

No. 68972-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

T.M.,

Appellant.

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

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OPENING BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. T.M.'s Fifth and Fourteenth Amendment rights to silence and due process were violated when the court admitted at trial his pre-Miranda statements to the police. CP 13 (FOF 8).

2. The trial court erred in failing to enter the required written findings of fact and conclusions of law following the CrR 3.5 hearing.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fifth and Fourteenth Amendments to the United States Constitution forbid admission of a defendant's statement which resulted from custodial interrogation absent evidence the defendant was provided with Miranda<sup>1</sup> warnings. A person is in custody for the purposes of Miranda where a reasonable person in the defendant's position would have believed he was in custody to the degree associated with formal arrest. When Officer Thompson contacted T.M. and accused him of being under the influence of alcohol, the officer had already placed him in handcuffs, a detention indistinguishable from arrest. The officer's suspicions were confirmed by T.M.'s pre-Miranda admissions. Must the statements

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966).

elicited by the officer's comments to T.M. be suppressed as involuntary?

2. CrR 3.5 requires the court enter written findings of fact and conclusions of law following a hearing regarding the admissibility of a defendant's statements. Here, the court held the required hearing but has never entered the necessary written findings and conclusions. Must this Court remand the matter for entry of the required CrR 3.5 written findings and conclusions?

#### C. STATEMENT OF THE CASE

On January 16, 2011, sixteen year-old T.M. was dropped off by his father to spend some time at a friend's house in Renton. RP 24-27. Later that night, rather than receiving a call from his son to pick him up, T.M.'s father received a call from Renton police. Id. T.M. had been found climbing up a streetlight in a shopping center parking lot, attempting to "pull" and "tug on" a street sign. T.M. had initially jogged away from the police officer trying to detain him by "spotlighting" him, but when the officer followed him in his patrol car, T.M. stopped jogging. RP 27, 32-35.

When the police officer shined his spotlight at T.M. for a second time, T.M. turned around and walked toward the officer to see what he wanted. RP 35-38. At this point, the officer said he

could smell alcohol “emanating” from T.M., who appeared to be a juvenile, and the officer noted that T.M. appeared nervous, shifting his hands in and out of his pockets. Id. Because T.M. smelled of alcohol, and because he appeared nervous and had walked toward the officer, rather than running away from him, the officer placed T.M. in handcuffs. RP 38.<sup>2</sup>

Officer Thompson maintained that although T.M. was handcuffed, he was only detained, not under arrest. RP 41-43. He obtained T.M.’s identity, and informed T.M. that he was being detained for being a minor in possession of liquor (MIP). RP 41-43, 54-56. The officer conceded that he did not explain the difference between detention and arrest to T.M., and that it was not reasonable to believe that a 16 year-old would understand the difference. RP 54-56. Once Officer Thompson informed T.M. that he was being held as a minor in possession, T.M. responded that that he wasn’t going to lie, that he was on his way home, and that he was a little bit intoxicated. RP 41-43. The officer testified that at this point, he advised T.M. not to make any further statements, and he read him his Miranda rights. Id.

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<sup>2</sup> Officer Thompson testified that in his experience, suspects generally run away from him; therefore, the fact that T.M. was cooperative actually made him suspicious and afraid for his safety. RP 39-41.

Following the reading of Miranda rights, T.M. allegedly made additional statements in response to the officer's questions, stating that he had been drinking at his friend's house, and that his friend had gotten him drunk. RP 45-46.

At trial, T.M. moved to suppress all statements at trial as involuntary, arguing that a handcuffed T.M. was in custody at the time the officer apprised him that he believed he was under the influence of alcohol, and that these remarks were the functional equivalent of interrogation. RP 80-82. The motion to suppress statements was denied. RP 84-85.

T.M. next argued that application of the *corpus delicti* rule precluded consideration of his statements, standing alone, to establish the *corpus delicti* of the crime charged. RP 45-46, 75-76; CP 3-6. The court agreed that as to RCW 66.44.270(2)(b)(public place), there was insufficient evidence, outside of T.M.'s admissions, and granted the motion to dismiss. RP 92. The court denied T.M.'s motion to dismiss as to RCW 66.44.270(2)(a) (possess, consume, or otherwise acquire any liquor).

At the conclusion of evidence, the Honorable Wesley Saint Clair found T.M. guilty of being a minor in possession of liquor, under RCW 66.44.270(2)(a). RP 102-03; CP 12-14.

#### D. ARGUMENT

1. T.M.'s FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE POLICE INTERROGATED HIM PRIOR TO ADVISING HIM OF HIS *MIRANDA* RIGHTS.

a. Miranda warnings are required prior to custodial interrogation. Under the Fifth Amendment to the United States Constitution, an individual has the right to be free from compelled self-incrimination while in police custody. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In Malloy v. Hogan, the United States Supreme Court held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. 378 U.S. 1, 6-11, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

Where there has been a failure to give Miranda warnings, the State violates a defendant's constitutional rights if it seeks to introduce unwarned statements at trial. United States v. Patane, 542 U.S. 630, 641, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004). Miranda warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent. State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992).

Under Berkemer v. McCarty, Miranda safeguards apply “as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” 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, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). A person is in custody only after a formal arrest, or if freedom of action or movement is curtailed to a degree associated with formal arrest. State v. Harris, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). In determining whether an individual was in custody, the review is an objective one; i.e.: whether a reasonable person in the individual’s position would believe he was in police custody to a degree associated with formal arrest. Berkemer, 468 U.S. at 440; State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997).

Whether the interrogation was custodial and thus required Miranda warnings is reviewed by this Court *de novo*. State v. Broadway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

b. T.M. was in custody at the time Officer Thompson handcuffed him after chasing him in a patrol car, and after informing him of the reason for being detained. Officer Thompson testified that he had watched T.M. in the parking lot as he climbed up a

signpost and attempted to “tug on” the sign. RP 32-34. The officer shined his spotlight on T.M. until the youth hopped down from the pole and jogged across the parking lot. Id. The officer followed T.M. down a side street, shining his spotlight on him again, until T.M. turned around and walked toward the officer, as if to see what the officer wanted. RP 35-37. Because T.M. appeared, at this point, to be nervous, as evidenced by his hands allegedly fidgeting near his pockets, the officer ordered T.M. to turn around, and he placed the youth in handcuffs and frisked him. RP 38, 54. Officer Thompson also claimed to smell alcohol emanating from T.M.’s person. RP 35-37. After placing him in handcuffs and searching him, Officer Thompson informed T.M. that he had been stopped for being a minor in possession of liquor. RP 41-43, 54-56.

Under these facts, a reasonable person would have believed he was under arrest at the time the officer handcuffed the youth and began questioning him. See Berkemer, 468 U.S. at 440. The fact that the officer did not formally arrest T.M. until moments later is of no importance; the officer’s statements were the functional equivalent of interrogation, as discussed further below, and the detention was equivalent to custody.

Officer Thompson maintained that he didn't expect T.M. to give an explanation of his behavior, once the officer accused him of being under the influence. The trial court's ruling seemed to validate this position. However, in determining whether T.M. was in custody, the review must be an objective one -- whether a reasonable person would have believed he was in police custody. Berkemer, 468 U.S. at 440-42; State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997). The trial court should not have considered what was in the mind of the arresting officer, or whether the officer considered T.M. to be under arrest at the time, or likely to answer his questions while handcuffed and detained. See Berkemer, 468 U.S. at 440 (irrelevant whether police had probable cause, believed defendant to be a "focus" of investigation, or believed defendant to be in custody); D.R., 84 Wn. App. at 836 (same).

In the custody analysis, it is also appropriate to consider T.M.'s young age. In J.D.B. v. North Carolina, the United States Supreme Court discussed the very situation T.M. faced when stopped by Officer Thompson. \_\_\_ U.S. \_\_\_, 131 S.Ct. 2394, 2403 (2011). Writing for the majority, Justice Sotomayor noted that "a reasonable child subjected to police questioning will sometimes feel

pressured to submit when a reasonable adult would feel free to go.” J.D.B., 131 S.Ct. at 2403. The Supreme Court held in J.D.B. that as long as “the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.” Id. at 2406.

Given the circumstances, including T.M.’s status as a juvenile, which was acknowledged by Officer Thompson, as well as by the fact that the officer chased T.M. in a patrol car, and then cuffed him behind his back, accusing him of being under the influence as a minor, it was reasonable for T.M. to believe he was in custody. Miranda warnings were thus required.

c. The officer’s accusatory statements to T.M. were the functional equivalent of interrogation, as they were reasonably likely to elicit an incriminating response. Courts reject any “artificial distinction” between an officer’s “questioning” and his “statements” to a suspect. United States v. Gomez, 927 F.2d 1530, 1537 (11<sup>th</sup> Cir. 1991). The test is whether under all of the circumstances in a given case, the officer’s questions or statements were reasonably likely to elicit an incriminating response from the suspect. Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d

297 (1980); State v. Bradley, 105 Wn.2d 898, 903-04, 719 P.2d 546 (1986).

Here, Officer Thompson's pre-Miranda statement to T.M. that he believed T.M. was under the influence of alcohol amounted to interrogation because it was "reasonably designed to elicit an incriminating response" from T.M. Innis, 446 U.S. at 300-01; Bradley, 105 Wn.2d at 903-04. As T.M. argued at trial, there is no functional difference between an officer asking an express question, "Son why do I smell alcohol on your breath because you're only 16?" ... and relaying that to the suspect as a statement, "this is why I'm doing this; I smell alcohol on your breath; that's why I'm putting you in handcuffs." RP 82. Because the officer's accusation was designed to elicit a response -- inculpatory or exculpatory -- it was the functional equivalent of interrogation. Innis, 446 U.S. at 300-01; Bradley, 105 Wn.2d at 903-04.

The remedy for failure to give Miranda warnings is the "exclusion of unwarned statements." Patane, 542 U.S. at 641-42, citing Chavez v. Martinez, 538 U.S. 760, 790, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003). The failure of the officer to administer Miranda warnings to T.M. prior to speaking with him in custody thus requires this Court to exclude all of T.M.'s resulting statements.

2. THE COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 3.5.

The trial court held the evidentiary hearing on the admissibility of T.M.'s statements within the context of the trial, and both sides argued the 3.5 issue on June 25, 2012. RP 79-83. At the conclusion, the court found T.M.'s statements voluntary and admissible. RP 84-85. To date, written findings of fact and conclusions of law as required by CrR 3.5 have not been entered by the trial court.

CrR 3.5(c) requires:

After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor[e].

(Emphasis added.) The term "shall" indicates a *mandatory* duty on the trial court. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

The importance of written findings and conclusions has been reinforced by the Washington Supreme Court:

A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. [citations omitted.] An oral opinion "has no final or binding

effect unless formally incorporated into the findings, conclusions and judgment.”

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998), quoting State v. Dailey, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980).

Head determined that in adult bench trials where written findings and conclusions are not filed, remand for entry of findings is the appropriate remedy. Head, 136 Wn.2d at 622. But, at the hearing on remand, no additional evidence may be taken as the findings and conclusions are based solely on the evidence already taken. Head, 136 Wn.2d at 625.

We hold that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Head, 136 Wn.2d at 624.

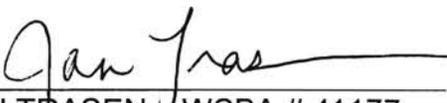
Although Head involved failure to enter written findings and conclusions on the issue of the defendant’s guilt, following a bench trial, its rationale is equally applicable here where the court has failed to file written findings following a hearing pursuant to CrR 3.5. Written findings and conclusions facilitate appellate review and enable the appellant to focus on the material issues. Id. at 622-23.

Here findings have never been filed. The importance of the lack of findings cannot be understated since the court's ruling has been challenged and this Court is left with merely an oral record from which to review the trial court's ruling, which as Head noted is not the final order of the court. This Court must remand T.M.'s matter for the entry of the CrR 3.5 findings, or alternatively, reverse and dismiss T.M.'s conviction if such findings are not entered.

E. CONCLUSION

For the above reasons, T.M. respectfully asks this Court to reverse and remand.

Respectfully submitted this 24<sup>th</sup> day of January, 2013.

  
\_\_\_\_\_  
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Washington Appellate Project  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68972-0-I
v.	)	
	)	
TYLER M.,	)	
	)	
Juvenile Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> TYLER M. 10843 SE 180TH PL RENTON, WA 98055	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JANUARY, 2013.

X \_\_\_\_\_ 

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