

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 66017-9-I
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
JOSE GUILLARTE ANAYA,)	
)	
Appellant.)	FILED: January 30, 2012

Schindler, J. — A jury convicted Jose Guillarte Anaya of delivery of cocaine in violation of the Uniform Controlled Substances Act¹ and making a false or misleading statement to a public servant.² Anaya argues the trial court erred in ruling his statements to the police were admissible because he was subject to custodial interrogation without being advised of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Because Anaya was not in custody when he made the statements during an investigative stop under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), we affirm.

FACTS

In March 2010, the Seattle Police were engaged in an undercover narcotics

¹ RCW 69.50.401(1), (2)(a).

² RCW 9A.76.175.

operation, described as a “buy and slide,” in the Pioneer Square neighborhood. The Seattle Police conduct buy and slide operations in areas impacted by a high volume of drug dealing. In a buy and slide operation, an undercover officer purchases narcotics, uniformed officers then stop the seller for purposes of identification before releasing the seller. A buy and slide operation protects the identity and safety of the undercover officer and allows the police to gather pertinent information before making an arrest.

At approximately 4:00 p.m. on March 29, undercover Officer Erin Rodriguez approached Denise Little. Officer Rodriguez testified that she asked Little “if she knew where I could get a twenty,” the term used to describe \$20 worth of cocaine. Little told Officer Rodriguez to follow her. Little lead the way as they walked “southbound about a block” to a bus stop located in front of Masins furniture store.

When they reached the bus stop, Little walked “right up” to a man, later identified as Jose Guillarte Anaya. Little talked to Anaya for a few seconds, then returned to Officer Rodriguez to get the money from her to buy the drugs. Officer Rodriguez gave Little \$20 in prerecorded buy money. Little then turned around and walked back to Anaya. Officer Rodriguez said that she was three or four feet away from Little and Anaya with “a direct line of sight,” and watched as Little and Anaya engaged in a very quick hand-to-hand transaction. After the exchange, Little returned and handed Officer Rodriguez \$20 worth of cocaine. Officer Rodriguez signaled to the surveillance officers that the transaction was complete and walked away.

Officer Forrest Lednicky testified that he and Sergeant Tom Yoon were

responsible for identifying the seller.

A . . . [U]ndercover police officers would try to buy street-level narcotics. After the buy was complete my job was to find that person, identify them, and release them from the scene.

Q Is that the normal procedure to release somebody after the contact where they buy drugs?

A No.

The surveillance officers contacted Officer Lednicky and Sergeant Yoon to give them a description of Anaya and his location. Officer Lednicky and Sergeant Yoon were in uniform, and approached Anaya to ask him to stop. Officer Lednicky said that Anaya was cooperative.

Officer Lednicky told Anaya that he was a “possible suspect that . . . we just needed to identify him, we let him know right away that he would be released as soon as we could identify him,” and asked Anaya to walk over to the police car, and “placed his hand” on Anaya’s elbow as they walked over to the police car.

Officer Lednicky, Sergeant Yoon, and Anaya stood on the sidewalk next to the police car. Officer Lednicky asked Anaya if he had any identification, “a driver’s license or ID card.” After Anaya said he did not have any identification, Officer Lednicky asked him for his name and date of birth. Anaya said his name was “Luis Martinez Montos” and his date of birth was March 16, 1964. Officer Lednicky testified that the time that elapsed between first stopping Anaya and when Anaya gave a false name and date of birth was approximately three minutes.

Officer Lednicky photographed Anaya and used a laptop computer to access the

No. 66017-9-1/4

Department of Licensing database. Officer Lednicky entered the name and date of birth Anaya provided but was unable to verify Anaya's identity. Officer Lednicky then handcuffed Anaya and drove to the West Precinct to obtain his fingerprints. After

obtaining his fingerprints, Anaya was released.

The State charged Anaya with delivery of cocaine in violation of the Uniform Controlled Substances Act, RCW 69.50.401(1), (2)(a). Anaya entered a plea of not guilty. On the first day of trial, the State moved to amend the information to add the charge of making a false or misleading statement to a law enforcement officer. The defense did not object.

The State requested a CrR 3.5 hearing on the admissibility of the false statements Anaya made to Officer Lednicky and Sergeant Yoon before he was placed in handcuffs and taken to the precinct for fingerprinting. Anaya claimed that the false statements should be suppressed because he was in custody and was not given Miranda warnings. The State argued that Anaya was not in custody when he made the false statements. The State argued that Anaya was subject to a Terry stop when the officers briefly detained him and asked for his name and date of birth.

Officer Lednicky was the only witness at the CrR 3.5 hearing. Officer Lednicky described his role in the operation and stopping Anaya. Officer Lednicky said that after he asked Anaya to accompany him to the police car, he briefly placed a hand above Anaya's elbow to escort him to the car. Officer Lednicky testified that the entire stop lasted 10 minutes and the time between stopping Anaya and when Anaya gave a false name and date of birth was no more than three minutes. Officer Lednicky testified that before Anaya gave the officers a false name and date of birth, he was not under arrest, the officers did not touch him as he stood next to the police car, and Anaya was not in

handcuffs.

- [Prosecutor] Was he placed in handcuffs at all?
[Lednicky] No.
[Prosecutor] Did you guys put your hands on him at all?
[Lednicky] Nothing more than a simple escort.
[Prosecutor] Can you describe what an escort is?
[Lednicky] Sure, it's usually I place my hand just above their elbow and just kind of guide them where I want them to go.

Following the CrR 3.5 hearing, the court concluded that Anaya was in custody “to the degree of a formal arrest.” The findings of fact state, in pertinent part:

- 9) Both officers stood beside the Defendant outside the police car when Officer Lednicky asked the Defendant for his “name” and “date of birth.”
- 10) The Defendant provided a name and date of birth.
- 11) These statements were made voluntarily, and not in response to any threats or promises.
- 12) No other questions were asked of the Defendant concerning the suspected drug transaction.
- 13) At the time the Defendant was asked these questions he was “in custody to the degree of a formal arrest,” as his movement was restricted by Officer Lednicky’s order for him to stop, and to remain near the police car for several minutes. Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984); See also State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986) . . . ; State v. Lorenz, 152 W.2d 22, 37, 93 P.3d 133 (2004).

However, the court also concluded that because Anaya was not subject to “interrogation, or its functional equivalent,” Miranda warnings were unnecessary, and the false statements Anaya made were admissible in the State’s case in chief. The conclusions of law state, in pertinent part:

- 1) The name and date of birth provided by the Defendant. These statements are admissible because Miranda was not applicable. The questions asked and the answers given regarding the Defendant’s identity do not amount to “interrogation,” or its

functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682 (1980). The questions posed to the Defendant were not reasonably likely to elicit an incriminating response. State v. Johnson, 48 Wn. App. 681, 739 P.2d 1209 (1987).

- 2) The actions taken by the officers here, a request for the Defendant's name and date of birth for the purposes of identifying him, constitute those normally "attendant to arrest," thus are not considered "interrogation" for the purposes of Miranda. State v. McIntyre, 39 Wn. App. 1, 6, 691 P.2d 587 (1984).

A number of witnesses testified at trial, including the surveillance officers Detective Daniel Romero and Officer Matthew Pasquan, undercover Officer Rodriguez, and Officer Lednicky. Detective Romero described a buy and slide and the role Officer Lednicky and Sergeant Yoon played in the operation. Detective Romero testified, in pertinent part:

- A In a buy-walk operation the arrest team's responsibility would be, number one, to arrest because sometimes buy-walks turn into buy-busts just by the nature of the business, and also for identification purposes sometimes we have to bring in an arrest team to stop the person, we'll use a ruse as we call it, we'll use another reason, we'll say that, we use another excuse to stop them. We won't tell them we buy drugs from them obviously, but we'll stop them and we'll identify them, may take their picture and then we'll let them go. They won't know that we just bought drugs from them, but now we have their identity and we can come back and get them at a later date.
- Q Why is ascertaining somebody's identity so important in a case?
- A Well because sometimes our operations can last months and a guy you see one day you may not see him until two or three months later, so we need to make sure we ID him positively that day and now we have probable cause for him when it's time to arrest him.

Detective Romero said that he observed Officer Rodriguez, Little, and Anaya as they engaged in the drug transaction. Detective Romero said that he saw Officer Rodriguez approach Little and then Little "was leading" her to the bus stop near Masins

furniture store. Detective Romero then saw Little approach a man “standing there next to the building.” Detective Romero identified Anaya as the man involved in the transaction.

Officer Pasquan testified that he observed the hand-to-hand exchange between Anaya and Little. Officer Pasquan said that after the drug transaction, he watched Anaya walk down the street, and saw Officer Lednicky and Sergeant Yoon approach Anaya.

Anaya testified. Anaya admitted that he gave Officer Lednicky a false name and date of birth. Anaya said he gave the officer false information because he had an outstanding warrant. But Anaya denied participating in the drug transaction.

The jury found Anaya guilty as charged of delivery of cocaine in violation of the Uniform Controlled Substances Act and making a false or misleading statement to a public servant. The court imposed a low-end standard range sentence.

ANALYSIS

Anaya argues that because he was subject to custodial interrogation and was not given Miranda warnings, the trial court erred in ruling the false statements he made to Officer Lednicky were admissible. The State argues Anaya was not subject to custodial interrogation. The State asserts the trial court erred in concluding Anaya was in custody because “he was not free to leave” during the three minutes he was detained. The State contends the brief detention and questioning of Anaya by the officers before he gave a false name and date of birth “amounted to no more than a

Terry stop.”³ We agree with the State.

We review the trial court's decision after a CrR 3.5 hearing to determine whether substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We review conclusions of law de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Whether the defendant was in custody is a mixed question of fact and law. State v. Solomon, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002).

The factual inquiry determines “the circumstances surrounding the interrogation.” . . . The legal inquiry determines, given the factual circumstances, whether “a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.”

Solomon, 114 Wn. App. at 787-88⁴ (quoting Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)); See also State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) (trial court's custodial determination reviewed de novo).

The Fourth Amendment and article I, section 7 of the Washington State

³ (Footnote omitted.) The State may assign error without filing a cross-appeal if the State does not seek affirmative relief. RAP 2.4(a); State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003) (The prevailing party need not cross-appeal a trial court ruling if it seeks no further affirmative relief. It may argue any ground to support a court's order which is supported by the record.)

⁴ (Citation omitted) (brackets in original).

Constitution prohibit unreasonable searches and seizures. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). Miranda warnings must be given whenever a suspect is subject to custodial interrogation by police. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). A person is in “custody” if after considering the circumstances, a reasonable person would feel that his or her freedom was curtailed to a degree associated with a formal arrest. Heritage, 152 Wn.2d at 218. As a general rule, a warrantless seizure is per se unreasonable and the State bears the burden of demonstrating the applicability of a recognized exception. Day, 161 Wn.2d at 893-94. A Terry stop is a well established exception that allows the police to briefly stop and detain a person who the police reasonably suspect is engaged in criminal conduct. Terry, 392 U.S. at 21; Day, 161 Wn.2d at 895.

To justify a warrantless Terry stop, the State must be able to point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped has been, or is about to be, involved in a crime. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). An investigative detention must be “reasonably related in scope to the justification for [its] initiation.” Terry, 392 U.S. at 29. The lawful scope of a Terry stop may be enlarged or prolonged as needed, and the officer may “ ‘maintain the status quo momentarily while obtaining more information.’ ” State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990); State v. Williams, 102 Wn.2d 733, 737, 689 P.2d 1065 (1984) (quoting Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

When justified, “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. By definition, a person subject to an investigative detention under Terry 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”).

A Terry stop is brief and less coercive than the police interrogation contemplated by Miranda. Heritage, 152 Wn.2d at 218. “[U]nlike a formal arrest, a typical Terry stop is not inherently coercive because the detention is presumptively temporary and brief, is relatively less ‘police dominated’, and does not easily lend itself to deceptive interrogation tactics.’ ” State v. Walton, 67 Wn. App. 127, 130, 834 P.2d 624 (1992) (quoting Berkemer v. McCarty, 468 U.S. 420, 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). See also State v. Marcum, 149 Wn. App. 894, 909-10, 205 P.3d 969 (2009) (the fact that numerous police vehicles surrounded the suspect's vehicle in a parking lot did not convert the detention into a custodial arrest). Consequently, a person is not in custody simply because the person is detained and questioned by police. While a Terry stop involves a degree of restraint, a routine investigative detention does not require Miranda warnings. Heritage, 152 Wn.2d at 218; Berkemer, 468 U.S. at 439-40. Statements made in the context of a Terry stop are noncustodial even though the suspect may not be free to leave. Walton, 67 Wn. App. at 130.

Preliminarily, Anaya contends substantial evidence does not support Finding of Fact 7. Finding of Fact 7 states: “Officer Lednicky told the Defendant that he was not under arrest, and would be released once the police were able to confirm his identity.”

Anaya argues that because Officer Lednicky did not use the word “confirm” when testifying, substantial evidence does not support the finding. We disagree. Finding of Fact 7 accurately reflects Officer Lednicky’s testimony, and the finding is supported by substantial evidence in the record. Although Officer Lednicky did not use the word “confirm,” the officer testified that he told Anaya that he would be released “as soon as we could identify him.”

We also conclude that the undisputed testimony at the CrR 3.5 hearing establishes Anaya was not in custody for purposes of Miranda. There is no dispute the police had reasonable grounds to justify a Terry stop.

Officer Lednicky stopped Anaya based on the description provided by the surveillance officers after observing a drug transaction, and briefly detained Anaya in order to identify him. Anaya agreed to stop and stood on the sidewalk with the two officers in a public place. Officer Lednicky told Anaya he would be released after the officers identified him. While Officer Lednicky testified that he touched Anaya’s arm to direct him to the car, Anaya was not under arrest, handcuffed, or physically restrained. After Anaya said he did not have any identification, Officer Lednicky asked Anaya to provide his name and date of birth. The detention was extremely brief, lasting no more than three minutes between the time Anaya was stopped and when he gave the officers a false name and date of birth.

We reject Anaya's argument that he was in custody because Officer Lednick testified that Anaya was not free to leave. A suspect subject to a Terry stop is not free to leave.

[S]uspects need not "feel they were free to leave." . . . But that does not convert [an] investigatory detention into a custodial arrest for purposes of the Fifth Amendment. Rather, 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 purposes of Miranda."

State v. Marcum, 149 Wn. App. 894, 910, 205 P.3d 969 (2009)⁵ (quoting Heritage, 152 Wn.2d at 218). Based on the record, we conclude Anaya was not in custody for purposes of Miranda and the court did not err in admitting the false statements.⁶

Statement of Additional Grounds

In his statement of additional grounds, Anaya argues substantial evidence does not support his conviction because the police did not find the prerecorded money used to buy the drugs. Despite the failure to locate the money, the testimony of Officer Rodriguez and the surveillance officers that Anaya gave Little the drugs supports the finding that Anaya delivered cocaine in violation of the Uniform Controlled Substances Act.

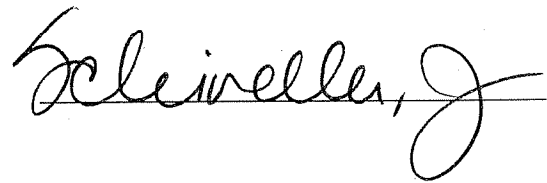
Anaya also argues that Officer Pasquan's testimony was not reliable because it was inconsistent with his written report. Officer Pasquan stated in his report that Anaya sold the drugs to Officer Rodriguez. At trial, Officer Pasquan testified that Anaya sold

⁵ (Emphasis in original.)

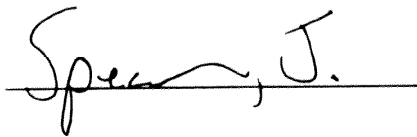
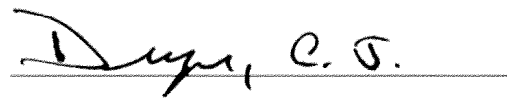
⁶ Because the question of whether Anaya was in custody is dispositive, we do not address whether Anaya was subject to interrogation.

the drugs to Officer Rodriguez through Little. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

We affirm.

A handwritten signature in cursive script, reading "Schneider, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Sperry, J.", written over a horizontal line.A handwritten signature in cursive script, reading "Dyer, C. S.", written over a horizontal line.