

**FILED**

**AUG 03 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 295931

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

JAKE GANN,  
Defendant/Appellant

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REPLY BRIEF OF APPELLANT

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## A. REPLY ARGUMENT

### 1. Although decided prior to *Berkemer v. McCarty*, *State v. Moreno* is persuasive authority.

The State in its response brief attempts to distinguish the Washington State Appellant decision of *State v. Moreno*, 21 Wn.App. 430, 434, 585 P.2d 481 (1978) based upon the more recent United States Supreme Court decision of *Berkemer v. McCarty*, 468 U.S. 420 (1984). However, there is nothing within *Berkemer* which would discount the holding of *State v. Moreno*. In fact, the *Berkemer v. McCarty* case simply re-evaluated the holding in *Terry v. Ohio*, 392 U.S. 1 (1968) and made it clear that *Terry* Stops were still valid. Under both decisions an officer may briefly detain and question a suspect without formal *Miranda* warnings being given.

There was a conflict in the State courts and Federal courts regarding the applicability of the Supreme Courts ruling in *Miranda* to interrogations involving minor offenses and traffic stops. *Berkemer v. McCarty*, 468 U.S. 420 at 426 - 427, (1984). The United States Supreme Court held that it does not matter whether it's a minor offense, if the defendant is in custody *Miranda* warnings

must be given. The Supreme Court also made it clear that *Terry* stops were still allowed and did not require *Miranda* warnings. What is important to this courts decision is that Berkemer reiterated the well settled principal that safe guards prescribed by *Miranda* become applicable as soon as the suspects freedom of action is curtailed to a "decree associated with a formal arrest". Therefore, when a motorist who has been detained pursuant to a traffic stop is subject to treatment that renders him "in custody" for practical purposes, he will still be entitled to the full panoply of protections prescribed by *Miranda*. Berkemer at 440 (citations omitted). In that case the facts prior to the defendant being taken into custody, where as follows:

After the patrolman stopped the defendant's vehicle the defendant got out of the vehicle and had difficulty standing the police officer then asked the defendant to perform a field sobriety test. The Respondent could not do so without falling and finally the officer asked whether the defendant had used intoxicants and the Respondent replied that he had. Thereupon the officer arrested the defendant and took him back to the Franklin County Jail. Berkemer, 468 U.S. 420 423-424.

Obviously this temporary detention following a traffic stop is not subject to *Miranda's* protections. That is not the situation in

Gann's detention.

In addition, it is long been held that Washington's Constitutional provisions afford a defendant greater protection under the Fourth Amendment than those under the United States Constitution e.g., State v. Carter, 151 Wn.2d 118, 125-26, 85 P.3d 887 (2004).

**2. State v. Hensler, cited by the State is also distinguishable from the facts of this case.**

In addition State v. Hensler is clearly not applicable to the facts present here. State v. Hensler, 109 Wn. 2d 357 (1987). First, that case stands more for the proposition that attorneys need to follow the rules of appellate procedure, rather than when *Miranda* warnings must be given. In addition, and unlike this case, the appellant in Hensler did not appropriately challenge the trial courts findings. In Hensler the defendant and his passengers exited the vehicle, the officer asked them to step back into the vehicle for the officers own safety, and upon approaching the vehicle the officer smelled marijuana. The officer also indicated to the suspects that he had received a report that they were using marijuana and cocaine and then asked if there was any truth to that statement

upon which both occupants said that they had been using the drugs. State v. Hensler 109 Wn. 2d 357 at 359.

Clearly distinguishable from this case however, is what happened next in the Hensler case. Upon acknowledging that they had used the drugs the officer then gave the suspects their *Miranda* warnings. The suspects acknowledged that they understood their rights and then surrendered cocaine and marijuana.

In Gann's case *Miranda* warnings were not given at any point and certainly not before Gann surrendered the pills that he had in his pocket. In addition, in this appeal Mr. Gann has assigned error and has argued that the tactics used by Officer Brown were in fact coercive amounting to a custodial interrogation. In the Hensler case the Washington State Supreme Court specifically points out that the defendant did not assign error to any of the trial courts findings. The only matter properly before that Court was the conviction for possession of cocaine. See Hensler at page 360. The Court of Appeals properly found that the admission of the possession of cocaine was made after proper *Miranda* warnings and thus there was no error by the trial court.

3. The State v. Walton, case cited by the State also is not on point.

In State v. Walton, 67 Wn. App. 127 (1992). The Court of Appeals ruled that no *Miranda* warnings were necessary with this typical *Terry* type of investigatory questioning. There was a report that a juvenile party was in progress, the officer arrived at the scene and contacted the defendant, at which points the officer detected an odor of alcohol on his breath. State v. Walton, 67 Wn. App. 127 at 128. The officer asked for Walton's identification at which point it was noted that the defendant was 17 years old. The officer then asked if the defendant had anything to drink and the defendant answered a half of beer. The Court of Appeals stated that a police officer may ask a detainee a moderate number of questions to confirm or dispel the officer's suspicions but the person detained is not obliged to respond. Walton at 130. The court however, did point out that there is prohibition against an officer attempting to elicit incriminating responses through illegitimate deceptive means. Walton at 131. The court found that the officers actions were non-coercive, routine, and investigatory and therefore not the product of a custodial interrogation which required *Miranda* warnings. These

facts are inconsistent with the present case where we are specifically challenging the deceptive coercive means that Officer Brown employed when questioning Mr. Gann.

### **B. CONCLUSION**

Each of the cases cited by the State in an attempt to distinguish the holdings of State v. Dennis, 16 Wn.App. 417, 558 P.2d 297 (1976) and State v. Moreno, 21 Wn. App. 430, 585 P.2d 481 (1978) are not convincing. Unlike the facts of Berkemer and Hensler there was no legitimate (or unchallenged) traffic stop in this case.

In this case there was no traffic stop nor was there any basis for the detention of Mr. Gann other than Officer Brown being advised by another trooper that he believed he saw Mr. Gann earlier involved in a drug transaction at the Okanogan Chevron. CP 17. Later Officer Brown confronted Mr. Gann at his home and not only told him that he knew he had been involved in a drug transaction (which was untrue) but he also was with another officer and used a picture to convince Mr. Gann that he better cooperate as they knew he was involved with this person in a drug transaction. CP 45, RP 9. Then Officer Brown coerced Mr. Gann

into handing over the pills that were in his pocket by telling Mr. Gann if he did not he was going to jail. CP 17 and 45. Clearly these types of tactics go far beyond the brief questioning that occurred in all of the cases cited by the State.

Therefore the appellant is requesting that this court reverse the trial courts order and remand this case for an entry of an order suppressing the evidence and dismissing this case.

DATED this 1<sup>st</sup> day of August, 2011.

Respectfully submitted,

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