

NO. 41231-4-II

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

COURT OF APPEALS
STATE OF WASHINGTON
DATE:
BY:

STATE OF WASHINGTON,

Respondent,

v.

RYAN DOERING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00242-0

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 10, 2011, Port Orchard, WA
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in admitting Doering's pre-Miranda statement that he had not been drinking when Doering was not in custody for Miranda purposes at the time of this statement. Furthermore, whether any error in this regard was harmless when the record demonstrates that the jury would have reached the same conclusion even without the admission of Doering's initial denial?

2. The Judgment and Sentence should be amended to clarify that the combination of confinement and community custody shall not exceed the statutory maximum.

3. Whether the claims raised by Doering in his consolidated PRP should be dismissed when they are clearly without merit?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ryan Doering was charged by an amended information filed in Kitsap County Superior Court with felony driving under the influence and driving with a suspended license in the second degree. CP 103. Following a jury trial, Doering was found guilty of the charged offenses, and the trial court imposed a standard range sentence. CP 130, 135. This appeal followed.

B. FACTS

The charges in the present case stemmed from the State's allegation that Doering was driving under the influence and with a suspended license in the early morning hours of March 25, 2010. CP 103. Prior to trial, a CrR 3.5 hearing was held regarding several statements made by Doering. RP 45.

CrR 3.5 Hearing

At approximately 1:00 in the morning on March 25, 2010 Officer Aaron Elton of the Bremerton Police Department was on duty and was at an intersection in Bremerton assisting in a "containment" on an unrelated case. RP 46. Officer Elton explained that he has known Doering for "a lot of years," and that while he was assisting in the containment he saw Doering drive by in a truck. RP 46-47. Officer Elton confirmed that Doering's drivers license was suspended, and once Officer Elton was finished with the containment he drove off in an effort to locate Doering. RP 46-47. Officer Elton found Doering a short distance away and made a traffic stop of Doering's vehicle. RP 46.

Officer Elton pulled Doering over and advised him that he had stopped him for driving on a suspended license. RP 47. As Officer Elton spoke with Doering he could tell that Doering was slurring his words and Officer Elton could smell the obvious odor of intoxicants coming from Doering's breath. RP 47. Officer Elton asked Doering if he had been

drinking and Doering said “No.” RP 47.

Doering also testified at the CrR 3.5 hearing and said that when Officer Elton first approached him he said “Hi, Mr. Doering” and explained that they knew each other. RP 58. Doering testified that Officer Elton also told him that had pulled him over for driving with a suspended license. RP 58. Doering then testified that Officer Elton looked over with his flashlight and saw that Doering’s passenger had a beer and asked Doering if he had been drinking, and Doering said “No.” RP 58-59. Doering testified that Officer Elton then asked him to step out of the car. RP 59.

Officer Elton also testified that after speaking with Doering for a brief period of time he arrested Doering for driving with a suspended license and advised Doering of his Miranda rights, which Doering said he understood. RP 47-48. After Miranda, Officer Elton asked Doering some more questions about his drinking and Doering then admitted that he had had a “couple of beers.” RP 48-49.

Officer Elton then called Officer Rogers, a designated traffic officer, and asked Officer Rogers to evaluate Doering and determine if he was impaired. RP 49. Officer Rogers arrived and Doering made several statements to him. Doering was eventually arrested for DUI and was transferred to the Bremerton Police Station for a BAC test. RP 53-54. Officer

Rogers went through the “DUI packet” with Doering and again advised him of his Miranda rights. RP 54. Doering subsequently made several statements to Officer Rogers. RP 54-55. Doering ultimately refused to take a breath test. RP 66-67.

At the conclusion of the CrR 3.5 hearing the trial court issued its oral ruling and stated, in part, that:

Officer Elton testified that he was on containment on an unrelated matter when he saw the defendant drive by. He testified that he is quite familiar with Mr. Doering and has had numerous contacts with him and was aware that the defendant was driving – had a conviction for driving while license suspended in the second degree.

Based on that information, the Officer stopped the defendant on 8th Street. It was made obvious that the defendant spoke – slurred his words, and he detected an odor of alcohol. The officer asked questions about his alcohol consumption, and the defendant denied having consumed any alcohol at first but then admitted that he had a few beers.

Subsequent to those statements, the defendant was officially arrested for driving while license suspended, and according to Officer Elton, was verbally advised of his Miranda rights from the department-issued card that the officer indicates that he carries with him in his uniform. The defendant, according to Officer Elton, understood those rights and gave appropriate responses, and no promises or threats were made, nor did he request an attorney.

Subsequent to the advisement of Miranda rights by Officer Elton, the defendant admitted to having a few beers.

RP 73-74.

The trial court then initially ruled that any statement made by Doering prior to the advisement of his Miranda rights (specifically, Doering's statement that he had not consumed any alcohol) was not admissible. RP 76-77, 81.

After this initial ruling by the court, the State essentially asked the court to clarify or reconsider a portion of its ruling, and the State argued that Doering's pre-Miranda denial of drinking should be admissible because the officer's questions were authorized under *Terry v. Ohio* as the officer was exploring the possibility that Doering had been drinking and Doering had not yet been taken into custody or formally arrested. RP 82. The trial court reserved ruling on this argument. RP 82-83.

After some additional argument, the trial court revised its initial ruling. RP 86. The court then explained that in a *Terry* detention situation Miranda warnings are not required. Further, the court characterized Officer Elton's initial stop of Doering as a *Terry* detention based upon the belief that Doering was driving on a suspended license. RP 86. Although Officer Elton briefly spoke with Doering about his drinking, those initial questions were investigatory in nature and related to the possibility that Doering was driving under the influence. RP 86. The court then ruled that all of Doering's statements, including his pre-Miranda denial of drinking, were admissible. RP 86.

The trial court later entered written findings of fact and conclusions of law finding that:

V.

That, as the Defendant spoke, Officer Elton detected slurred speech and an odor of alcohol.

VI.

That Officer Elton asked the Defendant questions about his alcohol consumption, and the Defendant initially denied having consumed any alcohol.

VII.

That Officer Elton questioned the Defendant regarding his alcohol consumption during a *Terry* investigative detention.

VIII.

That the Defendant was not under custodial arrest at the time he made the aforementioned statements regarding his alcohol consumption.

IX.

That, subsequent to these statements, the Defendant was arrested for Driving While License Suspended in the Second Degree, at which time Officer Elton verbally advised the Defendant of his *Miranda* rights from the department-issued card that he carries.

X.

That the Defendant understood those rights and gave appropriate responses, no promises were made, and the Defendant did not request an attorney.

XI.

That, subsequent to the advisement of *Miranda* rights by Officer Elton, the Defendant admitted to having a few beers.

...

CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That the statements made by the Defendant to the aforementioned officers were voluntarily made following a knowing, voluntary, and intelligent waiver of his *Miranda* rights.

III.

That the Defendant's statements made to the aforementioned officers after *Miranda* rights were read shall be admissible at trial pursuant to CrR 3.5.

IV.

That the Defendant's pre-*Miranda* statements to Officer Elton shall be admissible at trial pursuant to *Terry v. Ohio*.

CP 146-49.

Evidence at Trial

At trial, Officer Elton testified that he was assisting in search for a suspect in an unrelated incident when he saw Doering drive past him. CP 119, 121-22. Officer Elton ran Doering's name and confirmed that his license was suspended in the second degree. CP 124.

After finishing his involvement with the unrelated search, Officer Elton turned around and attempted to relocate Doering. CP 123. A few minutes later Officer Elton saw Doering nearby and saw that he was still in the same vehicle and was still the driver. CP 123. Officer Elton then initiated a traffic stop and pulled Doering over. CP 123.

Officer Elton observed that Doering was slurring his words and Officer Elton could also smell the "obvious odor of alcohol." CP 125. When

Officer Elton asked him if he had been drinking, Doering at first denied that he had been drinking. RP 126. Later, however, Doering admitted that he had had “one or two beers.” RP 126.

Officer Elton then called Officer Rogers, the designated traffic officer, to assist in evaluating whether Doering was too intoxicated to drive. RP 126. Officer Rogers arrived within a few minutes. RP 127.

Officer Rogers contacted Doering and explained why he was there. RP 138-39. Officer Rogers observed that Doering had slurred speech, seemed unstable on his feet, had red and watery eyes. RP 139. Doering also admitted to Officer Rogers that he had been drinking. RP 139. Officer Rogers asked Doering if he would be willing to submit to field sobriety tests and Doering agreed. RP 140.

The first test administered by Officer Rogers was the horizontal gaze nystagmus or “HGN” test. RP 145. In administering this test Officer Rogers had to remind Doering three times to keep his head still during the test. RP 149. Once Doering kept his head still, Officer Rogers was able to administer the test and found all six “clues”¹ were present, indicating alcohol or drug intoxication. RP 150-51.

¹ These six “clues” included three indicators that are applied to each eye, for a total of six clues. The three indicators or clues are: the “lack of smooth pursuit;” “distinct and sustained nystagmus at maximum deviation;” and “onset of nystagmus prior to 45 degrees.” RP 149-51

The next test was the Romberg balance test. RP 152. In this test Doering was asked to stand with his feet together and his hands by his side with his head tilted back and his eyes closed. RP 152-53. Doering was then asked to estimate the passage of 30 seconds. RP 153. Doering indicated he understood the instructions, but when he performed the test he estimated the passage of 30 seconds after only 13 actual seconds had passed. RP 153. Doering's performance on this test again indicated alcohol or drug use. RP 153.

Officer Rogers next gave Doering the "walk and turn" test in which Doering was asked to take a series of nine heel-to-toe steps down a line and then turn around and take nine steps back. RP 154. Doering was also instructed to look down at his feet during the test. RP 155-56. During the test Doering had to be reminded four times to look at his feet during the test. RP 155. Doering also failed to touch his heel to his toe by a considerable margin on a number of the steps. RP 156. Officer Rogers explained that Doering's performance on this test was "very consistent with someone impaired due to drugs and alcohol or both." RP 156.

The final field sobriety test administered by Officer Rogers was the "one-leg stand" test in which Doering was instructed to lift one foot six inches off the ground while counting out loud until instructed to stop. RP 157. While performing this test Doering counted the number 17 twice and

put his foot down at the count of 19. RP 158. Officer Rogers again stated that Doering's performance on this test demonstrated that he was exhibiting signs of alcohol or drug use. RP 158.

Based on his interaction with Doering and with Doering's performance on the field sobriety tests, Officer Rogers formed the opinion that Doering was impaired and unsafe to operate a motor vehicle. RP 158.

Doering was then taken into custody for suspicion of DUI and was placed in a patrol car and transported a few blocks to the police station for further processing. RP 159. At the station Officer Rogers took Doering to a BAC room and started going over a DUI packet with Doering. RP 159. As a part of this process Doering was advised of his constitutional rights. RP 159-61. Doering was also advised of the implied consent warnings regarding a breath test. RP 161-62. Doering indicated that he understood his rights. RP 164.

Officer Rogers then asked Doering a number of questions including: "Were you driving the vehicle?" RP 169. Doering responded "No." RP 169, 213. When Doering was ultimately asked to if he would provide a breath sample, Doering refused. RP 170.

Doering also testified at trial and claimed that he had only consumed one can of beer that day. RP 230. When his counsel asked if he was feeling

the effects of the alcohol when he was driving, Doering responded, “No. Definitely not.” RP 234-35. At the conclusion of his direct testimony, Doering admitted that he had two previous convictions for possession of stolen property. RP 261.

III. ARGUMENT

- A. THE TRIAL COURT DID NOT ERR IN ADMITTING DOERING’S PRE-MIRANDA STATEMENT THAT HE HAD NOT BEEN DRINKING BECAUSE DOERING WAS NOT IN CUSTODY FOR MIRANDA PURPOSES AT THE TIME OF THIS STATEMENT. FURTHERMORE, ANY ERROR IN THIS REGARD WAS HARMLESS BECAUSE THE RECORD DEMONSTRATES THAT THE JURY WOULD HAVE REACHED THE SAME CONCLUSION EVEN WITHOUT THE ADMISSION OF DOERING’S INITIAL DENIAL.**

Doering argues that the trial court erred in admitting Doering’s pre-Miranda statement that he had not consumed any alcohol. App.’s Br. at 5. This claim is without merit because the trial court did not err in finding that Doering was not in “custody” at the time of his pre-Miranda statement because Doering’s freedom of movement had not yet been restrained to a degree associated with formal arrest.

The Washington Supreme Court has explained that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if

unchallenged, and, “if challenged, they are verities if supported by substantial evidence in the record.” *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is that sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025, 72 P.3d 763 (2003). An appellate court is to leave credibility and conflicting testimony resolution to the fact finder. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Furthermore, an appellate court is to review conclusions of law to determine whether the findings of fact support them. *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). Finally, conclusions of law de novo are reviewed de novo. *Alpentel Community Club, Inc., v. Seattle Gymnastics Soc'y*, 121 Wn. App. 491, 496-97, 86 P.3d 784, *review denied*, 152 Wn.2d 1029, 103 P.3d 200 (2004).

State agents must give Miranda warnings when a suspect is subject to custodial interrogation. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). “Custody” for the purposes of Miranda is narrowly circumscribed and requires formal arrest or restraint on freedom of movement to a degree associated with formal arrest. *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599 (1992); *State v. Sargent*, 111 Wn.2d at 649-50, 762 P.2d 1127; *Heritage*, 152 Wn.2d at 218. It is irrelevant to this inquiry whether the police had probable cause to arrest a suspect. *State v. Lorenz*, 152 Wn.2d 22,

37, 93 P.3d 133 (2004).

Moreover, investigative detentions (*Terry* stops) are not custodial for Miranda purposes because they are brief, occur in public, and are less police dominated. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Heritage*, 152 Wn.2d at 218, 95 P.3d 345. Thus, although a reasonable person might not feel free to leave, a law enforcement officer may ask a moderate number of questions during an investigative detention to determine the suspect's identity and confirm or dispel the officer's suspicions without reading Miranda warnings. *Heritage*, 152 Wn.2d at 218.

In *Berkemer v. McCarty*, 468 U.S. 420, 439-40, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317 (1984), the United States Supreme Court explained that Miranda warnings are not required in a traffic stop of a suspected drunk driver prior to any questions about the consumption of alcohol. In *Berkemer*, an officer stopped McCarty's car after he had observed it weaving in and out of its lane. *Berkemer*, 468 U.S. at 423. When McCarty got out of his car he had difficulty standing, and at this point the officer decided to arrest McCarty, but did not announce this intention. *Id.* Instead, the officer asked McCarty to perform a field sobriety test commonly called the "balancing test." McCarty could not do so without falling. The officer then asked McCarty whether he had been using intoxicants. McCarty, in slurred speech which the officer had difficulty understanding, admitted drinking two beers and smoking several

marijuana cigarettes. *Id.* At that point the officer arrested McCarty and took him to jail. At no time during this sequence was McCarty given Miranda warnings. *Id.*

The Supreme Court held that the roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute “custodial interrogation” for purposes of Miranda:

[W]e reject the contention that the initial stop of respondent's car, by itself, rendered him “in custody.” And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest.... Although [the trooper] apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, [the trooper] never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was “in custody” at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Berkemer, 468 U.S. at 441-42, 104 S. Ct. at 3151-52.² The Court concluded

² In *Berkemer*, the United States Supreme Court also stated:

[T]he usual traffic stop is more analogous to a so-called “*Terry* stop”, see *Terry v. Ohio*, 392 U.S. 1 [88 S.Ct. 1868, 20 L.Ed.2d 889] (1968), than to a formal arrest. Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed ... a crime, may detain that person briefly in order to investigate the circumstances that provoke suspicion. [T]he stop and inquiry must be reasonably related in scope to the justification for their initiation. Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond.... The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that

that McCarty was not in custody until he was formally arrested. Consequently, the statements he had made prior to that point were admissible against him. In holding that McCarty was not in custody because he was not subjected to restraints comparable to those associated with a formal arrest, the Court concluded that McCarty, as a reasonable man, would not have understood his situation to be custodial and, therefore, would not have felt coerced. The Court rejected the existence of probable cause as a factor in the determination of custody and in so doing it reaffirmed that its focus was on the possibility of coercion alone and not on the possibility of deception. *Berkemer*, 468 U.S. at 436, 104 S. Ct. at 3148, n. 22. Under its analysis the Court looked solely to the surrounding circumstances and found the restraints insufficient to require concern for the possibility of coercion.

In the context of traffic stops, the Washington Supreme Court has also noted that although a driver has been detained and asked to perform field sobriety tests, this type of detention does not require Miranda warnings. *See, Heinemann v. Whitman County*, 105 Wn.2d 796, 808, 718 P.2d 789 (1986) (request for performance of field sobriety tests during routine traffic stop does not amount to custody so as to require Miranda warnings)

Terry stops are subject to the dictates of Miranda. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not “in custody” for the purposes of Miranda.

Berkemer v. McCarty, 468 U.S. 420, 439-40, 104 S.Ct. 3138, 3150, 82 L.Ed.2d 317 (1984)

Similarly, the Court of Appeals has also held that a person is not in custody while being interrogated by an officer at the scene of a serious vehicular accident involving injuries. *State v. Ferguson*, 76 Wn. App. 560, 886 P.2d 1164 (1995). In *Ferguson*, an officer responding to the scene of a serious accident involving injuries and found the defendant at the scene. *Ferguson*, 76 Wn. App. at 563. Prior to Miranda, the officer asked the defendant if he had been driving one of the vehicles, and the defendant answered yes. Based upon several factors the officer suspected that the defendant if he had been drinking and so he asked him whether he had been drinking, and the defendant admitted he had. *Id.* Another officer arrived at the scene and was told the defendant had been drinking. The second officer then also asked the defendant if he had been drinking, and the defendant said he had a couple of drinks. *Id.* Shortly thereafter one of the officers learned that another person had died at the scene, and the defendant was then arrested him for vehicular homicide, and read him his Miranda rights. *Id.* at 564.

One issue on appeal was whether Ferguson was in custody at the time he made the statements to the two officers. *Ferguson*, 76 Wn. App. at 565-66. In affirming the trial court's conclusion that Ferguson was not in custody, the Court of Appeals relied on *Berkemer*. *Ferguson*, 76 Wn. App. at 566, citing *Berkemer*, 468 U.S. at 439-40. The Court thus held that an officer may

(Footnotes, citations and some quotation marks omitted.).

ask the detainee a moderate number of questions to determine his or her identity and to try to obtain information to confirm or dispel the officer's suspicions, and that persons detained under such circumstances are not “in custody” for purposes of Miranda. *Ferguson*, 76 Wn. App. at 566, citing *Berkemer*, 468 U.S. at 439-40.

The defendant in *Ferguson*, however, argued that *Berkemer* did not apply because there is nothing “ordinary” or “routine” about the investigation of a vehicular homicide. *Ferguson*, 76 Wn. App. at 567. The Court of Appeals, however, disagreed and held that the seriousness of the potential traffic charge does not alter the analysis. *Id.* The Court noted that certainly a driver who is involved in a fatality road accident is likely to be detained longer than a driver who is pulled over for committing a relatively minor traffic infraction, and the officers had also testified that they would have prevented the defendant from leaving had he tried, yet the Court held that these facts did not change the defendant’s temporary detention from a *Terry* stop to a custodial arrest for purposes of Miranda. *Ferguson*, 76 Wn. App. at 567-68.

Furthermore, the Washington Supreme Court had held that even in investigatory situations where a suspect is affirmatively told that he or she is not free to leave, the detention does not equal “custody” for Miranda purposes. For example, in *State v. Hilliard*, 89 Wn.2d 430, 435, 573 P.2d 22

(1977), police officers told an otherwise unknown assault suspect that if they verified his story that he was only in the area to visit a married woman, he could leave. Our Supreme Court held that Hilliard was not in custody for Miranda purposes. *Hilliard*, 89 Wn.2d at 436, 573 P.2d 22.³

In the present case Doering was pulled over due to his driving on a suspended license. When Officer Elton approached the car and informed Doering of the reason for the stop he immediately noticed that Doering was slurring his words and Officer Elton could smell the obvious odor of intoxicants coming from Doering's breath. RP 47. Officer Elton then asked Doering if he had been drinking and Doering said "No." RP 47.

The present case, thus, is remarkably similar to *Berkemer*, where the Supreme Court held that Miranda warnings were not required before the officer was allowed to ask the suspect if he had been drinking. Furthermore, unlike in *Hilliard*, here Officer Elton did not tell Doering that he under arrest or that he would not be permitted to leave prior to his statement in which he denied drinking. Rather, Doering's denial of drinking came at a time when

³ In *State v. France*, 129 Wash.App. 907, 909-11, 120 P. 3d 654 (2005), however, the Court of Appeals held that police questioning was custodial when officers responding to a domestic violence report (1) knew the defendant, (2) expressly told the defendant he could not leave until "the matter was cleared up," and (3) asked the defendant incriminating questions based on knowledge of a no contact order between the defendant and the victim. The present case, however, is distinguishable, as at the time of the pre-Miranda statement at issue Officer Elton had not told Doering that he was going to be arrested for the suspended driving, nor had he told him that he was going to be detained indefinitely. Rather, as in *Heinemann*, Officer Elton merely asked Doering if he had been drinking after the officer had made several

Doering was still sitting in his car and had not yet even been asked to step out, had not been told he was under arrest, nor had he been asked to perform field sobriety tests. RP 47-49.

Doering argues that his encounter with Officer Elton was not a *Terry* stop, but rather was the equivalent of a custodial arrest. App.'s Br. at 9. Doering also argues that because Officer Elton had probable cause to believe that Doering had committed the offense of driving with license suspended in the second degree for which Officer Elton could have arrested him, that it was clear "from the beginning of Doering's encounter with Elton" that the "detention would not be brief and that Doering would not be permitted to leave." App.'s Br. at 8.

Doering's argument seems to suggest that because Officer Elton had probable cause that would have supported an arrest, Miranda warnings were immediately required. Earlier Washington cases used to apply a "probable cause" type of test to determine if Miranda warnings were required, but since the mid 1980's the Washington Supreme Court rejected a probable cause test in favor of the test outlined in *Berkemer*. See, *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986); *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989); *State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004).

observations that caused him to suspect that Doering had been drinking.

Thus it is “is irrelevant whether the officer’s unstated plan was to take [the defendant] into custody” and it is “irrelevant whether the police had probable cause to arrest [the defendant].” *Lorenz*, 152 Wn.2d at 37, *citing Beckwith v. United States*, 425 U.S. 341, 347, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976); *Berkemer*, 468 U.S. at 442, 104 S. Ct. 3138. Rather, in order for there to be custody, a reasonable person in the defendant’s position would have to believe that he or she was in police custody with the loss of freedom associated with a formal arrest. *Lorenz*, 152 Wn.2d at 37. Similarly, in *Berkemer* the officer had already decided that he would arrest the suspect for DUI, but had not informed the suspect of this fact, and the Court held that the defendant was not in custody for Miranda purposes. *Berkemer*, 468 U.S. at 423.

In the context of the present case, an *arrest* for driving with license suspended is certainly one possible outcome once an officer develops probable cause for that crime, but it is by no means the only possible outcome. For instance, CrRLJ 2.1 provides that whenever a person is arrested or could have been arrested pursuant to statute for a violation of law which is punishable as a misdemeanor or gross misdemeanor, the officer may simply “serve upon the person a citation and notice to appear in court.” CrRLJ 2.1(b)(1). In short, there is no mandatory arrest requirement for driving with a suspended license in the second degree. Doering’s argument

that it was clear “from the beginning of Doering’s encounter with Elton” that the “detention would not be brief and that Doering would not be permitted to leave,” is without support. In reality, the detention could well have been extremely brief and Officer Elton certainly could have chosen to simply issue a citation and summons. This process would have been no longer than the issuance of a traffic citation, and there is no support for a claim that a traffic stop and the issuance of a citation equals a loss of freedom associated with a formal arrest, which in turn would trigger *Miranda*. Furthermore, unlike in *Berkemer*, there is no evidence in the record that Officer Elton had already decided prior to the pre-*Miranda* statement that Doering was going to eventually be arrested.

In sum, the trial court did not err in finding that Doering’s pre-*Miranda* denial of drinking was admissible, as the totality of the circumstances does not suggest that a reasonable person would have felt restrained to the degree of a formal arrest. Thus, the trial court did not err in admitting Doering’s statement from the investigatory detention

Furthermore, even if it could be held that the trial court erred in admitting Doering’s statement that he had not been drinking, any error in this regard was harmless.

Erroneous admission of a statement in violation of Miranda is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988) (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)).

The statement at issue in the present case was Doering's statement that he had *not* been drinking, and this statement, of course, was not on its face prejudicial to Doering. Doering, however, argues that admission of the statement in which he denied drinking was not harmless because the State argued at trial that this statement showed that Doering was not credible. App.'s Br. at 11-12.

While Doering's statement that he had not been drinking was inconsistent with his later post-Miranda admission that he had one or two beers, Doering's credibility was already called into doubt by several other more critical facts. For instance, the jury could have reasonably concluded that Doering's claim of only having consumed one can of beer was inconsistent with his physical condition, his performance on the field sobriety tests, and his refusal to submit a breath sample. Furthermore, Doering also conceded that he had two previous convictions for crimes of dishonesty (possession of stolen property). RP 261. Finally, Doering's credibility was also in serious question due to the fact that he told Officer Rogers that he was

not the driver of the vehicle, despite overwhelming evidence that he was, in fact, the driver. RP 169, 213.

Given all of these circumstances, the fact that the jury also heard that Doering initially denied having consumed any alcohol was harmless and the record demonstrates that the jury would have reached the same conclusion even without the admission of Doering's initial denial.

B. THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO CLARIFY THAT THE COMBINATION OF CONFINEMENT AND COMMUNITY CUSTODY SHALL NOT EXCEED THE STATUTORY MAXIMUM.

Doering next claims that the judgment and sentence should be amended to clarify that the combined term of confinement and community custody may not exceed the statutory maximum. App.'s Br. at 12. As Doering notes, the judgment and sentence imposes a statutory maximum sentence of 60 months of confinement and a community custody term of 12 months. CP 135. The judgment and sentence also notes, however, that while 12 months of community custody is authorized, the period of community custody exceeds the statutory maximum term of 60 months.

In the case of *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), the Washington Supreme Court stated that:

[W]hen a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.

Brooks, 166 Wn.2d at 675.

The State acknowledges that the language in Doering’s judgment and sentence is confusing, and that the judgment and sentence should be amended to “explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum,” pursuant to *Brooks*. Furthermore, RCW 9.94A.701(9) provides that:

(9) The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

This amended portion of the statute went into effect on June 10, 2010, shortly before Doering was sentenced. It appears, therefore, that the appropriate remedy is for the trial court to simply “reduce” the term of community custody.

C. THE CLAIMS RAISED BY DOERING IN HIS CONSOLIDATED PRP SHOULD BE DISMISSED AS THEY ARE CLEARLY WITHOUT MERIT.

Doering has also filed a Personal Restraint Petition, which this Court consolidated with his present direct appeal. In his PRP Doering claims that his attorney provided ineffective assistance of counsel. This claim should be rejected as it is without merit.

In a PRP, a petitioner claiming ineffective assistance of counsel must show that he was actually and substantially prejudiced by the error. *In re Pers. Restraint of Davis*, 151 Wn. App. 331, 337, 211 P.3d 1055 (2009), *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 777, 100 P.3d 279 (2004). A personal restraint petition must set out the facts underlying the challenge and the evidence available to support the factual assertions. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992). Unsupported assertions or vague allegations are not sufficient. *Rice*, 118 Wn.2d at 886. “If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitled him to relief.” *Rice*, 118 Wn.2d at 886. Bare allegations unsupported by citation of authority, references to the record, or persuasive reasoning cannot sustain [a petitioner's] burden of proof.” *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), *review denied*, 110

Wn.2d 1002, 1988 WL 631904 (1998). *See also, In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990).

Doering argues that his counsel was ineffective for failing to object to the prosecutor's argument that he was intoxicated when he refused to take a breath test. PRP at 4. This claim is without merit because "a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Here the evidence certainly supported an inference that Doering was intoxicated based on the officers' observations, Doering's performance on the field sobriety tests, and the DUI refusal. Thus, the prosecutor was entitled to draw the reasonable inference from the evidence that Doering was in fact intoxicated and to express such inference to the jury.

Doering's remaining arguments in his personal restraint petition are bare assertions and conclusory allegations, unsupported by the record or other competent, admissible evidence to establish the facts alleged. In addition, Doering fails to show actual and substantial prejudice.

For all of these reasons, the claims raised in the consolidated personal restraint petition should be dismissed.

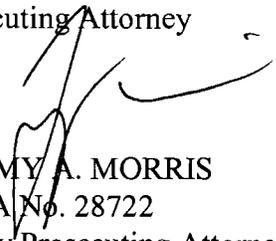
IV. CONCLUSION

For the foregoing reasons, aside from remand for clarification as required by *Brooks*, Doering's conviction and sentence should be affirmed.

DATED May 10, 2011.

Respectfully submitted,

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