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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

Plaintiff,

No. 13-1-01546-8

vs.

Responsive 3.5 Brief

SMITH, ALAN JUSTIN

Defendant.

Legal Argument:

1. Initial Interview Non-Custodial

Defendant in his 3.5 brief argues that he was in the "functional equivalent of custody" during the initial interview in the conference room at the Boeing Security building. While defendant acknowledges that the police ultimately allowed him to leave at the conclusion of the interview, he claims that because of the circumstances under which he was interviewed the interview was a custodial interview. This analysis is neither legally nor factually accurate. "Custody" for purposes of Miranda is narrowly circumscribed and requires formal arrest or restraint on freedom of movement associated with formal arrest. State v Post, 118 Wn.2d 596, 606 (1992). The inquiry into restraint is an objective one: how would a reasonable person in defendant's position have understood the situation? State v Ferguson, 76 Wn.App. 560, 566 (1995) citing Berkemer v McCarthy, 468 U.S. 420, 442 (1984). The issue is not whether a reasonable person would believe he or she was not free to leave, but rather "whether such

1 person would believe he was in police custody of the degree associated with formal arrest."  
2 Ferguson at 566, citing 1 Wayne R. LaFave and Jerold Israel, Criminal Procedures, section 6.6  
3 at 105 (Supp. 1991).

4 Defendant claims that the fact that he was escorted to and from the conference room by  
5 Boeing security somehow transformed this initial encounter with police into the formal equivalent  
6 of arrest. Defendant, of all the people present in the conference room, knew that this was just  
7 standard Boeing procedure. The fact that the Boeing security building is a secure building and  
8 requires an escort in and out had nothing to do with the police presence there on February 12.  
9 In any event, the security guards who escorted both defendant and the police to and fro on  
10 Boeing property were civilian employees of a civilian corporation. These were not "State  
11 agents" as that term is defined. See State v Cadena, 74 Wn.2d 185, 190-93 (1968), State v  
12 Peerson, 62 Wn.App. 755 (1991), and State v Brooks, 38 Wn.App. 256, 261-62 (1984).

13 Defendant's reliance on State v Sargent, 111 Wn.2d 641 (1988), as analogous is  
14 misplaced. In Sargent defendant had been convicted at trial of murder and arson. Prior to his  
15 sentencing he was incarcerated in the King County Jail. The trial judge ordered a Pre-Sentence  
16 report pursuant to statute. The probation officer met defendant in the visiting area of the King  
17 County Jail, in a booth separated by a glass wall. Sargent was locked into his side of the booth.  
18 Sargent initially indicated his innocence, and indicated he planned on appealing. The probation  
19 officer told Sargent that the only way to benefit from mental health counseling would be to admit  
20 to the crime. Sargent called the probation officer several days later and asked to make a  
21 statement. Several days later the probation officer met Sargent at the King County Jail again,  
22 and handed him a pad and pencil. Sargent wrote out a confession. The probation officer only  
23 contacted Sargent's lawyer after he had gotten the handwritten confession. The issue on  
24 appeal was whether or not the second contact between Sargent and the probation officer  
25 violated Sargent's 6<sup>th</sup> Amendment right to counsel, and whether the initial interview was  
26 custodial in nature, requiring Miranda warnings. The Court held that of course Sargent was in-

1 custody: "Sargent was unquestionably in custody when this interview took place. He was in jail,  
2 locked in the interview booth. These restraints on his freedom of movement constitute custody  
3 for Miranda purposes." Id. at 649. The probation officer was an "agent of the state" as he "owed  
4 an obligation to the State", and thus the failure to give Miranda was a violation. Id. at 652.  
5 These facts could hardly be further from what occurred between defendant and the two  
6 detectives from Bothell.

7 Defendant asserts in his briefing that after he indicated that "I think I may need to talk to  
8 an attorney" that the interrogation continued. This was not the testimony. Both detectives left  
9 the room, with Chissus ultimately returning and getting some basic contact information and  
10 photos of defendant's hands. In the ride back to defendant's office building the three engaged  
11 in some small talk, and Stone gave defendant his business card. At the security gate defendant  
12 was told his children were being taken into CPS care. No "interrogation", as that term is  
13 defined, occurred. "Interrogation" involves express questioning , as well as words or actions on  
14 the part of police that are likely to elicit an incriminating response. State v Johnson, 48 Wn.App.  
15 681 (1980). Routine questions asked during booking process are not interrogation; general  
16 questions regarding someone's background are not interrogation; and questions normally  
17 attendant to an arrest are not interrogation. Rhode Island v Innis, 446 U.S. 291, 301 (1980),  
18 State v Bradley, 105 Wn.2d 898, 903-04 (1986), State v McIntyre, 39 Wn.App. 1, 6 (1984).

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20 **2. Defendant's Interpretation of Radcliffe is Incorrect**

21 Defendant in his briefing asserts that the "clarification rule" as articulated in State v  
22 Robtoy, 98 Wn.2d 30 (1982), and repudiated in State v Radcliffe, 164 Wn.2d 900 (2008), citing  
23 Davis v United States, 512 U.S. 452 (1994), somehow lives on in the instant case. There is no  
24 legal authority for this argument. Both Robtoy and Radcliffe involved custodial interrogations  
25 where the suspects were being questioned in the inherently coercive environment of a police  
station. In both situations the suspects were initially properly Mirandized due to the custodial

1 nature of the interrogations to follow, both suspects waived their Miranda rights, and at some  
2 point during the interviews both suspects made equivocal requests for an attorney ("Maybe I  
3 should call my attorney", Robtoy at 286, and "he didn't know how much trouble he was in and  
4 he did not know if he needed a lawyer", Radcliffe at 904). The Radcliffe Court analyzed the  
5 right to a lawyer under both the 6<sup>th</sup> Amendment and under the 5<sup>th</sup> Amendment. Under the 6<sup>th</sup>  
6 Amendment a criminal defendant has an explicit right to a lawyer only after the State has filed  
7 charges. Id. at 905. This was clearly not the situation in the instant case, as police were in the  
8 very preliminary stages of their investigation when they contacted defendant February 12 at  
9 Boeing. The right to Miranda warnings arises from the right not to incriminate oneself, under the  
10 5<sup>th</sup> Amendment. Id. The right to Miranda warnings only applies in the situation where there is  
11 custodial interrogation by a State agent. State v Post, 118 Wn.2d 596, 605 (1992).

12       Ultimately, what both the Davis and Radcliffe courts held was that in a custodial  
13 interrogation where a defendant has already waived his Miranda rights a defendant must  
14 explicitly invoke his right to counsel in order to halt questioning. Somehow defendant interprets  
15 this as somehow placing a duty to "clarify" equivocal assertions of a right that did not yet exist  
16 on the Bothell detectives. As was made clear in State v Warness, 77 Wn.App. 636, 641 (1995):  
17 "The right is not itself provided by the Constitution, but is designed to counteract the coercion  
18 inherent in custodial interrogations and protect the constitutional right to be free from compelled  
19 self-incrimination (cites omitted). The need for Miranda protection does not exist except in a  
20 custodial interrogation system. The right cannot be invoked before it exists." It would be an odd  
21 happenstance that the police would be tasked with a more restrictive requirement in regards to  
22 a right that had not yet attached in this non-custodial interview, than they would have been had  
23 it been a full blown custodial interview and defendant had made the exact same statement.

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1                   **3. Defendant Voluntarily Appeared at the Bothell PD and Voluntarily Waived**  
2                   **Various Rights**

3                   Defendant's brief asserts that defendant's arrival at the Bothell PD the evening of  
4 February 12 was not of his own initiative, and that the mere arrival at the police station does not  
5 indicate a desire to waive rights. Defendant cites State v Hawkins, 27 Wn.App. 78 (1980) for  
6 this proposition. However, this argument ignores the facts of the instant case and those  
7 underlying Hawkins. In Hawkins there was an outstanding warrant for the defendant's arrest for  
8 robbery out of Kitsap County. Defendant turned himself in to the police in Oakland, California.  
9 Police there verified the outstanding warrant for defendant and defendant was placed under  
10 arrest pursuant to that warrant. The officer then engaged in conversation with defendant  
11 regarding the robbery. Ultimately, the Hawkins court ruled that the conversation between  
12 defendant and the Oakland police officer should have been preceded by Miranda warnings, as  
13 "defendant was clearly in police custody when the statements were made." Id at 82. The only  
14 question remaining for the court was whether the statements by defendant were made in  
15 response to police interrogation. Id. The court found that the confession did in fact follow  
16 interrogation. The Hawkins court distinguished its facts from two cases where defendants had  
17 voluntarily gone to a police station, their freedom of movement was not restricted when  
18 statements were made, and that the defendants were not in police custody at the critical times,  
19 thus findings that information volunteered to police by a person not yet in police custody is  
20 admissible in the absence of Miranda warnings. See Oregon v Mathiason, 429 U.S. 492 (1977),  
21 and State v Falk, 17 Wn.App. 905 (1977).

22                  Defendant is clearly not in custody at Bothell PD the evening of February 12. Initially, he  
23 drove there in his own vehicle, and left in the same car. He was never handcuffed or told he  
24 could not go. He signed off on a consent to search his car, and a statement where he indicated  
25 that he was "reinitiating" contact with police. Most importantly, however, in establishing what  
26 defendant's state of mind was when he arrived at Bothell PD however, was the phone message

1 he left for Detective Stone (offering to allow a search of his apartment and car, and a DNA  
2 sample) and the conversation between Stone and defendant describing the circumstances of  
3 defendant's arrival at the police station. At the end of the evening defendant was bade  
4 goodnight, and police left him at his apartment. Defendant had never been in custody at any  
5 time on February 12, and knew it.

6

#### 7           **4. Not Free to Leave and In Custody for Miranda Purposes Different**

8           On February 22 police had a judicially signed search warrant and planned to serve it at  
9 the conclusion of their interview of defendant that morning. Defendant claims in his briefing that  
10 as "he was not free to leave and the officers knew it", that this turned the encounter with  
11 detectives into a custodial interview requiring the giving of Miranda warnings. Defendant is  
12 wrong. As described both above and in the State's initial briefing, Miranda is required only  
13 when a defendant is in "custody" as that term is defined. Custody means "a suspect's freedom  
14 of action is curtailed to a 'degree associated with formal arrest'". State v Watkins, 53 Wn.App.  
15 264, 274 (1989). "The fact that a suspect is not "free to leave" during the course of a Terry stop  
16 does not make the stop comparable to a formal arrest for purposes of Miranda". State v Walton,  
17 67 Wn.App. 127, 130 (1992) citing Berkemer v McCarty, 468 U.S. 420 (1984). The reason is  
18 that, unlike a formal arrest a typical Terry stop is not inherently coercive because the detention  
19 is presumptively temporary and brief, is relatively less "police dominated", and does not easily  
20 lend itself to deceptive interrogation tactics. Walton at 130. In the instant case, there was  
21 nothing coercive about the contact between the two detectives and defendant. An officer may  
22 question a suspect without Miranda even after the officer has probable cause, as long as the  
23 suspect's freedom of movement has not been curtailed to the extent associated with formal  
24 arrest. State v McWatters, 63 Wn.App. 911, 915 (1992). "Not only is it irrelevant whether Mr.  
25 Ustimenko was the focus of the police investigation, but it is also irrelevant whether he was in a  
26 coercive environment when he was questioned (cites omitted). The only relevant question is

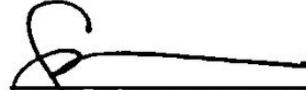
1 whether a reasonable person in his position would believe his freedom of action was curtailed.”  
2 State v Ustimenko, 137 Wn.App. 109, 116 (2007).

3 In sum, regardless of whether police planned on serving a search warrant at the  
4 conclusion of their interview of defendant or not, and regardless if unbeknownst to defendant he  
5 was not free to leave until the warrant had been processed, the only relevant question for this  
6 court is the degree to which defendant's freedom of movement had been curtailed, and if it was  
7 curtailed to an extent associated with formal arrest.

8 DATED this 23 day of April, 2014.

9 Respectfully submitted,

10 MARK K. ROE  
11 Prosecuting Attorney

12   
13 CRAIG S. MATHESON, #18556  
14 Deputy Prosecuting Attorney