

NO. 41231-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RYAN JAY DOERING,

Appellant.

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STATE OF WASHINGTON  
APR 19 2011  
COUNTY OF SNOHOMISH

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

The Honorable Sally F. Olsen, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact VII on CrR 3.5: “That Officer Elton questioned the Defendant regarding his alcohol consumption during a *Terry* investigative detention.” CP 147.

2. The trial court erred in entering Finding of Fact VIII on CrR 3.5: “That the Defendant was not under custodial arrest at the time he made the aforementioned statements regarding his alcohol consumption.” CP 147.

3. The court erred in admitting appellant’s statement made in the course of a custodial interrogation before he was advised of his constitutional rights.

4. The court erred in failing to explicitly state in the Judgment & Sentence that the combination of confinement and community custody shall not exceed the statutory maximum sentence.

Issues pertaining to assignments of error

1. Appellant was stopped for driving with a suspended license in the second degree, and he acknowledged his offense to the arresting officer. The officer proceeded to ask him questions about his alcohol consumption before formally arresting him and advising him of his constitutional rights. Where a reasonable person would understand that this detention was not merely a brief traffic stop but would culminate in

appellant's arrest, should his statements have been suppressed as the product of custodial interrogation? (Assignments of Error 1, 2 and 3).

2. The court imposed the statutory maximum sentence of 60 months on appellant's conviction for felony driving under the influence. The Judgment & Sentence also orders a 12 month term of community custody but does not explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum sentence. Is remand required to correct this error? (Assignment of Error 4).

B. STATEMENT OF THE CASE

1. Procedural History

The Kitsap County Prosecuting Attorney charged appellant Ryan Jay Doering by amended information with felony driving under the influence and driving while license suspended or revoked in the second degree. CP 103-05; RCW 46.61.502(1) and (6); RCW 46.20.342(1)(b). The case proceeded to jury trial before the Honorable Sally F. Olsen, and the jury returned guilty verdicts. CP 130. The court imposed the statutory maximum sentence of 60 months on the felony, concurrent with 365 days on the driving while license suspended count. CP 136-37. Doering filed this timely appeal. CP 150-51.

2. Substantive Facts

Around 1:00 a.m. on March 25, 2010, Bremerton Police Officer Aaron Elton was working containment in an unrelated case when he saw Ryan Doering drive past him. 2RP<sup>1</sup> 121-22. Elton was familiar with Doering and knew his license had been revoked, so when he finished his assignment, after first confirming the revoked license, Elton followed Doering to conduct a traffic stop. 2RP 124. Elton did not make any observations about Doering's driving, but stopped him solely because he was a suspended driver. 2RP 123, 129. Elton pulled Doering over, made contact, and told Doering he was stopped for driving with a suspended license. 1RP 47. Doering responded that he was aware of that. 1RP 58.

During their conversation, Elton noticed Doering's speech was slurred and there was an odor of intoxicants on Doering's breath, so he asked if Doering had been drinking. 1RP 47. Doering said he had not. 1RP 47, 59. Elton then removed Doering from the car, formally arrested him for driving with a suspended license, and advised him of his Miranda<sup>2</sup> rights. 1RP 47-48. In further conversation, Doering admitted drinking one to two beers. 1RP 49, 60.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP 8/16-17/10; 2RP—8/18/10; 3RP—8/19, 20, 27/10.

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Elton called in the police department's designated traffic officer, Donnell Rogers, who administered field sobriety tests and made the decision to arrest Doering for driving under the influence. 2RP 126, 140, 158-59. Doering was taken to the police station, where he was given implied consent warnings, and he declined to provide a breath sample. 2RP 159, 161, 165.

At the CrR 3.5 hearing prior to trial, Doering testified that Elton pulled him over for driving with a suspended license and told him to take the keys out of the ignition. 1RP 58. When Elton saw that Doering's passenger was holding a beer, Elton asked Doering if he had been drinking, and Doering said no. 1RP 58-59. After he stepped out of the car, Doering admitted drinking a beer or two. 1RP 60. Doering testified that neither Elton nor Rogers had advised him of his constitutional rights, and defense counsel argued that Doering's statements were inadmissible because he had not been given his Miranda warnings. 1RP 64, 72.

The court found that both Elton and Rogers had advised Doering of his constitutional rights. 1RP 76. It ruled, however, that none of Doering's statements to Elton before he was advised of his rights would be admitted at trial, including his initial statement that he had not been drinking. 1RP 76-77. The State objected, arguing that at the time he made the statement, Doering was not under arrest, but merely the subject

his activities before Miranda warnings are required. Heritage, 152 Wn.2d at 218; Marshall, 47 Wn. App. at 325.

Terry has been extended to traffic investigations, and the typical brief traffic stop does not rise to the level of custody for the purposes of Miranda. State v. Day, 161 Wn.2d 889, 897, 168 P.3d 1265 (2007); Heritage, 152 Wn.2d at 218 (citing Berkemer, 468 U.S. at 439-40). Because traffic stops are brief, they occur in public, and they are less police dominated than the custodial interrogations contemplated by Miranda, a detaining officer may ask a moderate number of questions to identify the suspect and confirm or dispel suspicions without rendering the suspect in custody. Heritage, 152 Wn.2d at 218.

Unlike the typical brief stop for a traffic infraction, which could be expected to end once a citation is issued, Doering was stopped for committing a gross misdemeanor. See State v. France, 129 Wn. App. 907, 910, 120 P.3d 654 (2005)(defendant was in custody because duration of police stop was uncertain, in contrast to traffic stop where suspect would be free to leave as soon as traffic citation issued); RCW 46.20.342(1)(b). Officer Elton told Doering he was being stopped for driving with a suspended license, and Doering admitted he was aware of his offense. 1RP 47, 58. Driving while license suspended is a non-minor offense, and a police officer needs nothing more than probable cause to arrest a person

for it. State v. Pulfrey, 154 Wn.2d 517, 528, 111 P.3d 1162 (2005). Nor is the officer required to cite and release a driver arrested for that offense. Pulfrey, 154 Wn.2d at 526; RCW 46.64.015. Thus, from the beginning of Doering's encounter with Elton, it was clear that the detention would not be brief and that Doering would not be permitted to leave. His freedom of action was curtailed from that point to the same degree as if Elton had formally placed him under arrest, and he was in custody.

This case is unlike the situation in Heritage, where park security guards approached a group of teens to investigate the smell of marijuana. Heritage, 152 Wn.2d at 212. Because the guards did not physically detain or search anyone and made it clear they did not have the authority to arrest, no reasonable person would have believed his or her freedom of action was curtailed to the degree associated with arrest. Heritage, 152 Wn.2d at 219. The encounter was a Terry stop, and Miranda warnings were not required. Id. Here, by contrast, Doering was physically restrained, the officer confronted him with evidence of a crime he admitted committing, and the officer had authority to arrest him. Any reasonable person would have believed from these circumstances that he was in custody.

Doering's arrest was more like the situation in France. There, a sheriff's deputy stopped the defendant, who was a suspect in a domestic

violence incident. The deputy told him there was an alleged domestic dispute, and they “needed to clear it up” before France would be allowed to leave. France, 129 Wn. App. at 908. The deputy then asked questions designed to obtain an admission from France that he was involved in the dispute and was aware of the no-contact order prohibiting him being at the residence. France, 129 Wn. App. at 909. This Court rejected the argument that France was not in custody, but merely the subject of an investigative detention. France was subjected to a detention of unlimited duration and would not be allowed to leave until the deputy decided the matter was cleared up. France, 129 Wn. App. at 910. Because France’s freedom of action was curtailed to the degree associated with formal arrest, the deputy’s questioning of him without Miranda warnings was improper. France, 129 Wn. App. at 910-11.

Like the detention in France, Doering’s encounter with Elton was not a brief Terry stop. The duration was open-ended, because Elton had probable cause to arrest Doering for driving with license suspended in the second degree. Neither Doering nor any reasonable person in his position would have felt he would be free to leave at the conclusion of the encounter. This was a police-dominated situation, unlike the typical traffic stop, equivalent to custodial arrest. Doering was in custody, and Miranda required that he be advised of his constitutional rights before any

interrogation. None of his statements in response to questions asked before he was advised of his constitutional rights should have been admitted at trial. See Marshall, 47 Wn. App. at 323 (prosecution may not use statements stemming from custodial interrogation unless defendant is first informed of constitutional rights).

Miranda is a constitutional requirement. Dickerson, 530 U.S. at 438. As such, the State bears the burden of proving that the admission of a statement obtained in violation of Miranda was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error is harmless only if the overwhelming untainted evidence necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). In other words, the State must show that admission of the statement did not contribute to the conviction. Fluminante, 499 U.S. at 296 (citing Chapman, 386 U.S. at 26).

The State cannot meet this heavy burden here. Doering was convicted of felony driving under the influence. There was no evidence of Doering's blood alcohol content at the time of his arrest, so the State relied on Officer Rogers's conclusion that Doering exhibited signs of drug or alcohol intoxication, based on his contact with Doering and Doering's

performance on field sobriety tests. 2RP 158. Doering testified, however, that he had only drunk one 16 ounce beer, and he was not impaired. 3RP 230, 235. Moreover, Officer Elton testified he did not notice any impaired driving. 2RP 123, 129.

Thomas Missell, an expert on field sobriety tests, called the reliability of the test results obtained by Rogers into question. 3RP 270, 281, 284. Missel pointed out that a study showed one of the factors relied on in the horizontal gaze nystagmus test could be attributable to fatigue, and Doering testified he had been awake over 18 hours at the time of the test. 3RP 235, 284. Additionally, Rogers erroneously instructed Doering on the one-leg stand test, contrary to standards established by the National Highway Traffic Safety Administration, invalidating the test. 3RP 280-82, 299. And while the State argued that Doering's refusal to provide a breath sample was evidence that he was under the influence, Doering explained that he chose not to provide a sample because the consequence of refusing was the loss of his license, and he did not have a license anyway. 3RP 249, 328-29.

In response to the evidence challenging Rogers's conclusion, the State relied on Doering's initial statement that he had not been drinking to argue that Doering lacked credibility, and the jury should not believe his claim that he was not impaired. 3RP 330-31. Because the untainted

evidence does not necessarily lead to a finding of guilt, the erroneous admission of Doering's custodial statement is not harmless beyond a reasonable doubt, and his conviction must be reversed.

2. REMAND IS NECESSARY TO CLARIFY THE JUDGMENT & SENTENCE.

At sentencing, the prosecutor informed the court that, while Doering's offense carries a term of 12 months of community custody, that term could not be imposed because the standard range sentence of 60 months was the statutory maximum sentence for the offense. 3RP 363. Thus, the court could not order the conditions of community custody the State would have recommended. 3RP 364. After the court imposed 60 months of confinement, the prosecutor stated that she placed a notation in the community custody section of the Judgment & Sentence explaining that the community custody period exceeds the statutory maximum term. 3RP 373-74. The court agreed that was appropriate. 3RP 375.

In the Judgment & Sentence, the community custody box is checked, indicating that the defendant shall be supervised by the Department of Corrections following his release from custody. CP 137. Another box is checked indicating that the term of community custody for Count I is 12 months. CP 138. Next to that term, the following notation is inserted:

Note: While 12 months of community custody is authorized for this offense, such period of community custody exceeds the statutory maximum term (5 years) given the defendant's sentence of 60 months.

CP 138. The form goes on to specify the terms and conditions of community custody to which Doering is subject. CP 138-40.

Under the Sentencing Reform Act, the combined terms of confinement and community supervision may not exceed the statutory maximum sentence for the offense:

Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

RCW 9.94A.505(5). Doering was convicted of felony driving under the influence, a class C felony, and thus the combined sentence of confinement and community custody could not exceed five years. RCW 46.61.502(1) and (6); RCW 9A.20.021(1)(c).

While it appears the trial court intended to follow the statute, its attempt to do so leaves the Judgment & Sentence unclear. The Judgment & Sentence indicates that a 12 month term of community custody is ordered. Although the added notation acknowledges that this term exceeds the statutory maximum sentence, the Judgment & Sentence could be read to impose 12 months of community custody, despite the fact that it exceeds the statutory maximum sentence. The court's attempt to comply

with the statute leaves the reader to infer that Doering is not to serve more than the statutory maximum term. The Washington Supreme Court has made it clear, however, that the Judgment & Sentence must “explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.” In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009). The appropriate remedy is to remand to the trial court to correct this error. Brooks, 166 Wn.2d at 675.

D. CONCLUSION

The court’s admission of Doering’s custodial statement in violation of Miranda was not harmless, and Doering’s conviction for felony driving under the influence must be reversed. In addition, remand is necessary to clarify the Judgment & Sentence.

DATED this 17<sup>th</sup> day of February, 2011.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Ryan Jay Doering*, Cause No. 41231-4-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
February 17, 2011

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