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COA NO. 66017-9-1

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE ANAYA,

Appellant.

REC'D

JUN 09 2011

King County Prosecutor
Appellate Unit

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

The Honorable Beth Andrus, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE COURT WRONGLY FAILED TO SUPPRESS AN INCRIMINATING STATEMENT MADE BY ANAYA GIVEN IN RESPONSE TO CUSTODIAL INTERROGATION.....	1
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	4
<u>State v. Heritage</u> , 152 Wn.2d 210, 95 P.3d 345 (2004).....	5
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	1-4
<u>State v. Post</u> , 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992).....	2, 4
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	1, 3, 4
<u>State v. Short</u> , 113 Wn.2d 35, 775 P.2d 458 (1989).....	4
 <u>FEDERAL CASES</u>	
<u>Berkemer v. McCarty</u> , 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).....	1, 4, 5
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	1-6
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	5

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>FEDERAL CASES</u> (CONT'D)	
<u>Thompson v. Keohane</u> , 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).....	4, 6
<u>United States v. Carter</u> , 884 F.2d 368 (8th Cir.1989)	3
<u>United States v. Griffin</u> , 922 F.2d 1343 (8th Cir.1990)	3

A. ARGUMENT IN REPLY

THE COURT WRONGLY FAILED TO SUPPRESS AN INCRIMINATING STATEMENT MADE BY ANAYA GIVEN IN RESPONSE TO CUSTODIAL INTERROGATION.

The trial court concluded Anaya was in "custody" when police asked him questions because his movement was restricted by Officer Lednicky's order to stop and to remain near the police car for several minutes. CP 19 (FF 13). The State claims the trial court erred in determining Anaya was in custody because it applied the wrong test. Brief of Respondent (BOR) at 7-13.

"Custodial interrogation" is questioning initiated by law enforcement officers after a person has been deprived of his or her freedom in any significant way. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "Custodial" refers to whether the suspect's freedom of movement was restricted at the time of questioning. State v. Sargent, 111 Wn.2d 641, 649-50, 762 P.2d 1127 (1988). The test for the "custodial" component is whether a reasonable person in the individual's position would believe he 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) (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). This requires the defendant to "show some objective facts indicating his . . . freedom of movement [or action]

was restricted [or curtailed]." Lorenz, 152 Wn.2d at 37 (quoting State v. Post, 118 Wn.2d 596, 607, 826 P.2d 172, 837 P.2d 599 (1992)).

Contrary to the State's assertion, the trial court applied the correct test, explicitly stating: "The test is whether a reasonable person in the defendant's position would have believed that he was in police custody with the [loss] of freedom associated with a formal arrest. Based on the evidence presented this morning, it is my conclusion that in fact a reasonable person in Mr. Anaya's position would have believed that he was in police custody with the loss of freedom associated with formal arrest." 1RP 55.

The evidence supports the court's conclusion that Anaya was in custody for Miranda purposes. Following police report that Anaya had just engaged in a drug delivery, two police officers, armed and in police uniform, left their police car and contacted Anaya as he walked along the sidewalk. CP 18 (FF 1, 3, 4); 1RP 46. They ordered Anaya to "stop." CP 18 (FF 4). They told Anaya they wished to speak with him and told him to come closer to their police car. CP 18 (FF 4). Officer Lednicky approached Anaya, placed his hand on Anaya's elbow and walked him from the sidewalk to the police car. CP 18 (FF 6). Sergeant Yoon possibly had his hands on Anaya. 1RP 50-51. Police told Anaya that he was a possible suspect they were looking for and they needed to identify

him. 1RP 41. An objective person in Anaya's position would know police were investigating a criminal matter. 1RP 47. See United States v. Griffin, 922 F.2d 1343, 1348 (8th Cir.1990) (quoting United States v. Carter, 884 F.2d 368, 370 (8th Cir.1989) ("the fact that the individual has become the focus of the investigation is relevant 'to the extent that the suspect is aware of the evidence against him' and this awareness contributes to the suspect's sense of custody.")).

Officer Lednicky told Anaya he was not under arrest, but also told Anaya he would not be released until they could identify him. 1RP 41. Anaya was not free to leave if he wished because police wanted to identify him. 1RP 43.

The circumstances show Anaya was in custody because a reasonable person would believe his movements were restricted to a degree associated with formal arrest. Freedom of movement "is the determining factor in deciding whether an interview is 'custodial.'" Sargent, 111 Wn.2d at 649-50. Police ordered him to stop. CP 18 (FF 4). Police told Anaya he would not be released until they could identify him. 1RP 41. Police admitted Anaya was not free to leave at the time of questioning. 1RP 43. Since Anaya's freedom of movement was limited, the questioning of Anaya was "custodial" for Miranda purposes. Sargent, 111 Wn.2d at 650; cf. Lorenz, 152 Wn.2d 37-38 (no custody because

police officers explicitly advised the suspect prior to interviewing that she was free to leave at any time and suspect acknowledged she was fully aware she was not under arrest and free to leave at any time); State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989) (no custody where agent was undercover, suspect had control of conversation, and agent left when suspect became abusive); Berkemer, 468 U.S. at 423, 441-42 (police at no time informed the motorist they pulled over that he was not free to leave).

The Washington Supreme Court recognizes lack of freedom of movement is the determinative factor. See State v. Copeland, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996) (citing Sargent, 111 Wn.2d at 648-49 ("'freedom of movement' is determinative of 'custody' for Miranda purposes."); Lorenz, 152 Wn.2d at 37 (quoting Post, 118 Wn.2d at 607) (defendant must "show some objective facts indicating his . . . freedom of movement [or action] was restricted [or curtailed]."); Short, 113 Wn.2d at 41 ("sole inquiry" was "whether the suspect reasonably supposed his freedom of action was curtailed.").

The United States Supreme Court likewise recognizes the dispositive legal inquiry is whether, given the factual circumstances, "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). The Court plainly

equated this legal standard with whether there was a restraint on freedom of movement of the degree associated with a formal arrest. Thompson, 516 U.S. at 112.

On the other hand, routine traffic and Terry¹ stops are not custodial for the purposes of Miranda because they are not police dominated. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). In Heritage, for example, a suspect was not in custody where park security guards seeking to find out who was smoking a marijuana pipe immediately made it clear they did not have the authority to arrest, did not physically detain anyone, and asked questions while the suspect was surrounded by friends. Heritage, 152 Wn.2d at 219. Anaya's case is different. Uniformed police, who unquestionably had the authority to arrest, physically detained Anaya, who did not have any friends or associates around to witness the event.

Significantly, in non-custodial settings analogous to a Terry stop, a police officer may ask someone "a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.*" Berkemer, 468 U.S. at 439 (emphasis added). The lack of obligation to respond in a routine Terry stop situation keeps the encounter below the level of custody. Berkemer, 468 U.S. at 439-40. While Anaya's

¹ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

encounter with the police was relatively brief and occurred in public, Anaya was nevertheless obligated to respond because police told him he would not be released until they obtained his identity, which further supports the conclusion that Anaya was in custody for Miranda purposes.

Again, the ultimate inquiry is whether there was a restraint on freedom of movement of the degree associated with a formal arrest, which means "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." Thompson, 516 U.S. at 112. That standard is satisfied under the circumstances of this case. A reasonable person in Anaya's situation would not believe he was at liberty to terminate the interrogation and leave after police ordered him to stop, physically led him to the police car, and told him he would not be released until they could identify him.

Anaya's argument that he was subject to interrogation for Miranda purposes is sufficiently set forth in the opening brief.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the convictions.

DATED this 9th day of June 2011.

Respectfully Submitted,

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v.)	COA NO. 66017-9-1
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JOSE ANAYA,)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF JUNE, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOSE ANAYA
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SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF JUNE, 2011.

x *Patrick Mayovsky*

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