

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, | | No. 29593-1-III |
| |) | |
| Respondent, |) | |
| |) | Division Three |
| v. |) | |
| |) | |
| JACOB GANN, |) | UNPUBLISHED OPINION |
| |) | |
| Appellant. |) | |
| |) | |

Brown, J.—Jacob Gann appeals his bench-trial conviction for possessing methadone, a controlled substance. He contends the court erred in denying his CrR 3.6 evidence suppression motion because the evidence was collected after he was interrogated without being first advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). We affirm.

FACTS

The facts are mainly drawn from unchallenged CrR 3.6 findings of fact that are, therefore, verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). In March 2010, an officer saw what he believed to be a drug transaction at a gas station involving Mr. Gann. The officer reported the incident to the drug task

force. Detective Steve Brown went to Mr. Gann's home with Detective Luis Rubio. The detectives wore plain clothes and drove an unmarked vehicle. While standing outside on Mr. Gann's front lawn, Detective Brown told Mr. Gann that an officer had observed him buying drugs. Detective Brown then told Mr. Gann, "you're either going to work with me or end up in jail if you keep using drugs." Clerk's Papers (CP) at 4. The detective asked him if he was going to give him the drugs. Mr. Gann then took methadone pills out of his pocket and handed them to Detective Brown.

The State charged Mr. Gann with possession of a controlled substance, methadone. Mr. Gann requested suppression of the drugs, arguing he was not advised of his *Miranda* warnings prior to turning over the drugs. The court denied his request, concluding "*Miranda* was not required in this situation as the defendant was not under arrest and was free to leave. A reasonable person would not believe that they could not go into their house in this scenario." CP at 4. Following a bench trial based on stipulated facts, the court found Mr. Gann guilty as charged. He appeals.

ANALYSIS

The issue is whether the trial court erred by denying Mr. Gann's CrR 3.6 motion to suppress. Mr. Gann contends this evidence was admitted in violation of *Miranda*.

We review a CrR 3.6 motion to suppress "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." *State v. Cole*, 122 Wn. App. 319,

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322-23, 93 P.3d 209 (2004) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Unchallenged findings of fact are verities on appeal. *O'Neill*, 148 Wn.2d at 571. Conclusions of law are reviewed de novo. *Cole*, 122 Wn. App. at 323.

While *Miranda* warnings are not required for voluntary consent, the procedural protections enunciated in *Miranda* are necessary when a person is subjected to custodial interrogation by a state agent. *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). “Custody for *Miranda* purposes is narrowly circumscribed and requires formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172, 837 P.2d 599 (1992). Mr. Gann initially argues he was subjected to custodial interrogation, citing *State v. Dennis*, 16 Wn. App. 417, 558 P.2d 297 (1976).

In *Dennis*, this court concluded the defendant was under custodial interrogation and that *Miranda* warnings were required when the officer in the defendant’s residence convinced the defendant to produce a supply of narcotics hidden in the refrigerator, and then the officer arrested him. *Dennis*, 16 Wn. App. at 419. The officer was inside the defendant’s home and told the defendant and his wife that a search warrant was on its way and they were going to wait for it. When the defendant’s wife requested the officer move to another room, he insisted on remaining at the kitchen table in a position where he could monitor and restrict the occupants’ freedom of movement within their home. *Id.* at 420-22. The court reasoned under those circumstances a reasonable

man would have believed his freedom of movement was significantly restricted and that any attempt to leave would probably result in immediate physical restraint or custody. *Id.* at 422.

Where a police officer's questioning or requests induce a suspect to hand over or reveal the location of incriminating evidence, such a nonverbal act may be testimonial in nature; that act should be suppressed if done while in custody without *Miranda* warnings. *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988). Here, like *Dennis*, Mr. Gann turned over incriminating evidence in response to a police question. Mr. Gann is arguably correct that this is a testimonial act. But the dispositive question is whether any interrogation occurred while Mr. Gann was in custody.

The *Miranda* safeguards apply "as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *Berkemer v. McCarty*, 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, 77 L. Ed. 2d 1275 (1983)). Whether a defendant was in custody for *Miranda* purposes depends on "whether the suspect reasonably supposed his freedom of action was curtailed." *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989).

But a "non-coercive" investigative detention does not amount to custody. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). In this type of detention, police may ask a "moderate" number of questions relating to the investigative purpose of the

stop without the detainee being considered in custody for *Miranda* purposes. *Id.* Similarly, the court found Detective Brown approached Mr. Gann in his front yard with plain clothes and an unmarked vehicle. He asked a moderate number of questions about the drug transaction at the gas station. No evidence shows he restricted Mr. Gann's movement. This case is unlike *Dennis* where the police were inside the home, told the defendant a search warrant was on its way, and when the defendant's wife asked the officer whether they could move to another room, he refused.

In sum, the trial court correctly reasoned based on the facts it found of a noncoercive encounter, that a reasonable person would believe he could leave and not answer the detective's questions. Thus, Mr. Gann was not in custody for *Miranda* purposes. The trial court properly denied his motion to suppress.

Affirmed.

A majority of the panel has determined 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.

Brown, J.

WE CONCUR:

Korsmo, A.C.J.

Siddoway, J.