97268-1

NO. 35812-7-III

COURT OF APPEALS

STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ALEJANDRO ESCALANTE,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

Alejandro Escalante requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Escalante seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated May 7, 2019. (Appendix "A" 1-5)

3. ISSUE PRESENTED FOR REVIEW

1. Was Alejandro Escalante in custody at the time he was interrogated by border patrol agents at a border patrol crossing in Stevens County Washington?

4. STATEMENT OF THE CASE

Mr. Escalante was a passenger in a van returning from the Shambala Music Festival which had been held in Salmo, B.C., Canada.

Border Patrol agents were conducting an emphasis patrol and searched all vehicles returning from the festival.

There were four individuals in the van. Aaron Torres was the driver. All four of the individuals were directed into a secured border patrol lobby. The only exit from the lobby was controlled by a border patrol agent in a separate partitioned glass booth.

The four individuals were required to turn over their passports to the border patrol agent in the booth.

Mr. Torres and one of the passengers requested to use the restroom. A patdown search was conducted. Controlled substances were found on the two individuals and they were placed in locked cells inside the border patrol building.

A patdown of Mr. Escalante and the other passenger did not reveal any controlled substances.

Mr. Escalante was required to remain in the lobby for a period of five hours while the van was searched. Controlled substances were found in numerous locations throughout the van. They were in various pieces of luggage and backpacks.

A black backpack, containing no identifying information, was found to contain heroin and LSD. Border patrol agents questioned Mr. Escalante and the other passenger concerning ownership of the backpack. Mr. Escalante claimed that it was his.

No *Miranda*[1] warnings were given prior to the questioning.

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

Border patrol agents then arrested Mr. Escalante and the other passenger. Stevens County deputies eventually arrived to transport the individuals to the Stevens County Jail.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

There is no question whether Mr. Escalante was interrogated. The State conceded that an interrogation occurred at the CrR 3.5 hearing. Stipulated facts additionally support the finding of an interrogation.

As the Court of Appeals noted, in its decision, the sole issue is whether or not Mr. Escalante was in custody.

Mr. Escalante asserts that the Court of Appeals reliance upon *United States v. Butler*, 249 F.3d 1094, (9th Cir. 2001) is misplaced under the facts and circumstances of his case.

The Court of Appeals concluded, based upon *Butler, supra*, that:

> Mr. Escalante was subject to a lengthy detention in the border crossing's lobby. However, the detention never turned into the equivalent of a custodial arrest until after he admitted ownership of the backpack. The lobby was shared with others that came and went during the search of the van. Two of his companions were arrested upon discovery of controlled

> substances and removed to nearby jail cells, but Mr. Escalante remained in the lobby throughout. He was never told he was under arrest, nor was he handcuffed or otherwise further restrained. A reasonable person would not, under these circumstances, believe he had been restrained in a manner equivalent to a formal arrest. Nothing changed over the time he was in the lobby.

The Court of Appeals conclusion is unreasonable. It ignores the fact that Mr. Escalante could not leave the lobby without permission.

He could not leave the lobby and enter the United States since he was no longer in possession of his passport.

He could not leave the lobby and return to the van. It was being searched. The driver of the van had been arrested. He did not have any transportation.

The fact that he was never told he was under arrest, nor handcuffed, is insufficient to support the Court of Appeals conclusion.

In *United States v. Leasure*, 122 F.3d 837, 840, (9th Cir. 1997) the Court set forth the critical area to be considered when determining if a person is in custody:

> … Miranda warnings need not be given in a border crossing situation unless, and until, the questioning agents have probable cause to believe that the person has committed an offense. … In most cases, the earliest that a person could be in custody is at the point when she is moved into a secondary inspection area and asked to exit her vehicle while it is searched.

The van in Mr. Escalante's case had been moved to a secondary inspection area. The occupants of the van had been directed into the secured lobby of the border patrol station.

Mr. Escalante's movements were severely restricted. The fact that he had reading material and a place to sit in the lobby does not preclude a finding that he was in custody.

> The conclusion that a suspect is in custody turns on 'whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest.' *State v. Lorenz,* 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). '**Custody' depends on 'whether the defendant's movement was restricted at the time of questioning,' and necessarily that the police restricted that movement.** *Id*. '**Custody'** does not refer to whether police intend to arrest, whether the environment was coercive, or whether there was probable cause to arrest at the time of the questioning. *Id,* at 37. It **refers instead to whether the suspect's movement is restricted at the time of questioning**. *Id.* at 36-37.

State Butler, 165 Wn. App. 820, 827, 269 P.3d 315 (2012). (Emphasis supplied)

There can be no dispute that Mr. Escalante's movements were restricted.

In *United States v. Bravo*, 295 F.3d 1002 (9th Cir. 2002) the Court held:

> The standard for determining whether a person is under arrest is not simply whether a person believes that he is free to leave [citation omitted], but rather whether a reasonable person would believe that he is being subjected to more than the "temporary detention occasioned by border crossing formalities." *United States v. Butler*, 249 F.3d 1094, 1100 (9th Cir 2001). Thus, whether an individual was in custody depends upon the objective circumstances of the situation, or whether " 'a reasonable innocent person in such circumstances would conclude that *after brief questioning he or she would not be free to leave*.' " *United States v. Montero-Camargo*, 177 F.3d 1113, 1121 (9th Cir. 1999) (*quoting United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981)) (emphasis added) *aff'd* 208 F.3d 1122 (9th Cir. 2000)….

Mr. Escalante submits that *Bravo* stands for the proposition that once a vehicle search is completed and contraband found, then any temporary detention ripens into a custodial hold and *Miranda* warnings are required if questioning is to occur. This is especially applicable in Mr. Escalante's case in view of the patdown searches.

> Pursuant to article I, section 7, seizure occurs when 'considering all of the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority' *Rankin* [*State v. Rankin,* 151 Wn.2d 689, 92 P.3d 202 (2004)] at 695 (citing *O'Neill* [*State v. O'Neill,* 148 Wn.2d 564, 62 P.3d 489 (2003)] at 574. The standard is 'a purely objective one, looking to the actions of the law enforcement officer ….' *State v. Young,* 135 Wn.2d 498, 501, 957 P.2d 681 (1988). **The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained.** *O'Neill,* 148 Wn.2d at 581.

State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). (Emphasis supplied.)

Mr. Escalante does not quibble with the fact that some period of detention is inevitable at a border crossing. It is the extent of that detention which determines whether or not a person has been seized and is in custody.

Typically, the questions asked at a border crossing involve the following: identity; address; birthplace; nationality; immigration status; cargo; vehicle ownership; and travel plans. *See: United States v. Massie,* 65 F.3d 843 (10th Cir. 1995).

The protection against self-incrimination provided by Const. art. I, § 9 is coextensive with that provided by the Fifth Amendment to the United

States Constitution. *See: State v. Unga*, 165 Wn.2d 95, 196 P.3d 645 (2008).

Nevertheless, Mr. Escalante contends that border crossing cases have resulted in a lessening of the protections afforded under Const. art. I, § 9.

Once the Border Patrol agents located contraband in the van they were required to advise the passengers of their *Miranda* warnings prior to any interrogation.

> The Fifth Amendment to the United States Constitution provides criminal suspects with the right to be free from self-incrimination. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995); *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010). Because of the coercive nature of custodial interrogations, law enforcement officers are required to provide a suspect with *Miranda* warnings prior to questioning the suspect in a custodial setting. *Hickman*, 157 Wn. App. at 772. Specifically, the requirements of *Miranda* apply where "a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Absent effective *Miranda* warnings, a suspect's custodial statements are presumed to be involuntarily given and, therefore, cannot be used against the suspect at trial. [Citations omitted.]

State v. Rhoden, 189 Wn. App. 193, 199, 356 P.3d 242 (2015).

6. CONCLUSION

Mr. Escalante contends that the facts fully support his position that he was not free to leave the border patrol station. He may have been free to move around inside the border patrol station; but in the absence of his passport, the fact that Mr. Torres (driver of the van) had been arrested, and the entry/exit was securely locked are all indicative of a custodial setting.

Miranda warnings were required under these facts and circumstances.

The Court of Appeals decision fails to appropriately consider both the factual predicates and the legal precedent concerning what constitutes custody.

Mr. Escalante's convictions should be reversed and the case dismissed.

DATED this 29th day of May, 2019.

Respectfully submitted,

s/ Dennis W. Morgan
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APPENDIX “A”

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May 7, 2019

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CASE # 358127
State of Washington v. Alejandro Escalante
STEVENS COUNTY SUPERIOR COURT No. 171002423

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Patrick Monasmith
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 35812-7-III
Respondent,	)	
	)	
v.	)	
	)	
ALEJANDRO ESCALANTE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

Wash away my troubles, wash away my pain
With the rain in Shambala.[1]

KORSMO, J. — Unfortunately for Mr. Alejandro Escalante, Shambala was only the beginning of his troubles. Upon returning from the Shambala Music Festival in British Columbia, federal authorities discovered controlled substances in his backpack and turned them over to state authorities. Mr. Escalante appeals from his convictions for possession of controlled substances, arguing that his federal constitutional rights were violated during the federal border search. We affirm.

[1] THREE DOG NIGHT, *Shambala*, on CYAN (Dunhill Records 1973).

FACTS

Mr. Escalante was one of four people in a van, driven by Mr. Aaron Torres, that stopped at a United States border crossing in Stevens County. The border patrol was subjecting all vehicles coming from the festival to an individualized search. Mr. Torres's van was directed to a search location and the four occupants were sent into a waiting room.

The waiting room essentially was a lobby with chairs and reading material. Entry and exit from the room were controlled by a border patrol employee who could observe the lobby from an adjacent room through a glass partition. The occupants of other cars also used the lobby while Mr. Escalante and his companions were there. Mr. Torres and one of his passengers sought to use the restroom. The request led to a pat down search of all four. Drugs were found on the two who requested to use the restroom; they were arrested and placed in holding cells. Mr. Escalante and the other passenger did not have drugs on them and remained in the lobby.

The vehicle search took nearly five hours and uncovered illegal drugs throughout the interior and exterior of the van. Agents questioned the two men in the lobby concerning ownership of a black backpack found in the back of the van; the pack did not contain any identifying information. Mr. Escalante admitted that it was his. Officers then arrested him due to heroin and LSD found in the backpack.

The Stevens County Prosecuting Attorney filed two charges of possession of a controlled substance. A CrR 3.5 hearing was held to determine the admissibility of Mr. Escalante's statement that he owned the backpack. The State conceded that Mr. Escalante had been subjected to interrogation, but disagreed that he was in custody. The court concluded that Mr. Escalante was not in custody while being questioned in the lobby and ruled the statement was admissible.

The case then proceeded to trial on stipulated facts. Mr. Escalante was found guilty of possessing the heroin and the LSD. He then timely appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

The sole issue presented by this case is a contention that the trial court erred in concluding that Mr. Escalante was not "in custody" at the time of questioning. Well settled federal authority controls this question.

Prior to conducting a custodial interrogation, an officer must first advise the suspect of his rights regarding the interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A suspect is in custody for purposes of *Miranda* when a reasonable person would believe his freedom of action is curtailed to the degree associated with a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct.

3138, 82 L. Ed. 2d 317 (1984).[2] The test is an objective one. *Id.* A person is not in "custody" even though he has been "seized." A seizure exists when, under the totality of the circumstances, "a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *see also Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A seizure can ripen into an arrest. *Berkemer*, 468 U.S. at 439-441. Typically, a detention at the border does not constitute custody even though the person is unable to leave or to refuse to be searched. *United States v. Butler*, 249 F.3d 1094, 1098 (9th Cir. 2001).

Interrogation is "express questioning or its functional equivalent" by police. *Rhode Island v. Innis*, 446 U.S. 291, 300-301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The "functional equivalent" of questioning involves behavior that police should know is "reasonably likely to elicit an incriminating response." *Id.* at 302.

Here, the parties agree that Mr. Escalante was subjected to interrogation when asked the incriminating question about the backpack. They also agree that he had been seized. They disagree on whether he was taken into custody prior to the questioning about the backpack. We agree with the trial court that he was not in custody at that time.

---

[2] In *Berkemer*, the court concluded that routine roadside seizure and questioning following a traffic stop did not amount to custodial interrogation. 468 U.S. at 440.

Mr. Escalante was subject to a lengthy detention in the border crossing's lobby. However, that detention never turned into the equivalent of a custodial arrest until after he admitted ownership of the backpack. The lobby was shared with others who came and went during the search of the van. Two of his companions were arrested upon discovery of controlled substances and removed to nearby jail cells, but Mr. Escalante remained in the lobby throughout. He was never told he was under arrest, nor was he handcuffed or otherwise further restrained. A reasonable person would not, under these circumstances, believe he had been restrained in a manner equivalent to formal arrest. Nothing changed over the time he was in the lobby.

The trial court did not err in determining that Mr. Escalante's admission to owning the backpack was not the result of custodial interrogation. Accordingly, the judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Pennell, J.

NO. 35812-7-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. ALEJANDRO ESCALANTE, Defendant, Appellant.	)))))))))))	STEVENS COUNTY NO. 17 1 00242 3 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 29th day of May, 2019, I caused a true and correct copy of the *PETITION FOR DISCRETIONARY REVIEW* and to be served on:

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