FILED
Court of Appeals
Division III
State of Washington
5/31/2018 10:07 AM

No. 97268-1

NO. 35812-7-III

COURT OF APPEALS

STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ALEJANDRO ESCALANTE,

Defendant/Appellant.

BRIEF OF APPELLANT

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES ii

CONSTITUTIONAL PROVISIONS iii

RULES AND REGULATIONS iii

ASSIGNMENTS OF ERROR 1

ISSUES RELATING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Chavez-Martinez v. United States, 407 F.2d 535 (9th Cir. 1969)..... 15

Miranda v. Arizona, 84 U.S. 436, 86 S. Ct. 1602,
6 L. Ed.2d 694 (1966)..... 1, 2, 6, 7, 10, 11, 12, 13, 15, 16, 17, 18

Personal Restraint of Cross, 180 Wn.2d 664, 327 P.3d 660 (2014) 8

Rhode Island v. Innis,
46 U.S. 291, 100 S. Ct. 1682, 64 L. Ed.2d 297 (1980)..... 7

State v. Barker, 143 Wn.2d 915, 25 P.3d 423 (2001)..... 9

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 16, 17

State Butler, 165 Wn. App. 820, 269 P.3d 315 (2012)..... 9, 12

State v. Ellwood, 52 Wn. App. 70, 757 P.2d 547 (1988)..... 10

State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009)..... 10, 14

State v. Martinez, 135 Wn. App. 174, 143 P.3d 855 (2006)..... 9, 10

State v. O'Niell, 148 Wn.2d 564, 62 P.3d 489 (2003)……13

State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004)..... 13

State v. Rhoden, 189 Wn. App. 193, 356 P.3d..... 16

State v. Unga, 165 Wn.2d 95, 196 P.3d 645 (2008) 14

United States v. Bravo, 295 F.3d 1002 (2002)..... 11, 12

United States v. Butler, 249 F.3d 1094 (9th Cir. 2001) 11

United States v. Espericueta-Reyes, 631 F.2d 616 (9th cir. 1980) 14

United States v. John Doe, 219 F.3d 1009 (9th Cir. 2000)..... 11

United States v. Massie, 65 F.3d 843 (10th Cir. 1995) 14

CONSTITUTIONAL PROVISIONS

Const. art. 1, § 7 9

Const. art. I, § 9 ..... 1, 2, 6, 14

United States Constitution, Fifth Amendment 1, 2, 6, 14

RULES AND REGULATIONS

CrR 3.5 ..... 2, 18

ASSIGNMENTS OF ERROR

1. The trial court's determination that Alejandro Escalante was not in custody when he was seized at the Frontier border crossing on August 15, 2017 is contrary to Findings of Fact entered following a stipulated facts trial (CP 60; CP 63; CP 83; Appendix "A")

2. The trial court's determination that border patrol officers were not required to give Mr. Escalante *Miranda*[1]warnings before asking him about ownership of a backpack, violated his rights under the Fifth Amendment to the United States Constitution and Const. art. I, § 9. (Conclusions of Law 2, 3, 4, 5, 7, 8, 9 and 10; CP 85-86; Appendix "A")

3. The silver platter doctrine is not applicable under the facts and circumstances of Mr. Escalante's case.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Was Mr. Escalante in custody when he was placed in the secure (locked) lobby of a border patrol station, his documents held by a border

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966)

patrol officer, and the driver and one (1) other passenger of the van in which he was riding placed in detention cells?

2. Did the border patrol officer's failure to provide Mr. Escalante with his *Miranda* warnings deprive him of the protection against self-incrimination under the Fifth Amendment to the United States Constitution and Const. art. I, § 9?

3. Does the silver platter doctrine have any application under the facts and circumstances of Mr. Escalante's case?

STATEMENT OF THE CASE

Alejandro Escalante was charged with one (1) count of possession of heroin and one (1) count of possession of LSD by an Information filed on August 17, 2017. (CP 1)

Mr. Escalante filed a CrR 3.5 motion on October 6, 2017. (CP 3)

A suppression hearing was conducted on November 29, 2017. Border Patrol Officers Tibbs and Koepke testified. (RP 6, ll. 16-18; RP 37, l. 25 to RP 38, l. 1)

When individuals desire to enter the United States from a foreign country they are required to give a binding declaration. If any concerns arise, or, if an automatic computer check requires it, a secondary declaration must be made and a search of the vehicle conducted. (RP 7, ll. 8-14; RP 11, ll. 11-25; RP 12, ll. 2-10)

The van, in which Mr. Escalante was a passenger, was traveling from the Shambala Music Festival in Salmo, B.C. An emphasis patrol was being conducted at the various border crossings in NE Washington. The van was directed to a secondary inspection area for a thorough search. All vehicles who were returning from Shambala were searched. (RP 19, ll. 20-24; RP 20, ll. 7-10; RP 31, ll. 12-19; RP 32, ll. 6-13; Findings of Fact 1, 2, 3)

Mr. Escalante and the other occupants of the van were directed to enter the Border Patrol building. They were required to sit in a secured (locked) lobby. All of their documents were retained by a border patrol officer in an enclosed booth. The documents cannot be returned until the person is released. Only that officer could open the door so that people could enter and exit the building. (RP 13, ll. 1-13; RP 13, l. 25 to RP 14, l. 7; RP 29, ll. 3-7; Finding of Fact 4)

If a search does not reveal any contraband then the individuals are free to go. The documents retained by the border patrol officer inside the lobby are then passed through the window to the person and the door lock is released. (RP 16, ll. 21-24; RP 17, ll. 1-4)

While the occupants of the van were in the secured lobby the van was being searched by border patrol agents. Various narcotics were found

throughout the van and in a number of different containers. (RP 24, ll. 18-22; RP 41, ll. 1-25)

Border Patrol Officer Tibbs testified that when a secondary inspection is underway that the occupants of the vehicle are not free to leave while the inspection is ongoing. They are not placed in restraints; but must remain inside the secured lobby. (RP 17, ll. 8-11; RP 23, ll. 5-12; ll. 18-21; RP 49, ll. 17-19)

The Border Patrol building has two (2) jail/detention cells inside. While the occupants of the van were inside a patdown search was conducted. Mr. Torres, the driver of the van, and Mr. Grieve, one (1) of the passengers, were placed in a detention cell when controlled substances were found on their person(s). Mr. Escalante and Mr. Jimenez, the other passengers, did not have any controlled substances on their person(s). (RP 18, ll. 2-17; RP 21, ll. 3-5; RP 26, l. 15 to RP 27, l. 10; RP 43, l. 22 to RP 44, l. 14; RP 45, l. 22 to RP 46, l. 12; RP 48, l. 22 to RP 49, l. 10; RP 52, ll. 11-23; Finding of Fact 6)

After the search of the van was completed, approximately five (5) hours later, the border patrol agents needed to determine who owned what. Mr. Escalante's ID had not been located in any of the items. (RP 25, ll. 8-18; RP 34, ll. 20-23; RP 45, l. 22 to RP 46, l. 12; RP 50, ll. 19-24)

A black backpack was located in the van behind the jump seat in the back of the van. The border patrol officers did not know who had been sitting there. (RP 35, ll. 12-20; RP 48, ll. 1-18)

The backpack was searched. Controlled substances were located in side it. Border Patrol Officer Koepke came into the lobby and asked who owned the backpack. Mr. Escalante claimed it. (RP 35, ll. 3-11; RP 43, ll. 4-13; Finding of Fact 9)

The trial court denied the suppression motion. Mr. Escalante filed a Motion for Reconsideration on December 7, 2017. The trial court denied that motion. (CP 50)

Stipulated facts were presented to the trial court. A stipulated facts trial was held on January 2, 2018. (CP 60; CP 63)

The trial court determined that Mr. Escalante was guilty of both counts charged in the Information. Judgment and Sentence was entered on January 2, 2018. (CP 64)

Findings of Fact and Conclusions of Law were entered on January 23, 2018. (CP 83)

Mr. Escalante filed his Notice of Appeal on January 2, 2018. An Amended Notice of Appeal was filed on January 19, 2018. (CP 77; CP 81)

SUMMARY OF ARGUMENT

Alejandro Escalante was in custody while he was locked in the secure lobby of the Frontier border station. He was not free to leave. All of his identification documents were being held by a border patrol officer in an enclosed area. The driver of the van and one (1) of the other passengers had been placed in a detention cell.

A search of the van revealed controlled substances in various containers and locations. The border patrol agents had no proof of Mr. Escalante's possession of any controlled substance. His identification had not been found in any of the containers. They did not know where he had been sitting in the van.

The border patrol agents knew there were controlled substances in the black backpack. They did not know who owned it. By asking Mr. Escalante if the backpack was his they sought to obtain an incriminating statement from him in violation of the Fifth Amendment to the United States Constitution and Const. art. I, § 9.

The border patrol agents did not provide Mr. Escalante with his *Miranda* warnings prior to asking if he owned the backpack. The State conceded at the suppression hearing that this was an interrogation. The State, however, argued that Mr. Escalante was not in custody.

The Findings of Fact entered by the trial court in conjunction with the suppression hearing and the stipulated facts trial do not support its Conclusions of Law 2, 3, 4, 5, 7, 8, 9 and 10.

The State's argument that the silver platter doctrine applies to Mr. Escalante's case is incorrect.

Miranda warnings were required. Mr. Escalante was in custody. The silver platter doctrine does not apply.

Mr. Escalante's convictions must be reversed and the case dismissed.

ARGUMENT

I. CUSTODY

The State correctly conceded at the suppression hearing that Mr. Escalante was being interrogated by the border patrol officer. (Conclusion of Law 1)

> 'Interrogation' can be express questioning, or any words or actions reasonably likely to elicit an incriminating response [*Rhode Island v. Innis*, 446 U.S. 291, 301-02, 100 S. Ct. 1682, 64 L. Ed.2d 297 (1980)]. The test for the latter category focuses primarily on the suspect's perceptions, rather than the officer's intent. 'This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of

> the underlying intent of the police.' *Id.* at 301.

Personal Restraint of Cross, 180 Wn.2d 664, 685, 327 P.3d 660 (2014).

The critical issue is whether or not the interrogation occurred while Mr. Escalante was in custody. Mr. Escalante has not challenged the trial court's Findings of Fact. He has challenged a number of the Conclusions of Law. Conclusions of Law are reviewed *de novo. See: Personal Restraint of Cross, supra* 681.

Mr. Escalante was in a secured lobby. He could not exit the building without being released by a border patrol agent. All of his documents were being held by a border patrol agent. The driver of the van had been arrested and placed in a detention cell along with one (1) of the other passengers.

Mr. Escalante's movements were severely restricted. The fact that he had reading material and a place to sit in the lobby does not preclude a finding that he was in custody.

> The conclusion that a suspect is in custody turns on 'whether a reasonable person in the individual's position would believe he or she 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). '**Custody' depends on 'whether the defendant's movement was restricted at the time of questioning,' and necessarily that the police restricted that movement.** *Id.* '**Custody'** does not refer to whether police intend

> to arrest, whether the environment was coercive, or whether there was probable cause to arrest at the time of the questioning. *Id,* at 37. **It refers instead to whether the suspect's movement is restricted at the time of questioning**. *Id.* at 36-37.

State Butler, 165 Wn. App. 820, 827, 269 P.3d 315 (2012). (Emphasis supplied)

There can be no dispute that Mr. Escalante's movements were restricted. There is no dispute that an interrogation occurred.

While sitting on a chair in the lobby Mr. Escalante's passport was retained by a border patrol agent behind a secure glassed-in area. It was the same border patrol agent who would have had to hit the release button on the locked doors.

In essence, the Border Patrol stop amounted to an invasion of Mr. Escalante's right to privacy under Const. art. 1, § 7 when it exceeded what was reasonable. The stop itself constituted a seizure.

"A traffic stop is a seizure for purposes of article 1, section 7 and a disturbance of one's private affairs." *State v. Barker,* 143 Wn.2d 915, 920-21, 25 P.3d 423 (2001).

Even if the Court is to give leeway due to the fact that the contact occurred at the U.S./Canadian border, the fact that Mr. Escalante was required to remain in the secured lobby area of the Border Patrol station still amounts to a seizure.

In *State v. Martinez,* 135 Wn. App. 174, 179, 143 P.3d 855 (2006) an officer directed Mr. Martinez to sit on a utility box and wait while a further investigation was conducted. The *Martinez* Court relied upon *State v. Ellwood,* 52 Wn. App. 70, 74, 757 P.2d 547 (1988). The officer in the *Ellwood* case told the individuals to "wait right here." Both the *Ellwood* and *Martinez* cases involved an officer who observed individuals in high crime areas. Mr. Escalante asserts that there is no difference between contact at a high crime area and a border patrol contact where an individual's right to privacy is at stake.

II. SEIZURE (*MIRANDA*)

> Whether police have seized a person is a mixed question of law and fact. *State v. Armenta,* 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). "'The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference," but "the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed *de novo.*"' *Id.*

State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009).

The three cases relied upon by the State to support its position that Mr. Escalante was not in custody are *United States v. John Doe*, 219 F.3d 1009 (9th Cir. 2000*); United States v. Butler*, 249 F.3d 1094 (9th Cir. 2001); and *United States v. Bravo*, 295 F.3d 1002 (9th Cir. 2002).

The *John Doe* case involved a juvenile who was a passenger in a vehicle stopped at the San Ysidro Port of Entry in California. The juvenile and the driver of the vehicle were taken to the security office which constitutes a detention area. They were searched for weapons and contraband and seated on benches. After drugs were found in the vehicle they were moved from the security office to detention cells.

The juvenile was advised of his juvenile *Miranda* warnings. The issue before the Court was whether or not the juvenile *Miranda* warnings were adequate under the facts and circumstances. The Court determined that they were inadequate. However, in the course of the decision they discussed at what point the juvenile was in custody. The *John Doe* Court ruled:

> To determine when [the juvenile] was arrested and taken into custody, we must determine when a reasonable person "would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) …. Although [the juvenile] was not in custody at the time he was escorted to the security office to await the results of the examination of the pickup, once the marijuana had been found and [the juvenile] was

> placed in a locked cell, no reasonable person would have believed he was free to leave.

It was at that point that *Miranda* rights were required to be given. They were given even if they were inadequate.

Mr. Escalante contends that once contraband is discovered, and an individual is confronted with that fact, any reasonable person would know that he/she is not free to leave.

The *Butle*r case started at the Tecate Port of Entry. Mr. Butler gave inconsistent and contradictory statements to several of the border patrol officers. A secondary search of his vehicle was conducted.

The *Bravo* case involved a contact at the Calexico West Port of Entry in California. Mr. Bravo was briefly handcuffed, escorted to the security office, the handcuffs were removed and he was informed that if nothing was found in the truck he would be released.

The secondary inspection of the truck located 50 kilograms of marijuana. Mr. Bravo was informed of his *Miranda* rights and he admitted that he had agreed to transport the marijuana across the border.

The *Bravo* Court went on to hold:

> The standard for determining whether a person is under arrest is not simply whether a person believes that he is free to leave [citation omitted], but rather whether a reasonable

> person would believe that he is being subjected to more than the "temporary detention occasioned by border crossing formalities." *United States v. Butler*, 249 F.3d 1094, 1100 (9th Cir 2001). Thus, whether an individual was in custody depends upon the objective circumstances of the situation, or whether " 'a reasonable innocent person in such circumstances would conclude that *after brief questioning he or she would not be free to leave*.' " *United States v. Montero-Camargo*, 177 F.3d 1113, 1121 (9th Cir. 1999) (*quoting United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981)) (emphasis added) *aff'd* 208 F.3d 1122 (9th Cir. 2000)….

Mr. Escalante submits that *John Doe*, *Butler*, and *Bravo* stand for the proposition that once a vehicle search is completed and contraband found, then any temporary detention ripens into a custodial hold and *Miranda* warnings are required if questioning is to occur. This is especially applicable in Mr. Escalante's case in view of the patdown searches.

> Pursuant to article I, section 7, seizure occurs when 'considering all of the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority' *Rankin* [*State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004)] at 695 (citing *O'Neill* [*State v. O'Neill,* 148 Wn.2d 564, 62 P.3d 489 (2003)] at 574. The standard is 'a purely objective one, looking to the actions of the law enforcement officer ….' *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1988). **The relevant question is whether a**

> **reasonable person in the individual's position would feel he or she was being detained.** *O'Neill,* 148 Wn.2d at 581.

State v. Harrington, supra, 663. (Emphasis supplied.)

The State's reliance upon the 9th Circuit cases, as well as the trial court's reliance upon *United States v. Espericueta-Reyes,* 631 F.2d 616, 622 (9th cir. 1980) is misplaced. *Espericueta-Reyes* involved a confidential informant, an initial search at the border and two (2) subsequent extended searches. The portion of the opinion with relevance to Mr. Escalante's case involves the ruling in *Chavez-Martinez, infra*.

Mr. Escalante does not quibble with the fact that some period of detention is inevitable at a border crossing. It is the extent of that detention which determines whether or not a person has been seized and is in custody.

Typically, the questions asked at a border crossing involve the following: identity; address; birthplace; nationality; immigration status; cargo; vehicle ownership; and travel plans. *See: United States v. Massie,* 65 F.3d 843 (10th Cir. 1995).

The protection against self-incrimination provided by Const. art. I, § 9 is coextensive with that provided by the Fifth Amendment. *See: State v. Unga,* 165 Wn.2d 95, 196 P.3d 645 (2008).

Nevertheless, Mr. Escalante contends that border crossing cases have resulted in a lessening of the protections afforded under Const. art. I, § 9.

As can be seen in the State's and trial court's reliance upon 9th Circuit Court cases there has been an evolution from the original position taken by that Court in *Chavez-Martinez v. United States,* 407 F.2d 535 (9th Cir. 1969). The Court ruled in *Chavez-Martinez* that:

> We hold that the warning required in *Miranda* need not be given to one who is entering the United States unless and until the questioning agents have probable cause to believe that the person questioned has committed an offense, or the person questioned has been arrested, whether with or without probable cause. It is at this point, in border cases, that the investigation has 'focused' in the *Miranda* sense.
>
> We know of no cases that are in conflict with the rule that we announced. Our decision in *Williams v. United States,* 9 Cir., 1967, 381 F.2d 20, supports it. **Where we have reversed because a Miranda warning was not given, the contraband had been found before the questioning.** *Groshart v. United states,* 9 Cir., 1968, 392 F.2d 172.

(Emphasis supplied.)

Once the BPOs located contraband in the van they were required to advise the passengers of their *Miranda* warnings prior to any interrogation.

> The Fifth Amendment to the United States Constitution provides criminal suspects with the right to be free from self-incrimination. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995); *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010). Because of the coercive nature of custodial interrogations, law enforcement officers are required to provide a suspect with *Miranda* warnings prior to questioning the suspect in a custodial setting. *Hickman*, 157 Wn. App. at 772. Specifically, the requirements of *Miranda* apply where "a suspect endures (1) custodial (2) interrogation (3) by an agent of the State." *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Absent effective *Miranda* warnings, a suspect's custodial statements are presumed to be involuntarily given and, therefore, cannot be used against the suspect at trial. [Citations omitted.]

State v. Rhoden, 189 Wn. App. 193, 199, 356 P.3d

III. <u>SILVER PLATTER DOCTRINE</u>

The silver platter doctrine has no bearing on Mr. Escalante's case. The issue is not a violation of state law; but rather a violation of *Miranda* warnings which is federal law.

As set forth in *State v. Brown*, 132 Wn.2d 529, 586, 940 P.2d 546 (1997):

> … [E]vidence independently obtained by federal officers in compliance with federal law, but in violation of state constitutional guarantees, is admissible in Washington state criminal proceedings.

Mr. Escalante contends that the failure to give him his *Miranda* warnings violated federal law. Thus, it violated both federal and state constitutional guarantees.

> The 'key element of the silver platter doctrine requires that the officers of the federal jurisdiction not act as agents of the foreign state jurisdiction nor under color of state law.'

State v. Brown, supra, 587 (*quoting State v. Gwinner,* 59 Wn. App. 119, 796 P.2d 728 (1990) at 125.)

Overall, in order for the silver platter doctrine to have any validity, officers must comply with either federal or state law. They did not do so in Mr. Escalante's case.

CONCLUSION

When Alejandro Escalante was questioned concerning the ownership of a backpack, which contained controlled substances, an interrogation occurred. No *Miranda* warnings were given. He was in custody.

The trial court's Conclusions of Law are unsupported by the Findings of Fact. The Conclusions of Law deviate from existing case law concerning what constitutes a custodial interrogation.

Mr. Escalante was not free to leave the border patrol station. Any reasonable person in Mr. Escalante's position would understand that once the driver and a passenger had been arrested and placed in detention cells, along with the fact that his own identification documents were being held by border patrol, he was not free to leave.

Miranda warnings were required. The failure to give the *Miranda* warnings resulted in an incriminating statement concerning ownership of the backpack which contained controlled substances.

Mr. Escalante's CrR 3.5 motion should have been granted. His motion for reconsideration should have been granted.

Mr. Escalante's convictions should be reversed and the case dismissed.

DATED this 31st day of May, 2018.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

APPENDIX “A

FILED
IN SUPERIOR COURT
STEVENS COUNTY

2018 JAN 23 AM 11: 08

PATRICIA A. CHESTER
COUNTY CLERK

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF STEVENS

STATE OF WASHINGTON, Plaintiff, v. ALEJANDRO ESCALANTE Defendant	Cause No.: 2017-1-00242-3 FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING RULE CrR 3.5 HEARING

This matter came before the Stevens County Superior Court on November 29, 2017 for the purpose of a CrR 3.5 hearing. The Court hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On August 15, 2017 the defendant and three other individuals arrived at the Frontier Border Crossing Station located in Stevens County Washington.
2. At the primary inspection area the driver of the vehicle informed the Customs Officials that they were coming from a music festival in Salmo, BC known as Shambala. At the primary inspection area the passengers in the vehicle made a negative declaration, meaning that

STEVENS COUNTY PROSECUTING ATTORNEY
215 S. Oak Street, Room 114
Colville, WA 99114
(509) 684-7500 fax (509) 684-7589

0-000000083

57

there were no narcotics or anything else that needed to be declared as part of the border crossing procedure.

3. After the first negative declaration Customs and Border Patrol Officials directed the driver to park the van at a secondary inspection area. Officials obtained a second negative declaration from all the passengers.

4. The four occupants of the vehicle were directed to exit the vehicle and told to go to a lobby in the border station. This room was a secured lobby. A Customs Officer monitored the lobby and the door was secured with an electronic lock that had to be triggered. The lobby had a seating area with magazines and other literature that people could read while their vehicles were being searched.

5. The defendant and his three travel companions remained in the lobby for approximately five hours while the vehicle was being searched. During that time other individuals, whose vehicles were being searched, came and went from the lobby area.

6. At one point while the vehicle was being searched one the defendant's travel companions asked to use the restroom. Prior to him using the restroom a pat down search was conducted. Suspected LSD was found. That individual was placed in a secured holding cell. A second passenger was also searched, drugs were located, and he was placed in a separate holding cell. These cells were described to be standard jail cells.

7. The defendant was never removed from the lobby while the vehicle was being searched. The defendant was never handcuffed while the vehicle search occurred. The defendant was never placed in a holding cell like his two other travel companions. He remained in the secured lobby with the fourth passenger.

8. During the course of the vehicle search Customs Officials found narcotics throughout the vehicle and specifically in a black backpack.

STEVENS COUNTY PROSECUTING ATTORNEY
215 S. Oak Street, Room 114
Colville, WA 99114
(509) 684-7500 fax (509) 684-7589

9. Customs Officials brought the bag into the lobby area and asked whose backpack it was. The defendant claimed ownership of the bag. The defendant was not asked any further questions.

10. Local law enforcement was contacted. When they arrived they read the defendant his *Miranda* rights and he invoked his right to counsel.

CONCLUSIONS OF LAW

1. The State conceded the issue that the defendant was being "interrogated" when Customs Officials asked who owned the backpack.

2. Special rules apply at the border. *United States v. Leasure,* 122 F.3d 837 (9th Cir.1997). Detention and questioning during routine searches at the border are considered reasonable within the meaning of the Fourth Amendment. *United States v. Espericueta–Reyes,* 631 F.2d 616, 622 (9th Cir.1980). "During such a search, some period of detention for these persons is inevitable. *Id.*

3. A *Terry* detention is a seizure, but not an arrest. A person who is only subjected to a *Terry* routine investigative stop need not be given *Miranda* warnings prior to questioning. *State v. Phu v. Huynh,* 49 Wn. App. 192, 201, 742 P.2d 160 (1987).

4. Even the fact that a suspect is not "free to leave" during the course of a *Terry* or investigative stop does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton,* 67 Wn. App. 127, 130, 834 P.2d 624 (1992).

5. A suspect is "in custody" when he or she has been placed under arrest, or the suspect's freedom of action or movement has been curtailed to a degree associated with formal arrest. *State v. Harris,* 106 Wn.2d 784 (1986).

STEVENS COUNTY PROSECUTING ATTORNEY
215 S. Oak Street, Room 114
Colville, WA 99114
(509) 684-7500 fax (509) 684-7589

6. *Miranda* warnings are required when a temporary detention ripens into a custodial interrogation. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002);*State v. King*, 89 Wn. App. 612, 624-25, 949 P.2d 856 (1998).

7. In the present case the defendant was never "in custody." His freedom of movement was not curtailed to the degree associated with formal arrest.

8. Two of the defendant's travel companions were "in custody" when they were placed in detention cells. The defendant's freedom of movement was never similarly restricted.

9. Since the defendant was not "in custody" the Customs Officials were not required to advise him of his *Miranda* warnings.

10. Therefore, the defendant's admission that the black back pack was his is admissible.

Dated this the 23 of January 2018

Patrick A. Monasmith
Stevens County Superior Court Judge

Presented By:

Lech Radzimski, WSBA # 39437
Deputy Prosecuting Attorney

Approved as to Form:

Dennis Morgan, WSBA # 5286
Attorney for Defendant

STEVENS COUNTY PROSECUTING ATTORNEY
215 S. Oak Street, Room 114
Colville, WA 99114
(509) 684-7500 fax (509) 684-7589

NO. 35812-7-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. ALEJANDRO ESCALANTE, Defendant, Appellant.	))))))))))))	STEVENS COUNTY NO. 17 1 00242 3 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this 31st day of May, 2018, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

COURT OF APPEALS, DIVISION III E-FILE
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

STEVENS COUNTY PROSECUTOR'S OFFICE E-FILE
Attn: Brian O'Brian
SCPAAppeals@spokanecounty.org

ALEJANDRO ESCALANTE U.S. MAIL
14401 S.W. 88 Street, Apt N409
Miami, Florida 33186

s/ Dennis W. Morgan_____

DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

May 31, 2018 - 10:07 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35812-7
Appellate Court Case Title:	State of Washington v. Alejandro Escalante
Superior Court Case Number:	17-1-00242-3

The following documents have been uploaded:

- 358127_Briefs_20180531100639D3816030_5501.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Escalante Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- trasmussen@stevenscountywa.gov

Comments:

Sender Name: Dennis Morgan - Email: nodblspk@rcabletv.com
Address:
PO BOX 1019
REPUBLIC, WA, 99166-1019
Phone: 509-775-0777

Note: The Filing Id is 20180531100639D3816030