IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RYAN JAY DOERING, Appellant.	No. 41231-4-II Consolidated with No. 41286-1-II
In the Matter of the Personal Restraint of: RYAN JAY DOERING, Petitioner.	UNPUBLISHED OPINION

Worswick, A.C.J. — Ryan Doering appeals his convictions for felony driving under the influence and second degree driving with license suspended or revoked. Doering argues that the trial court erred in (1) admitting his pre-arrest statement that he had not been drinking, and (2) sentencing him to a combined total of confinement and community custody in excess of the statutory maximum. In a pro se personal restraint petition,[1] Doering also argues that he received

[1] Rules of Appellate Procedure (RAP) 16.3.

ineffective assistance of counsel at trial. We affirm the trial court's admission of Doering's pre-arrest statements, remand for the trial court to amend the judgment and sentence, and dismiss Doering's personal restraint petition.

FACTS

In the early morning hours of March 25, 2010, while Bremerton Police Officer Aaron Elton assisted fellow officers with an unrelated incident, Officer Elton saw Doering drive by in a silver pickup truck. Officer Elton recognized Doering because he had known Doering for several years. Officer Elton checked the truck's license plate and confirmed that Doering was driving with a suspended license. A few minutes later, Officer Elton drove in search of Doering. Officer Elton quickly caught up to Doering's truck, verified that Doering was still driving, activated his emergency lights, and stopped Doering because he was driving with a suspended license.

Officer Elton told Doering that he was stopped for driving with a suspended license. Doering replied that he was "aware of that." 1 Report of Proceedings (RP) at 58. Officer Elton noticed Doering slurred his speech and had the odor of alcohol on his breath. Officer Elton asked Doering if he had been drinking and Doering replied "no." 1 RP (Aug. 17, 2010) at 47.

Officer Elton arrested Doering for driving with a suspended license and read Doering his *Miranda*[2] rights from a department-issued card. Doering said that he understood his rights and continued to speak with Officer Elton. Officer Elton again asked Doering if he had been drinking.

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

Doering admitted that he "had one or two beers" shortly before he began driving. 1 RP (Aug. 17, 2010) at 60; 2 RP (Aug. 18, 2010) at 126. Officer Elton then requested Officer Donnell Rogers, Bremerton Police Department's on-duty dedicated traffic officer, to assist in determining whether Doering was driving under the influence.

When Officer Rogers arrived, Officer Elton told Officer Rogers that he already read Doering his *Miranda* rights. Officer Rogers noticed that Doering's pupils were dilated, his eyes were red and watery, his speech was fast and slurred, and he was unsteady on his feet. Officer Rogers requested Doering voluntarily perform a series of field sobriety tests (FSTs), which Doering did. Based on all of Officer Rogers's contact with Doering and Doering's poor performance on the FSTs, Officer Rogers concluded that Doering was intoxicated and unable to drive safely. Officer Rogers arrested Doering for suspicion of driving under the influence (DUI), handcuffed him, and transported him to the police station.

Doering was argumentative at the police station, so Officer Rogers did not remove Doering's handcuffs. Officer Rogers gave Doering implied consent warnings for breath testing and read Doering his *Miranda* rights from a standardized form. Doering said that he understood his rights, but did not sign the standardized form in the DUI packet because he was still handcuffed. Doering refused to submit to breath testing.

The State charged Doering with felony DUI and second degree driving with license suspended or revoked. Before trial, the trial court held a CrR 3.5 hearing regarding admissibility of Doering's statements to Officers Elton and Rogers. At this CrR 3.5 hearing, Officers Elton

and Rogers testified as described above. Doering testified at the hearing that Officer Elton never read him his *Miranda* rights but that Officer Rogers did not read him his *Miranda* rights "until way at the end;" however, on cross-examination, Doering stated that Officer Rogers never read him his rights. 1 RP (Aug. 17, 2010) at 59, 62, 66.

The trial court weighed the credibility of the witnesses for both sides and concluded that Officer Elton properly advised Doering of his rights verbally at the scene and that Officer Rogers properly advised Doering of his rights in writing at the station. The trial court ruled that Doering's pre-*Miranda* statements were admissible because Doering was not subject to custodial interrogation when he made them; rather, Doering made his pre-*Miranda* statements in the course of a *Terry*[3] investigative stop.

At trial, Officer Elton testified that Doering first denied having consumed alcohol but later admitted having a beer or two. The State also presented Officer Rogers's testimony detailing Doering's slurred speech and Doering's poor performance on the FSTs. Doering testified that he was not under the influence of alcohol and that he initially denied having consumed alcohol because he "didn't want to go into that situation." 3 RP (Aug. 19, 2010) at 234.

The jury found Doering guilty of felony DUI and second degree driving with license suspended; the jury also found that Doering refused a breath test to determine his blood alcohol content. The State recommended the statutory maximum sentence of 60 months confinement and expressed regret that, because it recommended the statutory maximum sentence, imposing the

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

normal 12 months of community custody for felony DUI would necessarily lessen the duration of Doering's confinement. The trial court acknowledged that it had "very little discretion in [sentencing] this case" because the statutory maximum sentence range was "a flat 60 [months]," so the trial court could not deviate and it sentenced Doering to 60 months confinement. 3 RP (Aug. 27, 2010) at 372-73.

However, the trial court entered a written judgment and sentence that conflicted with its oral ruling. The written judgment and sentence ordered Doering to the statutory maximum 60 months confinement and also ordered 12 months of community custody, stating "Note: While 12 months of community custody is authorized for this offense, such period of community custody exceeds the statutory maximum term (5 years) given [. . . Doering's] sentence of 60 months." Clerk's Papers (CP) at 137-38. Doering timely appealed.

ANALYSIS

I. Admissibility of Doering's Statements

Doering argues that the trial court erred in admitting his pre-*Miranda* statement that he had not consumed any alcohol because he made that statement while subject to custodial interrogation. We disagree.

We review whether a criminal defendant was in custody for purposes of *Miranda* de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). We apply an objective test, inquiring "whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." *State v. Heritage*, 152 Wn.2d 210, 218,

95 P.3d 345 (2004).

Criminal defendants cannot be compelled to make incriminating statements. U.S. Const. amend. V; Wash. Const. art. I, § 9. *Miranda* warnings protect that right and must be given before a criminal defendant is subject to custodial interrogation. *Lorenz*, 152 Wn.2d at 36. Whether the interrogating officers had probable cause to arrest the suspect is irrelevant to this objective inquiry. *Lorenz*, 152 Wn.2d at 37.

Conversely, a person subject to an investigative detention (or *Terry* stop) is not in custody under *Miranda* because investigative detentions are brief, occur in public, and are less police dominated. *Heritage*, 152 Wn.2d at 218. Police may properly make an investigative detention if they have "a reasonable and articulable suspicion that the individual [stopped] is involved in criminal activity." *State v. Marcum*, 149 Wn. App. 894, 903, 205 P.3d 969 (2009) (quoting *State v. Walker*, 66 Wn. App. 622, 626, 834 P.2d 41 (1992)). An officer's suspicion is reasonable if there is the "substantial possibility that criminal conduct has occurred or is about to occur." *Marcum*, 149 Wn. App. at 903 (quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).

Police officers may make a *Terry* stop of a vehicle registered to a person with a suspended license. *State v. Phillips*, 126 Wn. App. 584, 587, 109 P.3d 470 (2005); RCW 46.20.349. During an investigative detention, police officers may ask a "moderate number of questions to determine [the detainee's] identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439-40, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Police officers may ask such questions without giving *Miranda* warnings during

an investigative detention even if those questions are designed to "elicit an incriminating response." *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). Moreover, if a police officer's initial articulable suspicion is further aroused during a *Terry* stop, that officer may expand the scope of that lawful *Terry* stop as necessary. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

Here, Officer Elton stopped Doering for driving with a suspended license. Because Officer Elton had reasonable and articulable suspicion that Doering was committing a crime (driving with a suspended license), Officer Elton had the authority to stop Doering.

As soon as Officer Elton noticed Doering's slurred speech and smelled alcohol on Doering's breath, Officer Elton had reasonable and articulable suspicion that Doering was committing a second crime. Based on that reasonable suspicion, Officer Elton had the authority to expand the scope of his lawful *Terry* stop and ask if Doering had been drinking. Because Officer Elton stopped Doering in a lawful *Terry* stop and properly expanded the scope of that *Terry* stop when Officer Elton formed reasonable and articulable suspicion that Doering was intoxicated, Doering was not in custody.[4] Because Doering was not in custody, he was not

[4] Doering supports his argument that he was in custody when Officer Elton asked if he had been drinking, by analogizing to *State v. France*, 129 Wn. App. 907, 120 P.3d 654 (2005). In *France*, although the officer had probable cause to arrest France, the officer explicitly told France that he was not free to leave until after they "cleared up" a domestic relations issue. *France*, 129 Wn. App. at 909-10. In holding that the officer subjected France to custodial interrogation rather than an investigative detention, we considered both that the duration of the stop was open-ended because the officer had probable cause to arrest France and that the officer explicitly told France he was not free to leave until after they "cleared up" the issue. *France*, 129 Wn. App. at 909-11. Doering argues that, because Officer Elton had probable cause to arrest him for misdemeanor

subject to custodial interrogation and Officer Elton lawfully inquired whether Doering had been drinking without informing him of his *Miranda* rights. We affirm Doering's conviction.

II. Judgment and Sentence

Doering argues that the trial court erred in entering a judgment and sentence ordering 60 months of confinement and 12 months of community custody, for a total of six years, because his statutory maximum sentence is five years. The State concurs and concedes that the appropriate remedy is for the trial court to amend the judgment to explicitly state that the "combination of confinement and community custody shall not exceed the statutory maximum" pursuant to *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 671-73, 211 P.3d 1023 (2009). We agree.

Doering's statutory maximum sentence cannot exceed five years. Although the trial court's oral ruling stated that it could not deviate from the 60-month statutory maximum sentence, the trial court's written judgment and sentence imposed 60 months confinement and 12 months community custody. Because the total duration of Doering's confinement and community custody is 72 months (i.e., six years), the sentence exceeds the five-year statutory maximum. Thus, we agree with both Doering and the State and remand for the trial court to amend Doering's sentence in accordance with *Brooks*.

III. Personal Restraint Petition

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driving with a suspended license, the stop's duration was open-ended and he was in custody. Here, though, Officer Elton made a lawful *Terry* stop of Doering's truck, asked Doering if he had been drinking while Doering was still in his truck, and never told Doering that he could not leave. Thus, Doering's argument fails in accordance with *Phillips*, 126 Wn. App. at 587.

In a pro se personal restraint petition (PRP), Doering argues that he received ineffective assistance of counsel at trial. We disagree and dismiss his PRP.

In a PRP, the petitioner has the burden of proving by a preponderance of the evidence either constitutional error resulting in actual and substantial prejudice or nonconstitutional error resulting in a complete miscarriage of justice.[5] *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). In meeting that burden of proof, a PRP petitioner must state facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010); RAP 16.7(a)(2). A PRP petitioner cannot meet this burden of proof with conclusory allegations unsupported by citation to authority or references to the record. *Monschke*, 160 Wn. App. at 488; *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). We must dismiss a PRP where the petitioner fails to meet his burden of showing he was actually prejudiced by alleged constitutional error. *Monschke*, 160 Wn. App. at 489.

We review ineffective assistance of counsel claims de novo. *Monschke*, 160 Wn. App. at 490. The federal and state constitutions guarantee effective assistance of counsel. U.S. Const.

[5] We recognize the dissent in *In re Pers. Restraint of Crace*, 157 Wn. App. 81, 114-19, 236 P.3d 914 (2010) (Quinn-Brintnall, J., dissenting), *review granted*, 171 Wn.2d 1035, 257 P.3d 664 (2011). *Crace* discussed the higher burden placed on petitioners alleging ineffective assistance of counsel in a PRP. 157 Wn. App. at 110-14. We do not reach the issue of Doering's burden of proof here because he (1) fails to establish his counsel's performance was deficient and (2) fails to establish prejudice under *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thus, Doering failed to meet his PRP burden of showing prejudice under any standard.

amend. VI; Wash. Const. art. I, § 22. We start with a strong presumption of counsel's effectiveness. *State v. Gerdts*, 136 Wn. App. 720, 726, 150 P.3d 627 (2007); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A person claiming ineffective assistance of counsel must show both that (1) counsel's deficient performance deprived the defendant of his constitutional right to counsel and (2) counsel's deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability the outcome would have differed. *Reichenbach*, 153 Wn.2d at 130. If a person bases his ineffective assistance of counsel claim on counsel's failure to object, he must show that the objection would have succeeded. *Gerdts*, 136 Wn. App. at 727.

Here, Doering argues that he received ineffective assistance of counsel because his counsel failed to object to "any untrue information," including when "Officer [Rogers] . . . lied about knowing [Doering]" and when the "prosecutor continued to tell the jury that [Doering] was drunk [because he] did not take a breathalyzer." Personal Restraint Petition (PRP) at 4. Doering further argues that he was denied effective assistance of counsel because his attorney neither filed pretrial motions "to have officers at the scene testify . . . that they falsely accused [him] of being 'high' on 'meth,'" nor presented evidence of Doering taking and "passing" FSTs, nor objected to the jury seeing Doering in "cuffs." PRP at 4.

In his PRP, Doering did not cite evidence that his counsel failed to object to "untrue information" and that, even if counsel failed to object to "untrue information," that the failure prejudiced Doering's defense. Doering made no showing that, had counsel made every objection Doering believed was appropriate, those objections would have succeeded. Further, Doering fails to support his allegations with references to the record, other admissible evidence, or authority. For example, neither Doering's PRP nor the record contain any factual reference to whether the jury did or did not see Doering in handcuffs. In his PRP, Doering fails to satisfy both *Strickland* prongs and, thus, fails to establish constitutional error and resulting prejudice. Because Doering fails to establish prejudice under *Strickland*, Doering did not meet his PRP burden. Therefore, we dismiss his PRP.

We affirm the trial court's admission of Doering's pre-arrest statements, remand for the trial court to enter a sentence not exceeding the statutory maximum, and dismiss Doering's personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.