoltman's incriminating statements. See Br. of Appellant at 17-27.

The State asserts that Miranda warnings were not required "because traffic stops are presumptively temporary and brief, exposed to public view, and 'substantially less "police dominated" than that surrounding the kinds of interrogation at issue in Miranda' and its progeny." Br. of Resp't at 11 (quoting Berkemer v. McCarty, 468 U.S. 420, 436-39, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). But the State's reliance on Berkemer in the context of this case is inappropriate. This stop was not brief; 25 minutes elapsed while Stoltman and Hibszki were transferred back and forth between their vessel and the police vessel to be questioned in isolation. RP 36. Because the stop occurred on open water instead of on the street, neither was the stop exposed

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

[2] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

to public view. RP 27-28, 31. And two officers detained and moved Stoltman from one boat to another thereby controlling the entirety of Stoltman's movements and creating a wholly police-dominated scenario. RP 31, 33-34. Thus, all the reasons the Berkemer court declined to require Miranda warnings are absent in this case. Because Stoltman instead was "subjected to treatment that render[ed] him 'in custody' for practical purposes, he [was] entitled to the fully panoply of protections prescribed by Miranda. Berkemer, 468 U.S. at 440.

The State erroneously contends that the Washington Supreme Court's middle-ground approach announced in State v. Wheeler, 108 Wn.2d 230, 737 P.2d 1005 (1987), was satisfied. Br. of Resp't at 15-16. In Wheeler, our supreme court held that "because transportation of the suspect *even a short distance* is more intrusive than a mere stop, it 'should be dependent upon *knowledge that a crime has been committed*' and impermissible when the defendant's conduct was suspicious but 'there has not been any report of crime' recently in the vicinity." 108 Wn.2d at 236-37 (emphasis added) (footnotes omitted in original) (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.2, at 26 (Supp. 1986)).

Contrary to the State's contention, Officer Olson did not know a crime had been committed, the reports of his informant notwithstanding. Officer Olson testified he was investigating whether Stoltman and Hibszki

had committed a crime by stealing the pipe valve located in their boat. RP 33. Because Officer Olson admittedly lacked specific knowledge that Stoltman had committed a crime, any transportation of Stoltman—even an "extremely short distance," Br. of Resp't at 16—was impermissible under Wheeler. Because Officer Olson exceeded the scope of Terry, Stoltman was in custody and entitled to be informed of his right against self-incrimination as Miranda requires.

The State also suggests that Stoltman could not have been subjected to custodial interrogation because Stoltman stated he had nothing more to say to Officer Olson after Officer Olson told Stoltman that his statement conflicted with Hibszki's. Br. of Resp't at 16-17. The State's argument seems to be that a suspect could not possibly have been subjected to custodial interrogation if he or she refuses to respond to additional police questioning. This argument lacks merit. Stoltman indicated he had nothing more to say to Officer Olson only after Stoltman had already been subjected to one round of interrogation during which Officer Olson elicited incriminating statements. RP 33-34, 93-94. That Stoltman might have had the good sense to stop answering Officer Olson's questions after Officer Olson let on that Stoltman's statements were incriminating does not mean that a reasonable person in Stoltman's position would have known he was free to cease questioning when the interrogation started. And, even if it did,

a reasonable person in Stoltman's position still would not have understood he could leave the scene. See RP 92 (Officer Olson explaining that Stoltman was not free to leave).

Officers Olson and Moszeter controlled Stoltman's movements and actions, twice transferred Stoltman to a police vessel to be questioned in complete isolation, searched his personal effects, and asked questions without informing Stoltman that he could refuse to answer. Stoltman could not have understood that he could leave the scene or refuse to speak with investigating officers. Stoltman's freedom of action was accordingly curtailed to a degree associated with formal arrest, Berkemer, 468 U.S. at 440, and Miranda warnings were required. Because Officer Olson failed to inform Stoltman of his Miranda rights, this court must suppress Stoltman's incriminating statements.

2. THE ITEMS OFFICER OLSON SEIZED WERE NOT IMMEDIATELY APPARENT AS CONTRABAND AND THEREFORE NOT SUBJECT TO PLAIN VIEW SEIZURE

In order to seize items in plain view, officers must have immediate knowledge that they have evidence in front of them. State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). Because Officer Olson had to perform further investigation to determine whether the items he seized were evidence of a crime, he lacked immediate knowledge that he had evidence before him,

and the plain view doctrine does not apply. The items Officer Olson seized must accordingly be suppressed.

The State contends the large pipe valve, smaller pipe valves, and cut piping was properly subject to plain view seizure because Stoltman had stolen cable the day before and because the large pipe valve in Stoltman's possession seemed out of place. Br. of Resp't at 19. It is telling that the State does not address Stoltman's discussion of State v. Keefe, 13 Wn. App. 829, 835, 537 P.2d 795 (1975), in which this court held that officers' knowledge of Keefe's past involvement in a forgery ring could not sustain officers' seizure of a typewriter. Rather, the Keefe court indicated that where it cannot be immediately determined that an item is contraband, there is "no legal right to carry the search further." Id. at 833. Officer Olson testified he was suspicious of the pipe valves and piping in Stoltman's possession but acknowledged he did not know whether the pipe valves and piping were contraband. RP 33, 92, 95. Rather, Officer Olson had to investigate further to determine whether the items in Stoltman's possession had been stolen. RP 33. This is precisely the type of search and seizure that the Keefe court stated was "unjustified and without legal sanction." Keefe, 13 Wn. App. at 835.

The plain view doctrine does not apply in this case. This court must suppress the items Officer Olson seized.

3. THE STATE'S REASONS FOR PREACCUSATORIAL DELAY ARE OUTWEIGHED BY PREJUDICE TO STOLTMAN, REQUIRING DISMISSAL

The 31-month preaccusatorial delay in this case permitted the State to locate an adverse witness and deprived Stoltman of an opportunity to interview another adverse witness and to engage in misdemeanor plea negotiations. These serious prejudices outweigh the fact that one law enforcement officer's father was terminally ill, especially given that Officer Olson had the option of transferring this case to another police department and chose not to.[3]

The State cites State v. Alvin, 109 Wn.2d 602, 746 P.2d 807 (1987), and State v. Schifferl, 51 Wn. App. 268, 753 P.2d 549 (1988), to assert that Stoltman cannot complain of preaccusatorial delays. Br. of Resp't at 24. But Alvin and Schifferl involved only one claim of prejudice, which was the loss of juvenile court jurisdiction due to the defendants reaching the age of

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[3] The State asserts that the "trial court is in the best position to determine whether the prejudice resulting from delay affects a defendant's ability to defend against the charges," suggesting that this court should defer to the trial court's determination on the issue. Br. of Resp't at 25. This conflicts with the State's acknowledgment that the standard of review in preaccusatorial delay cases is de novo. Br. of Resp't at 22. Moreover, as Stoltman previously noted, the trial court erroneously "balanc[ed] the interests of the State against the prejudice to the defendants." CP 120; Br. of Appellant at 37 n.9; cf. State v. Oppelt, 172 Wn.2d 285, 294, 257 P.3d 653 (2011) ("[W]hat are meant to be balanced are the *reasons for the delay* and the prejudice to the defendant caused by the delay." (emphasis added)). Given that the trial court balanced the wrong factors when it declined to dismiss this prosecution, it should go without saying that its determination is not entitled to any deference.

majority. Alvin, 109 Wn.2d at 603-04; Schifferl, 51 Wn. App. at 269-70. In addition, the delays in each of the cases were well under one year, a far cry from the 31-month delay in this case. Alvin, 109 Wn.2d at 603 (five-month delay); Schifferl, 51 Wn. App. at 269-70 (three-month delay). Because Alvin and Schifferl are easily distinguished, both in terms of the time of delay and the prejudice suffered, they should not control in this case.

Moreover, unlike Alvin and Schifferl, this case involved a lengthy delay based in part on the terminal illness of one officer's family member. Contrary to the State's suggestion, this is not a "routine delay[], common in the administrative and investigatory process, which may uniquely affect [an] individual's case." Alvin, 109 Wn.2d at 606. The level of process due criminal defendants should not depend on the health of officers' family members, especially when the poor health of an officer's family member might, as here, subject cases to lengthy delays spanning years rather than months.

Aside from the health of Officer Olson's father, Officer Olson indicated that he could have transferred Stoltman's case to the Seattle Police Department. RP 56. Ironically, he opted not to do so because the Seattle Police Department "sat on" one of his previous cases for a year, requiring him to take the case back. RP 56. Officer Olson's personal opinion as to another police department's untimely processing of cases cannot serve to

reasonably outweigh the prejudice Stoltman experienced as a result of the preaccusatorial delay.

Stoltman was prejudiced by having to wait 31 months before the State charged him. He lost his ability to negotiate for a misdemeanor plea and to interview a deceased witness. The State's technological advancement during the delay period also allowed the State to locate another adverse witness who testified against Stoltman at trial. This prejudice outweighs the State's reasons for delay and violates Stoltman's due process rights. This court must dismiss this matter with prejudice.

B. CONCLUSION

Because all evidence admitted against Stoltman was obtained in violation of his constitutional rights and because the delayed prosecution resulted in prejudice to Stoltman, this court must reverse Stoltman's conviction and remand with instructions to dismiss this prosecution with prejudice.

DATED this 7th day of August, 2014.

Respectfully submitted,

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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 7TH DAY OF AUGUST 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.

[X] JUSTIN STOLTMAN
4738 16TH AVE NE #5
SEATTLE, WA 98005

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF AUGUST 2014.

X Patrick Mayovsky