

**FILED**

**JUN 28 2011**

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

NO. 295931

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
RESPONDENT

V.

JACOB GANN  
APPELLANT

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RESPONDENT'S BRIEF

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KARL F. SLOAN  
Deputy Prosecuting Attorney  
Okanogan County, Washington

STEPHEN M. BOZARTH  
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## A. STATEMENT OF THE CASE

The respondent is satisfied with the statement of procedural history contained in the first two paragraphs of the Appellant's statement of the case.

On March 22, 2010 Detective Steve Brown of the North Central Washington Narcotics Task Force was contacted by Trooper Goodall of the Washington State Patrol at the Task Force office. RP 5. Trooper Goodall informed Detective Brown that he believed a drug transaction was about to take place between the Appellant, Jacob Gann, and another individual later identified as Glen Shaler. RP 5. Both individuals were known to Detective Brown. RP 5-6.

Detective Brown detailed to the Chevron station but failed to locate Gann. RP 5 From previous experience Detective Brown suspected Mr. Gann of being involved in drug activity and knew where he lived. RP 5-7. Detective Brown printed off a picture of Glen Shaler and, accompanied by Detective Rubio, contacted Mr. Gann outside of his residence. RP 5, 8. Detective Brown was not in uniform and was driving an unmarked vehicle. RP 8.

Detective Brown initiated a conversation with Mr. Gann by asking him about Mr. Shaler. RP 9. During the course of the brief conversation Detective Brown noticed Mr. Gann was nervous and

was tapping his pocket with his hand. RP 9. Detective Brown told Mr. Gann that he believed that he was using drugs and that if he continued using drugs he would end up in Jail. RP 10. After discussing a possible agreement to work for the Task force, Detective Brown asked Mr. Gann for the drugs in his pocket. RP 10. In response, Mr. Gann produced a number of methadone pills from his pocket. RP 10.

The conversation with Mr. Gann lasted approximately five minutes. RP 11. Mr. Gann was free to leave at any time during the conversation. RP 11, 23. No threats or promises were made by the officer to entice the statement or the methadone. RP 11. Mr. Gann was not taken into custody after the conversation concluded. RP 11, 23. Mr. Gann was not placed in handcuffs during the conversation. RP 23.

## B. ARGUMENT

1. The contact between Detective Brown and Mr. Gann was non-custodial in nature and Miranda was not implicated. Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation. *State v. Harris*, 106 Wash.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987) *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974

(1966). The *Miranda* rule applies when "the interview or examination is (1) custodial (2) interrogation (3) by a state agent." *State v. Post*, 118 Wash.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992 citing *State v. Sargent*, 111 Wash.2d 641, 649-53, 762 P.2d 1127 (1988 ))

Miranda warnings are only required when (1) a suspect's freedom is restricted 'to a 'degree associated with formal arrest,' and (2) the suspect is subjected to questions that are likely to elicit an incriminating response. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam)). Custody for the purpose of *Miranda* refers to a situation where the "suspect's freedom of action is curtailed to a ... 'degree associated with formal arrest.' " *State v. Mahoney*, 80 Wash. App. 495, 496, 909 P.2d 949 (1996) quoting *State v. Short*, 113 Wash.2d 35, 40, 775 P.2d 458 (1989) (quoting *State v. Harris*, 106 Wash.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987)). Formal arrest entails imprisonment, handcuffs, being told you are under arrest, and other clear and dramatic indices of loss of freedom. There is no loss of freedom where the defendant voluntarily speaks with officers. In *State v. Green*, 91 Wash. 2d 431, 588 P.2d 1370 (1979) the Court found that where a suspect

voluntarily came to the station to give a statement there was no custody. The defendant is not in custody when he or she comes voluntarily to an interview without any threat or promise and is not told that he or she could not leave.

A suspect may be questioned without *Miranda* even if the police detain him. In *State v. Walton*, 67 Wash. App. 127, 834 P.2d 624 (1992) the court held that a suspect who is not free to leave during the course of an investigatory detention is not entitled to *Miranda* warnings. This was true even when the officer would have arrested him if he had tried to leave. *State v. Ferguson*, 76 Wash. App. 560, 568, 886 P.2d 1164 (1995). Even frisking, handcuffing, and placing a suspect in a patrol car may not rise to the level of an arrest. *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987).

It is clear that Mr. Gann was not in custody for the purposes of *Miranda*. The uncontested facts from the testimony of both Detective Brown and Mr. Gann show that Mr. Gann was not placed under arrest, not handcuffed nor taken to the police station. Mr. Gann was free to leave and no threats were made. It was a brief conversation between an officer who was not in uniform and who drove to his house in an unmarked vehicle. There simply was no “clear and dramatic indices of loss of freedom.”

Mr. Gann's reliance on *State v. Moreno*, 21 Wn.App. 430, 434, 585 P.2d 481 (1978) is misplaced. In *Moreno*, the court held that police conducting a Terry stop could not ask questions likely to elicit an incriminating response unless they first informed the suspect of his Miranda rights. *Moreno*, 21 Wn.App. at 434. But that case was decided before *Berkemer* clarified the distinction between a Terry seizure and Miranda custody. Further, Washington cases since *Moreno* have established that a 'very brief, noncoercive, nodeceptive, single question' during an investigative stop does not require Miranda warnings. *State v. Hensler*, 109 Wn.2d 357, 363, 745 P.2d 34 (1987). See also *Walton*, 67 Wn.App. at 130-31 (officer conducting Terry stop may ask moderate number of questions to confirm or dispel suspicions without giving Miranda warnings). Therefore, *Moreno* does not control this issue.

Mr. Gann's reliance on *State v. Dennis*, 16 Wn.App. 417, 558 P. 2d 297 (1976) is equally misplaced. In *Dennis* the court, in reviewing the context of the contact, ruled that "Under these circumstances a reasonable man in defendant's position would have believed his freedom of movement was significantly restricted and that any attempt to leave would probably result in immediate physical restraint or custody. *Dennis*, 16 Wn.App at 422. The ruling in *Dennis* turned on the finding that the contact was custodial in nature. However, in this case it clear that Detective Browns

contact with Mr. Gann was not custodial in nature given more recent rulings on the subject.

C. CONCLUSION

Given the facts the trial court appropriately found that the contact between Detective Brown and Mr. Gann was non-custodial in nature and, therefore, *Miranda* was not implicated. Based on the facts and argument above the State respectfully requests the Court uphold Mr. Gann's conviction for Unlawful Possession of a Controlled Substance.

Dated this 27th day of June, 2011

Respectfully Submitted by:

A handwritten signature in black ink, appearing to read 'STEPHEN BOZARTH', written over a horizontal line.

STEPHEN BOZARTH, WSBA #29931  
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