IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28392-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
JOSEPH R. COVINGTON,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Siddoway, J. — Joseph R. Covington appeals his conviction of possession of a controlled substance following a stipulated facts bench trial. He argues that he should have been given *Miranda*[1] warnings as soon as the arresting officer smelled the odor of marijuana emanating from his car following a stop for a traffic infraction, and that the trial court erred in denying his motion to suppress inculpatory statements he made before receiving those warnings. We agree with the trial court that the officer's limited communication with Mr. Covington prior to placing him under arrest was within the moderate scope of noncustodial pre-*Miranda* questioning permitted during an

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

investigatory detention. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The facts leading to the drug charge against Mr. Covington are closely paraphrased from the court's unchallenged findings entered after a CrR 3.5/3.6 suppression hearing.[2]

Deputy Jason Petrini was working patrol on April 9, 2008, in Spokane County when he clocked Mr. Covington's oncoming vehicle at 49 miles per hour in a 35-mile-per-hour zone. The deputy made a U-turn, activated his overhead lights, and stopped Mr. Covington on a side street. Mr. Covington was the sole occupant of the vehicle. Deputy Petrini asked for his license, registration, and proof of insurance. Mr. Covington admitted to speeding.

Deputy Petrini then smelled the odor of fresh unburned marijuana coming from the vehicle's interior. He has specific training and experience in detecting and distinguishing between the odor of fresh and burned marijuana, having smelled it between 500 and 600 times, and has made numerous arrests based upon his ability to detect the odor.

Upon sensing the marijuana odor, Deputy Petrini asked Mr. Covington if he had any marijuana in his car and Mr. Covington answered "no." Deputy Petrini said he could smell it. Report of Proceedings (Mar. 19, 2009) (RP) at 11. Mr. Covington then said he had recently smoked marijuana and that he had a bong under the driver's seat. At that

[2] *See State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (unchallenged findings entered after a suppression hearing are verities on appeal).

point, Deputy Petrini arrested Mr. Covington for possession of a controlled substance and searched the vehicle incident to the arrest.

On the floorboard area of the driver's seat the deputy found a bong and packaged unburned marijuana. He then read Mr. Covington his *Miranda* warnings. Mr. Covington admitted he intended to sell the marijuana. He was charged with possession of marijuana with intent to deliver.

Prior to trial, Mr. Covington moved to suppress his inculpatory statements and the drug contraband seized in the search, arguing among other things that if the odor of marijuana was sufficient to detain him, then the deputy was required to give Mr. Covington *Miranda* warnings before asking him incriminating questions. He testified that after Deputy Petrini pulled him over, he did not feel free to leave and that he answered the deputy's questions because he felt obligated to do so. RP at 29.

The court concluded that the deputy's questions and search of Mr. Covington's vehicle were proper. It concluded that the initial traffic stop for speeding was valid, thus authorizing the deputy to detain Mr. Covington to ask for his license, registration, and proof of insurance, and to issue any infractions. It concluded that the traffic stop turned into an investigative detention under *Terry*[3] when Deputy Petrini smelled the odor of marijuana emanating from the interior of Mr. Covington's vehicle, and the deputy was

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

entitled to extend the detention to confirm or dispel reasonable suspicion of illegal activity. It concluded that Deputy Petrini's initial question whether Mr. Covington possessed marijuana was part of the *Terry* investigation for which *Miranda* warnings were not required.

The court concluded that there was probable cause for arrest in light of the deputy's smelling the odor of unburned marijuana, Mr. Covington's statements admitting recent marijuana use and possession of drug paraphernalia, and the fact that Mr. Covington was the vehicle's registered owner and sole occupant. The court denied Mr. Covington's motion to suppress.

Mr. Covington then stipulated to facts sufficient to support a conviction for possession of marijuana with intent to deliver. He admitted that three baggies containing what proved to be marijuana were seized from his vehicle, that the marijuana was his, and that "I was going to sell them to my friend." Clerk's Papers (CP) at 44-45 (Stipulated Facts 15, 16, and 22). He additionally stated that he is "just the middle man" and sells marijuana to his friends "to make a few dollars." CP at 44 (Stipulated Facts 18 and 19). He conceded that he was read his *Miranda* rights, that he understood those rights, and that he agreed to waive them and answer Deputy Petrini's questions. CP at 44 (Stipulated Fact 14).

The court found Mr. Covington guilty as charged based upon the stipulated facts.

Mr. Covington appeals.

ANALYSIS

The sole issue on appeal is whether Deputy Petrini's questioning of Mr. Covington after smelling marijuana in a single-occupant car and having probable cause to arrest constituted custodial interrogation requiring *Miranda* warnings. Mr. Covington argues that it did and that it was legal error to deny his motion to suppress. The court's conclusions of law after a suppression hearing are reviewed de novo. *See State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

There is no dispute that the initial vehicle stop was a valid investigatory detention based upon Deputy Petrini's reasonable and articulable suspicion that Mr. Covington was committing a traffic infraction. *Terry*, 392 U.S. at 10 n.3; *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (warrantless traffic stop justified if officer has reasonable and articulable suspicion that a traffic infraction is occurring). A person subject to a vehicular *Terry* stop "'is seized . . . "from the moment [a car stopped by the police comes] to a halt."'" *State v. Marcum*, 149 Wn. App. 894, 910, 205 P.3d 969 (2009) (alterations in original) (quoting *Arizona v. Johnson*, 555 U.S. ___, 129 S. Ct. 781, 787, 172 L. Ed. 2d 694 (2009) (quoting *Brendlin v. California*, 551 U.S. 249, 263, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007))). By definition, an individual subject to a *Terry* investigative detention is not "free to leave." *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d

445 (1986) (a stop, although less intrusive than an arrest, is nevertheless a seizure).

The unchallenged findings of fact further establish that the situation quickly ripened into probable cause for Deputy Petrini to arrest Mr. Covington for marijuana possession and search the vehicle incident to arrest. RCW 10.31.100(1) authorizes the police to arrest on probable cause to believe a person is possessing marijuana. Well settled case law also establishes that the police have probable cause to arrest the occupant of a vehicle for possession of a controlled substance when a trained officer detects the odor of a controlled substance emanating from the vehicle. *State v. Wright*, 155 Wn. App. 537, 553, 230 P.3d 1063 (citing, e.g., *Marcum*, 149 Wn. App. at 912; *State v. Compton*, 13 Wn. App. 863, 864-65, 538 P.2d 861 (1975)), *review granted*, 241 P.3d 413 (2010). The officer is then further authorized to conduct a warrantless search of the vehicle for the perceived drug evidence incident to the arrest. *State v. Grande*, 164 Wn.2d 135, 146, 187 P.3d 248 (2008); *Wright*, 155 Wn. App. at 553; *Compton*, 13 Wn. App. at 865-66.

But probable cause notwithstanding, state agents are not required to give *Miranda* warnings unless a suspect is subject to custodial interrogation. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). We review whether a person was in custody for *Miranda* purposes de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). The test is an objective one—whether a reasonable person in the suspect's position would

have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 441-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *see Heritage*, 152 Wn.2d at 218. A routine *Terry* stop does not rise to the level of "custody" for purposes of *Miranda*. *See Berkemer*, 468 U.S. at 439-40; *Heritage*, 152 Wn.2d at 218. A "detaining officer may ask a moderate number of questions during a *Terry* stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect 'in custody' for the purposes of *Miranda*." *Heritage*, 152 Wn.2d at 218. However, a suspect may be considered in custody for *Miranda* purposes if the officer engages in coercive or deceptive interrogation tactics. *State v. Hensler*, 109 Wn.2d 357, 362, 745 P.2d 34 (1987); *see also State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992).

Here, the routine traffic stop extended to a marijuana investigation that quickly ripened into probable cause to arrest when the trained deputy smelled the odor of unburned marijuana emanating from the vehicle. Objectively viewed, the encounter was still a *Terry* stop that had not yet escalated to a custodial situation requiring *Miranda* warnings when the deputy's sensing of the marijuana odor was part and parcel of the initial contact.

Mr. Covington argues otherwise, relying on *State v. Bryan*, 40 Wn. App. 366, 698 P.2d 1084 (1985) which in turn relied on *State v. Dictato*, 102 Wn.2d 277, 687 P.2d 172

(1984). *Dictato* held, and *Bryan* relied on its holding, that "[o]nce the police have probable cause to arrest a suspect, . . . delay in making the arrest cannot serve as an excuse for conducting interviews without *Miranda* warnings." *Dictato*, 102 Wn.2d at 291; *Bryan*, 40 Wn. App. at 368. *Dictato* applied a test for identifying custodial arrest under which the existence of probable cause was a critical factor. In *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987), however, our Supreme Court explicitly rejected the "probable cause to arrest" standard applied in *Dictato* in favor of the United States Supreme Court's elucidation of the test for determining when *Miranda* safeguards apply adopted in *Berkemer*, 468 U.S. 420. Thus, it is no longer relevant to the inquiry whether the police had probable cause to arrest the suspect either before or during questioning. *Lorenz*, 152 Wn.2d at 37 (citing *Berkemer*, 468 U.S. at 442).

The principles in *Berkemer* are controlling here. The timing of probable cause is not relevant to the deputy's initial question to confirm or dispel suspected marijuana possession, even though Mr. Covington testified at the suppression hearing that he did not feel free to leave and felt obligated to answer questions. And contrary to Mr. Covington's argument that the deputy's question in this case was calculated and deceptive unlike the interrogation in *Hensler*, Deputy Petrini's comment that he could smell marijuana was not coercive—he was only relating his sensory perception. To the

extent the comment is construed as designed to potentially elicit an incriminating response, it was still within the moderate scope of noncustodial pre-*Miranda* questioning that is valid under *Terry* and *Berkemer*. *See Hensler*, 109 Wn.2d at 362-63; *Walton*, 67 Wn. App. at 130-31.

Accordingly, the trial court did not err in concluding at the suppression hearing that the initial questioning was part of a valid *Terry* investigation for which no *Miranda* warnings were required.

Additionally, and assuming *Miranda* warnings should have preceded either Deputy Petrini's first question about marijuana or his comment he could smell it after Mr. Covington initially denied possession, the seizure of the unburned packaged marijuana incident to arrest was valid in any event. *Grande*, 164 Wn.2d at 146. Mr. Covington does not challenge the court's conclusion of law on that point, nor could such a challenge succeed. Nothing in Mr. Covington's response to the deputy's initial questioning about marijuana negated probable cause or made the discovery of marijuana in the vehicle dependent on his incriminating statements that he possessed a bong and had recently smoked marijuana. Deputy Petrini did not ask any more questions until *after* he found the baggies of marijuana in the vehicle and read Mr. Covington his *Miranda* warnings, and Mr. Covington stipulated at trial that he understood those rights, waived them, and then admitted that he intended to sell the marijuana.

In this situation, a constitutional violation, if any, in obtaining Mr. Covington's pre-*Miranda* statement that he had a bong under the seat and had recently smoked marijuana is harmless beyond a reasonable doubt. *See State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (constitutional error is harmless beyond a reasonable doubt if any reasonable jury would reach the same result absent the error and the untainted evidence is so overwhelming it necessarily leads to a finding of guilt).

We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.