

IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI, )  
 )  
 Respondent, )  
 )  
 vs. ) No. SC 86044  
 )  
 JOHN TALLY, )  
 )  
 Appellant. )

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF DALLAS COUNTY, MISSOURI  
THIRTIETH JUDICIAL CIRCUIT  
THE HONORABLE THEODORE B. SCOTT, JUDGE

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APPELLANT'S SUBSTITUTE REPLY BRIEF

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## **JURISDICTIONAL STATEMENT**

The jurisdictional statement on page 5 of appellant's opening brief is incorporated herein by reference.

## **STATEMENT OF FACTS**

The statement of facts appearing on pages 6 through 9 of Appellant's opening brief is incorporated herein by reference.

## REPLY ARGUMENT

**The fact that Appellant was detained in a valid Terry stop does not bear on the ultimate question: in light of the circumstances of the encounter, did Appellant reasonably believe that he was in the custody of the police at the time he made his statement?**

### About the standard of review

Respondent notes that in reviewing the denial of Appellant's motion to suppress, this Court should defer to the trial court's determination of witness credibility and factual findings, considering the evidence in the light most favorable to the ruling (Resp. Br. 9-10) (*citations omitted*.) That is a generally correct statement of the standard of review, but it does not apply where, as here, the basis for the ruling cannot be discerned from the record. Without knowing the decision made by the trial court—what law was applied as distinguished from how the court ruled—the reviewing court cannot infer what judgments the trial court may have made about the evidence before it.

When the motion to suppress was heard, Appellant alleged a Fifth Amendment violation: he argued that his statement to Detective Hamilton should be suppressed because it was made in circumstances that amounted to a custodial interrogation, in response to questions from Detective Hamilton that were not

preceded by advice of rights as required by **Miranda**<sup>1</sup> (Tr. 40-42, 43). In response, the State argued that there was no Fourth Amendment violation:

MS. BLACK: Your Honor, I think what we have here is a Terry stop. It was a short detention. I think the case law is clear that officers can even go so far as using handcuffs in a Terry stop.

Mr.—Detective Hamilton had reasonable suspicion, but he didn't have probable cause. I think in—it's very reasonable for an officer to do an investigative stop with reasonable suspicion.

The preliminary investigative questions before arrest by police are noncustodial. This remains true even if the police become suspicious of the—suspicious of the person they are questioning or the person becomes the focus of the investigation. In a—in determining whether you have a custodial interrogation, you can—the Court can focus on at the point when a police officer has reasonable grounds to believe that a crime was committed and that the defendant committed the crime.

I think that this stop does rise to the level of a Terry stop. I do not believe that it rises to the level of in-custody interrogation.

(Tr. 42-43). The sense of this argument is that there was no custodial interrogation because Detective Hamilton did not have probable cause to arrest Appellant before his admission, therefore he was not in custody at the time of the statement, reasoning that at best confuses Fourth and Fifth Amendment precepts of custody.

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<sup>1</sup> **Miranda v. Arizona**, 384 U.S. 436 (1966).

The trial court denied the motion after alluding to Appellant's opportunity to put the question of voluntariness (not at issue) to the jury (Tr. 44-45). But Appellant did not claim that his statement was involuntary, only that it was obtained as the result of a custodial interrogation not preceded by advice of his rights per **Miranda**, and thus not admissible as evidence of his guilt.

If, as urged by the State, the trial court decided there could not be a custodial interrogation in the context of a valid **Terry**<sup>2</sup> stop, the court's consideration of the facts would have ended at the point it found the stop was valid. Accordingly, this Court is not required to disregard evidence that would support a finding of custodial interrogation under Fifth Amendment analysis, including: Deputy Wood's testimony that the helicopter landed nearby while Appellant was still on his knees (Tr. 25, 145), that Appellant was still on his knees when the deputy approached from the rear and heard him admit some of the plants were his (Tr. 25-26, 160); that Appellant was handcuffed after he made the statement and as he got up from the ground (Tr. 27, 108, 160); testimony from state's witness Joe Horman that Appellant remained on the ground while Detective Hamilton questioned him, and was still kneeling when Deputy Wood handcuffed him (Tr. 141, 145); Appellant's testimony that the helicopter followed so closely after directing him to the house that he could see into the cockpit (Tr. 195-196); and Detective Hamilton's testimony that when Appellant asked if he was under arrest, the detective replied "no, not at this time." (Tr. 7).

The circumstances constituted a *de facto* arrest requiring that Appellant be advised of his rights under **Miranda**

Respondent faults what it describes as Appellant’s “freedom to leave analysis,” for providing “no meaningful guidance for determining whether a *Terry* stop has evolved into ‘custody’ for purposes of *Miranda*.” (Resp. Br. 20-21).

Although Respondent identifies the source of Appellant’s freedom-to-leave criterion as **Berkemer v. McCarty**, that is not so. Appellant cited **Yarborough v. Alvarado**, 524 U.S. \_\_\_, 124 S.Ct. 2140, 2149 (2004), for the United States Supreme Court’s statement of the current Fifth Amendment in-custody inquiry as: given the circumstances surrounding the interrogation, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave? (App.Br. 15).

Because **Alvarado** and **Thompson v. Keohane**, 516 U.S. 99 (1995), cited in **Alvarado** for the freedom-to-leave standard, involved situations originating with a consensual encounter, the analysis is not complicated with considerations of Fourth Amendment status. As Respondent observes, a citizen is not in fact free to leave during a **Terry** encounter with law enforcement (Resp. Br. 21); clearly, he is “seiz[ed] within the meaning of the Fourth Amendment.” **Berkemer**, 468 U.S. at 436-437.

Perhaps the notion of freedom-to-leave in the context of a **Terry** stop is better expressed as the suspect’s expectation that the detention is a temporary one,

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<sup>2</sup> **Terry v. Ohio**, 392 U.S. 1 (1968).

investigative in nature. **Berkemer** instructs that where seizure (custody in the Fourth Amendment sense) has been established, the Fifth Amendment in-custody determination becomes “whether a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.' ” **Berkemer v. McCarty**, 468 U.S. 420, 440 (1984) (*citing California v. Beheler*, 463 U.S. 1121, 1125 (1983)).<sup>3</sup> **Berkemer** identified the relevant question in considering whether a detention has matured into custody as “how a reasonable man in the suspect's position would have understood his situation.” 468 U.S. at 442.

The Supreme Court’s recent consideration of alleged Fourth and Fifth Amendments violations following a valid **Terry** stop shows that the Court does not consider seizure pursuant to an initial, valid **Terry** stop to end the inquiry into a possible Fifth Amendment violation. In **Hibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County**, --- U.S. ----, ----, 124 S.Ct. 2451 (2004), the Court held that a Nevada statute requiring a citizen to identify himself during a **Terry** stop did not contravene the Fourth Amendment because the request “has an immediate relation to the purpose, rationale, and practical demands of a *Terry*

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<sup>3</sup> Both **Beheler** and **Oregon v. Mathiason**, 429 U.S. 492 (1977), identified by the **Beheler** Court as “remarkably similar,” began with consensual encounters.

Accordingly, **Berkemer**’s incorporation of the Fifth Amendment in-custody inquiry from **Beheler** suggests that the Court considered the question of whether the suspect has been seized under the Fourth Amendment to be immaterial.

stop.” 124 S.Ct. at 2459. *Hiibel*’s argument that his statement was compelled was dismissed on the grounds that being required to simply identify oneself, without more, does not violate the Fifth Amendment because such information is not ordinarily incriminating, and was not incriminating in this case. *Hiibel*, 124 S.Ct. at 2460-2461. However, the Court recognized that there could be circumstances in which requiring a citizen to identify himself might be sufficiently incriminating to violate the Fifth Amendment, even though permissible under the Fourth Amendment pursuant to the exception carved out by *Terry*. *Hiibel*, 124 S.Ct. at 2461.

Although Respondent dismisses the freedom-to-leave approach as not useful in the context of a *Terry* stop, it ignores Appellant’s application of the totality of the circumstances analysis prescribed by this Court in *State v. Werner*, 9 S.W.3d 590 (Mo. banc 2000)—except to argue that Detective Hamilton’s “box camera” ruse was not relevant to a determination of custody under the Fifth Amendment because it was a “legitimate investigatory technique.” (Resp. Br. 24-25). The totality of the circumstances analysis set out in *Werner* includes criteria that suggest traditional Fourth Amendment analysis, then proceeds to examine the situation in light of other factors reflecting “coercive atmosphere” concerns commonly associated with Fifth Amendment in-custody analysis.

Respondent’s choice not to respond to Appellant’s use of *Werner*, or to his discussion of Eighth Circuit cases considering the question of custodial

interrogation, shows that in spite of lip service to **Berkemer**'s caveat (that **Miranda** warnings are required in circumstances following an initial **Terry** stop that rise to the level of a *de facto* arrest), the State's position is that **Miranda** simply does not apply to **Terry** stops, or at least not until the suspect is actually arrested.<sup>4</sup>

Respondent repeats the government's argument rejected by the Court in **Berkemer**—that recognizing a valid **Terry** stop might mature into a *de facto* arrest requiring **Miranda** warnings would deprive law enforcement of a legitimate investigative tool and needlessly expand **Miranda**'s exclusionary rule (Resp. Br. 12, 26). The contrary position, argued by McCarty, was that categorically exempting **Terry** stops from the dictates of **Miranda** would permit the police to create coercive environments during “investigatory detentions” in order to get incriminating statements from suspects who may not be aware of their constitutional rights. **Berkemer**, 468 U.S. at 441. The **Berkemer** Court acknowledged its holding might cause the police and the lower courts “occasionally to have difficulty deciding exactly when a suspect has been taken into custody.” *Id.* But the Court preferred the ambiguity to the hazards of a more easily understood, all-or-nothing rule, either requiring an officer to give **Miranda**

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<sup>4</sup> One of the topical headings in Respondent's brief is telling: “C. Because Appellant was Detained Pursuant to an Investigatory *Terry* Stop, Appellant was not “in Custody” for Purposes of *Miranda*.” (Resp. Br. 13).

warnings at the start of every traffic stop, or one providing that the citizen need not be advised of his rights until formally arrested, as Respondent advocates. *Id.*

Respondent quotes **United States v. Acosta**, 363 F.3d 1141, 1148 (11<sup>th</sup> Cir. 2004) as warning: “If we applied the general *Miranda* custodial test literally to *Terry* stops, the result would be that *Miranda* warnings are required before any questioning could occur during any *Terry* stop.” (Resp. Br. 21). The operative word in the quotation is “literally.” The United States Supreme Court held in **Berkemer** that routine traffic stops, as a subspecies of **Terry** detentions, do not deprive a citizen of his freedom in a *legally* significant way, that is, they are minimally intrusive under the Fourth Amendment, and do not constitute custody in the Fifth Amendment sense, because they are relatively brief, limited and noncoercive. 468 U.S. at 439-440. The analyses currently employed by the United States Court of Appeals to determine when a **Terry** stop matures into a *de facto* arrest differ somewhat, but none of the Circuits subscribe to Respondent’s view that the Fifth Amendment does not come into play at all until the suspect is arrested.

In arguing that the box camera ruse should have no bearing on the question of custody, Respondent concludes that “the considerations outlined in *Berkemer v. McCarty*—and not the subjective knowledge of the officer—should govern whether a *Terry* stop (and the attendant questioning) exerts the kind of pressure that *Miranda* was designed to combat.” (Resp. Br. 25). Respondent’s characterization of the ploy as a matter of Detective Hamilton’s subjective

knowledge is puzzling and contrary to the use of that phrase in **Berkemer**, and later in **Stansbury v. California**, 511 U.S. 318 (1994) (police officers' consideration of Stansbury as a suspect did not convert an otherwise non-custodial situation into one that required warning under **Miranda**, because their nondisclosed suspicions could not have affected Stansbury's perception of the circumstances.)

Finally, this case is not **Berkemer**. While the setting and threatening mood of Appellant's encounter with the police may be disputed, at least one of Detective Hamilton's "investigative questions" was accusatorial and calculated to elicit an incriminating response. If the Ohio patrolman who stopped McCarty had implied the police had proof that he had been drinking, if McCarty had asked if he were under arrest and the patrolman said "not at this time," and the stop taken place in an isolated area, the Supreme Court would not have concluded that the detention was a nonthreatening, ordinary traffic stop. Appellant's encounter with Detective Hamilton and the officers in the helicopter was not an ordinary, public citizen-police encounter wherein the police "ask[ed] the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." **Berkemer**, 468 U.S. at 439.

At the time Appellant admitted some of the marijuana plants were his, circumstances were such that he reasonably believed he was under arrest, and his unwarned statement should have been suppressed.

## CONCLUSION

Because the State did not prove that Appellant's unwarned, incriminating statement was not made in circumstances constituting a *de facto* arrest, this Court should reverse his conviction and remand for a new trial.

Respectfully submitted,

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### **Certificate of Compliance and Service**

I, Irene Karns, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06(b).

The brief was completed using Microsoft Word 2002, in Times New Roman size 13 point font, and includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix if any, the brief contains 2,430 words, which does not exceed the number of words allowed for an appellant's reply brief.

- ✓ The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, SP1, updated on November 24, 2004. According to that program, these disks are virus-free.

- ✓ Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were shipped by United Parcel Service this 29th day of November, 2004, to Deborah Daniels, Assistant Attorney General, 1530 Rax Court, Jefferson City, Missouri 65109.

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