 72943-8

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Court of Appeals
Division I
State of Washington

COA NO. 72943-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DARE,

Appellant.

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

The Honorable Ellen J. Fair, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. INCRIMINATING STATEMENTS MADE BY DARE IN RESPONSE TO CUSTODIAL INTERROGATION MUST BE SUPPRESSED.

a. Dare was in custody for Miranda purposes by the time the officer told him to stay still.

The trial court ruled that Dare was in custody by the time Trooper Caiola intended to arrest him and told the occupants to stay still with their hands in front of them. CP 28. The State claims the trial court erred in determining Dare was in custody at this point in time. Brief of Respondent (BOR) at 13-18. Dare disagrees.

"Custodial interrogation" is questioning initiated by law enforcement officers after a person has been deprived of his or her freedom in any significant way. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "Custodial" refers to whether the suspect's freedom of movement was restricted at the time of questioning. State v. Sargent, 111 Wn.2d 641, 649-50, 762 P.2d 1127 (1988). The test for the "custodial" component is whether a reasonable person in the individual's position would believe he 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) (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). This requires the defendant to "show

some objective facts indicating his . . . freedom of movement [or action] was restricted [or curtailed]." Lorenz, 152 Wn.2d at 37 (quoting State v. Post, 118 Wn.2d 596, 607, 826 P.2d 172, 837 P.2d 599 (1992)).

The State is correct that an officer's subjective, unexpressed intent to arrest a person is irrelevant. BOR at 15-16. But the objective facts still supports the court's conclusion that Dare was in custody for Miranda purposes at the time Trooper Caiola told the occupants to stay still and place their hands in front of them. By this time, the trooper had already informed Dare that he was writing down the VIN from the dashboard. 1RP 12. The trooper ran the VIN through dispatch and then directed Dare and the others to stay still. 1RP 12-13. By this point, an objective person in Dare's position would know police were investigating a criminal matter. See United States v. Griffin, 922 F.2d 1343, 1348 (8th Cir.1990) (quoting United States v. Carter, 884 F.2d 368, 370 (8th Cir.1989) ("the fact that the individual has become the focus of the investigation is relevant 'to the extent that the suspect is aware of the evidence against him' and this awareness contributes to the suspect's sense of custody.")).

The circumstances show Dare was in custody because a reasonable person would believe his movements were restricted to a degree associated with formal arrest. Freedom of movement "is the determining factor in deciding whether an interview is 'custodial.'" Sargent, 111 Wn.2d at 649-

50. Trooper Caiola curtailed Dare's freedom of movement by telling him to stay still and keep his hands in front of him. CP 26; 1RP 13-14, 22-23; 2RP 4. Further, Caiola parked his vehicle behind Dare's vehicle, further contributing to the loss of freedom to terminate the encounter and leave. CP 25; 1RP 8.

Since Dare's freedom of movement was limited, the questioning of Dare was "custodial" for Miranda purposes. Sargent, 111 Wn.2d at 650; cf. Lorenz, 152 Wn.2d 37-38 (no custody because police officers explicitly advised the suspect prior to interviewing that she was free to leave at any time and suspect acknowledged she was fully aware she was not under arrest and free to leave at any time); State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989) (no custody where agent was undercover, suspect had control of conversation, and agent left when suspect became abusive); Berkemer, 468 U.S. at 423, 441-42 (police at no time informed the motorist they pulled over that he was not free to leave).

The Washington Supreme Court recognizes lack of freedom of movement is the determinative factor. See State v. Copeland, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996) (citing Sargent, 111 Wn.2d at 648-49 ("'freedom of movement' is determinative of 'custody' for Miranda purposes."); Lorenz, 152 Wn.2d at 37 (quoting Post, 118 Wn.2d at 607) (defendant must "show some objective facts indicating his . . . freedom of

movement [or action] was restricted [or curtailed]."); Short, 113 Wn.2d at 41 ("sole inquiry" was "whether the suspect reasonably supposed his freedom of action was curtailed.").

The United States Supreme Court likewise recognizes the dispositive legal inquiry is whether, given the factual circumstances, "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). The Court plainly equated this legal standard with whether there was a restraint on freedom of movement of the degree associated with a formal arrest. Thompson, 516 U.S. at 112.

On the other hand, routine traffic and Terry[1] stops are not custodial for the purposes of Miranda because they are not police dominated. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). In Heritage, for example, a suspect was not in custody where park security guards seeking to find out who was smoking marijuana immediately made it clear they did not have the authority to arrest and did not physically detain anyone. Heritage, 152 Wn.2d at 219.

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

Dare's case is different. A uniformed law enforcement officer,[2] who unquestionably had the authority to arrest, physically detained Dare. A reasonable person in Dare's position, observing the trooper park his patrol car behind his own, take down the VIN on the dash, run the number through dispatch, and then return to tell the occupants to stay still, would by that point believe he was in police custody to a degree associated with formal arrest. From an objectively reasonable perspective, the order directing Dare to stay still within his hands in front without further explanation transformed a presumptively brief investigative encounter into one of indefinite duration. See State v. France, 129 Wn. App. 907, 909-10, 120 P.3d 654 (2005) (where the duration of police stop is left open-ended and uncertain, the encounter is not a routine Terry stop in which Miranda warnings are not needed). Further, the trooper never told Dare he was free to leave. See Tankleff v. Senkowski, 135 F.3d 235, 244 (2nd Cir. 1998) (whether the defendant is told he is free to leave is a recognized relevant factor in determining whether a defendant is "in custody").

Taking all of the circumstances into account, a reasonable person in Dare's situation would not believe he was at liberty to terminate the encounter and leave. Again, the ultimate inquiry is whether there was a restraint on freedom of movement of the degree associated with a formal

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[2] 1RP 4.

arrest, which means "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson, 516 U.S. at 112. That standard is satisfied under the circumstances of this case.

b. The trooper interrogated Dare by telling him the car was stolen.

The psychological ploy of "posit[ing] the guilt" of the subject is a technique for eliciting statements from the suspect and amounts to interrogation in a custodial setting. Rhode Island v. Innis, 446 U.S. 291, 299, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). As argued in the opening brief, the trooper posited Dare's guilt when he told Dare, the driver of the car, that the car was stolen. Brief of Appellant at 14-20.

Relying on United States v. Payne, 954 F.2d 199 (4th Cir. 1992), the State contends no interrogation occurs when an officer merely describes the evidence against a suspect. BOR at 20-22.[3] While decisions from federal circuit courts can provide persuasive authority concerning federal questions, they "are not binding upon the Washington Supreme Court or this court." Feis v. King Comity Sheriff's Dep't, 165 Wn. App. 525, 547, 267 P.3d 1022 (2011).

The federal circuit courts, meanwhile, do not speak with one voice on the question of whether describing inculpatory evidence constitutes

[3] The State describes Payne as a Ninth Circuit case, but it is actually from the Fourth Circuit. BOR at 21.

interrogation. Compare Payne with Combs v. Wingo, 465 F.2d 96, 99 (6th Cir. 1972) ("The only possible object of showing the ballistics report to the appellant in this case was to break him down and elicit a confession from him. The question was implied if not spoken. Everything was there but a question mark. It was a form of question and got the desired result."); United States v. Poole, 794 F.2d 462, 466 (9th Cir. 1986) (showing a suspected bank robber surveillance photos was interrogation); United States v. Pena, 897 F.2d 1075, 1081, n.16 (11th Cir. 1990) (government informed suspect that marijuana had been recovered, thereby eliciting his exclamations of regret: "This practice of permitting interrogators to apprise a suspect of the evidence against him as a prelude to asking him to reconsider his decision to remain silent has been brought into doubt by Rhode Island v. Innis"), disapproved on other grounds, Anderson v. Smith, 751 F.2d 96 (2d Cir. 1984)).

At any rate, Payne is distinguishable. The agent in that case told a suspect that a gun was found in his house, to which Payne replied "I just had it for my protection." Payne, 954 F.2d at 201, 203. Payne was subsequently charged and convicted for drug and weapons offenses. Id. at 201. The Fourth Circuit did not believe the officer's statement qualified as interrogation because declaratory descriptions of incriminating evidence do not invariably constitute interrogation and Payne's response to the

statement was neither foreseeable nor the result of a psychological ploy. Id. at 202-03.

Payne recognized "[t]he inquiry mandated by Innis into the perceptions of the suspect is necessarily contextual [,] . . . and whether descriptions of incriminating evidence constitute the functional equivalent of interrogation will depend on circumstances that are too numerous to catalogue." Id. at 203 (internal citations omitted). Payne encourages a case-by-case analysis to determine whether presentation of evidence to a suspect constitutes interrogation.

Unlike Payne, the trooper in Dare's case did not merely make a declaratory statement describing incriminating evidence. The trooper made a much more direct statement that a crime had been committed: the car was stolen. Dare, as the driver of the stolen car, was clearly the target of that statement. The trooper did not simply present Dare with evidence that could lead to a conclusion that a crime had been committed. Rather, the trooper straight up expressed his belief that the car was stolen, which plainly conveys a crime was committed. It is easy to see from Dare's perspective, under the circumstances of this case, that being advised the car was stolen was the functional equivalent of a law enforcement officer positing guilt, which Innis plainly recognizes as a known interrogation technique. Innis, 446 U.S. at 299. In contrast, FBI agents in Payne at no

time told the suspect that having a gun in his house was a crime, nor was it obvious that it would be. Payne, 954 F.2d at 201.

Further, the trooper was well aware of Dare's extraordinary anxiety produced by the encounter. 1RP 9, 11. Dare's mental state was compromised and ripe for exploitation. From an objective standpoint, it was reasonably foreseeable that expression of the trooper's belief that the car was stolen would elicit a response from an inordinately nervous suspect. See Innis, 446 U.S. at 302 n.8 ("Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.").

The State cites Arizona v. Roberson, 486 U.S. 675, 687, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988) for the proposition that an officer does not necessarily interrogate an in-custody suspect by merely describing the evidence against him. BOR at 21. Dare agrees with that proposition. The flip side is that an officer, in some circumstances, can interrogate a suspect by describing the evidence against him. As argued, the record in this case shows the trooper went beyond merely describing evidence. And the particular circumstances of Dare's case shows he was interrogated when the trooper told Dare the car he was driving was stolen.

c. The officer safety exception does not apply.

The State did not argue before the trial court that the officer safety exception to the Miranda requirement applied to the trooper telling Dare that the car was stolen. The State advances this argument for the first time on appeal. BOR at 24-25. This Court does not generally affirm on the basis of a theory that the State argues for the first time on appeal. State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997).

Even so, the State's argument fails. The only authority it cites is State v. Lane, 77 Wn.2d 860, 863, 467 P.2d 304, 306 (1970), which held "it is not a violation of either the letter or spirit of Miranda for police to ask questions which are strictly limited to protecting the immediate physical safety of the police themselves and which could not reasonably be delayed until after warnings are given." BOR at 24-25. Even where safety is a concern, "Miranda requires that a warning of rights be given *as* quickly as reasonably possible." Lane, 77 Wn.2d at 863-64 (applying exception where officer asked suspect if he had a gun because it was related solely to officer safety with "good reason to believe" the defendant "was armed and potentially dangerous.").

For the safety exception to apply, two requirements must be satisfied: "(1) the question is solely for the purpose of officer or public safety, and (2) the circumstances are sufficiently urgent to warrant an

immediate question." State v. Spotted Elk, 109 Wn. App. 253, 260, 34 P.3d 906, 910 (2001).

Trooper Caiola did not testify he told Dare the car was stolen solely to ensure officer safety. The trial court made no such finding. The trial court found the trooper's statement was "made *in part* to maintain officer safety at the scene." CP 30 (emphasis added). Even assuming this challenged finding is supported by substantial evidence, it does not meet the requirement that the interrogating statement be made *solely* for the purpose of officer safety. Spotted Elk, 109 Wn. App. at 260. The State even concedes Trooper Caiola did not ask any questions directly related to officer safety. BOR at 25. The first requirement for the safety exception is unsatisfied.

Second, no immediate threat to officer or public safety presented itself, such that the trooper needed to engage in interrogation before giving the Miranda warnings. Neither Dare nor any of the occupants made any threatening gestures or furtive movements. They were cooperative. They were not being investigated for a violent crime. The trooper had no factual basis to believe anyone was armed with a weapon. There is nothing that separates these facts from those of an ordinary, routine arrest scenario.

The exception applies to exigent situations. Fleming v. Collins, 954 F.2d 1109, 1112 (5th Cir. 1992); see also New York v. Quarles, 467 U.S. 649, 658, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984) (the exception is "circumscribed by the exigency which justifies it")). Washington courts have therefore applied the exception where there is an immediate threat to safety. State v. Finch, 137 Wn.2d 792, 830, 975 P.2d 967 (1999) (applying exception where a SWAT team negotiated with a suspect who shot two people then barricaded himself in a trailer; suspect indicated he was suicidal, had shot himself, and intended to shoot police officers); State v. Richmond, 65 Wn. App. 541, 545-46, 828 P.2d 1180 (1992) (applying exception where the officer was trying to ascertain the location of a reported stabbing victim). No immediate danger presented itself in Dare's case. The exception is inapplicable.

d. Dare's post-Miranda statements must be suppressed because objective criteria show the trooper engaged in an impermissible two-step interrogation process.

In State v. Rhoden, __Wn. App.__, 356 P.3d 242, 247 (2015), the Court of Appeals held an officer engaged in an impermissible two-step interrogation process.[4] In that case, a deputy asked the suspects whether there were any drugs in the home during the initial interrogation in the

[4] Rhoden came out before the State filed its brief, yet the State does not acknowledge its existence.

living room before giving the Miranda warnings. Rhoden, 356 P.3d at 247. Rhoden admitted that he had a small quantity of methamphetamine in his bedroom. Id. After completing his questioning of the group in the living room, the deputy escorted Rhoden to the kitchen, read Rhoden his Miranda advisements, and repeated the same questions he had asked in the living room, to which Rhoden answered consistently with his responses given before receiving the Miranda warnings. Id.

The Court of Appeals concluded objective evidence of "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre and postwarning statements" all supported the conclusion that the two-step interrogation procedure was deliberate under United States v. Williams, 435 F.3d 1148, 1159 (9th Cir. 2006). Id. Further, the midstream Miranda warnings in Rhoden were ineffective because "there was not a significant break in time or place between the pre- and post-Miranda interrogation. Perhaps more importantly, the evidence also showed that [the deputy] did not take any additional measures to insure that Rhoden understood his Miranda rights, such as advising him that his pre-Miranda statements could not be used against him." Rhoden, 356 P.3d at 247.

The same factual dynamic presents itself in Dare's case. Trooper Caiola was the only interrogator involved. 1RP 15; CP 27. The content of

Dare's pre-warning and post-warning statements overlap. 1RP 15, 19; 3RP 57-60. The pre-warning interrogation was complete once Dare confessed that he knew Satan stole cars in response to Caiola's question of why he would say "I knew it." 1RP 15.

As in Rhoden and Seibert, the warnings were given only after Dare had confessed during a custodial interrogation without Miranda warnings. Rhoden, 356 P.3d at 246 (citing Missouri v. Seibert, 542 U.S. 600, 604-05, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004)). As in Rhoden and Seibert, the interrogating officer then provided Miranda warnings and again obtained Dare's confession, "without a significant break in time or place and without measures to assure the suspect that [his] non-*Mirandized* statements could not be used against her in a subsequent criminal prosecution." Id. (citing Seibert, 542 U.S. at 605). The objective evidence in Dare's case shows a deliberate two-step interrogation process.

e. The error was not harmless beyond a reasonable doubt.

The State argues so long as the initial statement of "I knew it" was admissible, any other error in admitting other statements was harmless beyond a reasonable doubt. BOR at 31-33. Certainly the "I knew it" statement was damaging. But its import is ambiguous standing alone and would not necessarily lead to a finding of guilt. What does "it" refer to? One inference is that Dare knew the car was stolen. But other inferences

are available. Dare testified his statement did not mean he knew the car was stolen, but rather he knew they were in trouble. 3RP 104. Another available inference is that Dare viewed the trooper's statement as confirmation of a gut feeling that the car was stolen because he knew Satan to steal cars, i.e., he knew it in hindsight, but not necessarily before the trooper voiced his belief that the car was stolen. The State does not deny the other admitted statements were inculpatory, particularly "He said, referencing his earlier statement about he knew it, that she steals cars." 3RP 60. The State cannot establish their admission was harmless beyond a reasonable doubt.

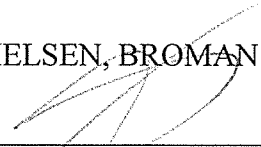
B. CONCLUSION

For the reasons set forth above and in the opening brief, Dare requests that this Court reverse the conviction.

DATED this 29th day of October 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72943-8-I
	)	
MICHAEL DARE,	)	
	)	
Appellant.	)	

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 28TH DAY OF OCTOBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL DARE
DOC NO. 380690
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF OCTOBER, 2015.

x Patrick Mayovsky