Supreme Court No. 101807-0
Court of Appeals No. 56451-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BARRETT JONATHAN MYERS

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Barrett Myers, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Myers seeks review of the unpublished opinion of the Court of Appeals in cause number 56451-3-II, 2023 WL 1990550 (Slip op. February 14, 2023). A copy of the decision is attached as Appendix A at pages A-1 through A-11.

C. ISSUE PRESENTED FOR REVIEW

1. Should this Court accept review where an off-duty deputy sheriff hired to provide private security for English Ridge, a housing development homeowner's association, stopped and searched a car driven by the petitioner, and where the traffic stop was an impermissible pretextual stop where the deputy appeared to be on a "frolic and lark" of his own where the stop took place approximately two and a half miles from the neighborhood where he was hired to perform private security and where there was no

evidence that the car had any connection to the housing development or had passed through the development.

2. Was the deputy acting in a private capacity for the English Ridge Housing Association, off on a frolic of his own outside his official duties he stopped the petitioner's car approximately two and a half miles from English Ridge?

D. STATEMENT OF THE CASE

1. Procedural history

The State charged Barrett Myers with possession of drugs with intent to deliver. Clerk's Papers (CP) at 4-6.

The defense moved to suppress drugs and other items obtained during a search of Myer's Kia by Deputy Brad Crawford. The following facts were elicited at the suppression hearing:

The English Ridge Homeowners Association, located near Puyallup, Washington, hired Deputy Sheriff Crawford to provide security while off duty from his job with the Pierce County Sheriff's Department. 1RP at 24, 42. Early on October 3, 2019

Deputy Crawford was working security for English Ridge. 1RP at 24. Although off duty, he was wearing his department issued uniform and driving a Sheriff's Department Chevrolet Tahoe. 1RP at 24, 25. At approximately 2:00 a.m. Deputy Crawford saw a 2007 Kia travelling westbound on 112th Street East. 1RP at 26. Deputy Crawford ran the license plate of the vehicle and determined that the car was registered to Mr. Myers and that his license was suspended in the third degree. 1RP at 26. The deputy drove alongside the vehicle and saw that the driver appeared to match the picture in the Department of Licensing records on his computer screen. 1RP at 26. Using his overhead emergency lights he stopped the Kia in the parking lot of a retail marijuana business called 112th Street Cannabis. RP at 26-27. The deputy instructed the driver to get out of the car and he was then handcuffed. 1RP at 27. Deputy Crawford stated that he saw hypodermic needles in the driver's side door panel. 1RP at 27. Deputy Crawford stated that he read Mr. Myers his constitutional warnings and that Mr. Myers waived his right to remain silent and talked with him. 1RP at 28-29. Mr. Myers told Deputy Crawford that he had used the

needles to inject methamphetamine earlier that day and denied that he had any drugs in the car. 1RP at 30. Deputy Crawford asked for consent to search the car and Mr. Myers agreed but said that he wanted to exclude a locked box under the front passenger seat from the search. 1RP at 30. Mr. Myers told the deputy that the lockbox and a purse in the trunk of the car belonged to McKayla Zweeg and that he did not know what was in them. 1RP at 30, 31. Deputy Crawford told Mr. Myers that he planned to impound the car and apply for a search warrant, and that Mr. Myers then said that he would consent to a full search of the vehicle including the lock box. 1RP at 31. Deputy Crawford said that after Mr. Myers consented to a full search, he read Mr. Myers his ***Ferrier*** warnings, including advising him that that he had the right to refuse the search, the right to restrict the scope of the search, and the right to revoke his consent. 1RP at 33.

Deputy Crawford retrieved the lock box from under the passenger seat and asked where the key was located. Mr. Myers told the deputy that the key on the key chain in the vehicle ignition. 1RP at 33. Using the key, Deputy Crawford opened the

box, which contained 26 grams of heroin, a rubber container with more heroin in it, a digital scale, baggies containing 1.5 grams of methamphetamine, a fentanyl test kit, and empty plastic baggies. 1RP at 34.

After the deputy finished his search, Mr. Myers asked Deputy Crawford to retrieve cash from a compartment in the dashboard of the car. 1RP at 35. Deputy Crawford located $706 and two credit cards in a hidden compartment in the dashboard. 1RP at 35. Deputy Crawford testified that Mr. Myers told him that money was from working on cars, not dealing drugs. 1RP at 65.

Defense counsel argued that the traffic stop was pretextual and that the deputy stopped the car while the car was traveling westbound on 112th Street East, and that the car was travelling away from the English Ridge neighborhood for which the deputy was hired to provide security. 1RP at 71-72.

Defense counsel filed a motion to suppress alleging that the stop was pretextual. CP at 37-45. A printout from a Google Maps app showed the distance between 112th Street Cannabis and English Ridge is approximately 2.5 miles. CP at 45.

Deputy Crawford testified that the reason for the stop was because the DOL reported that the driver associated with the car was suspended in the third degree, and the photo provided by DOL matched the driver seen by Deputy Crawford. 1RP at 77-78. Deputy Crawford was aware of a previous arrest on a warrant of an occupant of the Kia that took place on September 11, 2019. 1RP at 30. Deputy Crawford asked Mr. Myers if he was the person arrested on that date and he aid McKayla Zweeg was the person who was arrested on that date. 1RP at 30.

Defense counsel argued that the car was stopped two and a half miles from English Ridge, was travelling away from the housing development and was engaged in providing security for the neighborhood at the time he stopped Mr. Myers. 1RP at 81-84. Counsel also argued that the deputy's subjective intent and actual motive for the traffic stop was "to allow him to get his foot in the door" to search the car based on his knowledge that an occupant of the car had been arrested on a warrant three weeks earlier. 1RP at 86-87. The trial court denied the motion. 1RP at 105-08.

On appeal, Division 2 affirmed the trial court's ruling that the traffic stop was not pretextual and that Myers voluntarily gave consent to search the vehicle. ***Myers***, 2023 WL 1990550, at *1, *5-8.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW OF THE QUESTION WHETHER AN OFF-DUTY DEPUTY PERFORMING PAID PRIVATE SECURITY WAS ON A FROLIC AND CONDUCTED A PRETEXTUAL STOP OF THE PETITIONER'S VEHICLE TWO AND A HALF MILES FROM THE HOUSING DEVELOPMENT FOR WHICH HE WAS HIRED TO PROVIDE SECURITY .

Pretextual traffic stops are warrantless seizures that violate article I, section 7 of the Washington State Constitution. ***State v. Ladson***, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). A pretextual

traffic stop occurs when an officer does not stop a citizen to enforce the traffic code but rather to investigate suspicions unrelated to driving. ***Ladson***, 138 Wn.2d at 351. To determine whether a traffic stop is a pretext for accomplishing a search, "the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." ***Ladson***, 138 Wn.2d at 359. To satisfy an exception to the warrant requirement, the State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code. *Id.*

In this case, Deputy Crawford was not on duty as a deputy sheriff, but was instead working for private homeowner's association. Deputy Crawford's status on October 3, 2019 as an off duty officer, however, is of little moment for purposes of this analysis. The petitioner recognizes this Court's decision in ***State v. Graham***, 130 Wn.2d 711, 717-18, 927 P.2d 227 (1996), which this Court held that an off-duty police officer working as a private security guard can be performing official duties for the purposes of

the crime of obstructing a police officer. ***Graham*** holds that an off duty police officer working as a private security guard is still a "public servant" performing "official duties" for purposes of the crime of obstructing a public servant, and he is a "peace officer" for the purposes of the crime of resisting arrest. ***Graham***, 130 Wn.2d at 713–14. Within the security guard/peace officer context, this Court noted the common law duty of a police officer to preserve the public peace, to protect lives, and to preserve property, even when off duty. ***Graham***, 130 Wn.2d at 719.

The Court of Appeals seized on the petitioner's concession that the deputy's status as an off-duty officer is not the key element of the analysis of the case and essentially ignored the thrust of the argument, which is that deputy was far afield from the area for which he was hired to preform off-duty security, and was engaged in what cases call "a frolic," culminating in a pretextual stop. ***Myers***, slip op. at *7. Division Two addresses the petitioner's ***Ladson*** issue, but essentially ignores the argument that the deputy was far from the English Ridge housing development and stopped a car that had no ties to English Ridge, for which there was no indication that the

driver had passed through English Ridge, and was at the point of the stop acting in a "free lance" capacity. A public employee's acts occur under color of state law when they relate to official duties. See, e.g., ***Gibson v. Chicago***, 910 F.2d 1510, 1516 (7th Cir. 1990); ***Hughes v. Meyer***, 880 F.2d 967, 971–72 (7th Cir. 1989). In this case however, there is a question if the deputy was acting in a private capacity, off on a lark and a frolic stopping cars outside of English Ridge.

Under the totality of the circumstances in this case, the objective and subjective circumstances call into question the basis of the deputy's actual motive for initiating the traffic stop of the Kia. The evidence shows that the stop was not based on constitutional grounds—it was calculated pretext to circumvent the narrow exceptions to the warrant requirement. The deputy was approximately two and a half miles from the neighborhood he was hired to patrol. The stop of the Kia was not part of his "official duties" to provide security for English Ridge; the deputy was far afield from the area he was hired to patrol. Moreover, he offered no explanation as to what he was doing on 112th Street East when he

stopped the Kia. Finally, the deputy was aware after running the license plate that someone associated with the Kia had been arrested on a warrant three weeks earlier. It is reasonable to conclude that the deputy's true intent was to stop the car to search for evidence of crimes, not merely because the driver had a suspended license.

Being engaged in official duties excludes a personal frolic of the officer's own devising. ***State v. Hoffman***, 116 Wn.2d 51, 100, 804 P.2d 577 (1991); ***State v. Mierz***, 127 Wn.2d 460, 479, 901 P.2d 286 (1995). Officers are performing official duties even during an arrest that later turns out to be without probable cause, provided they were not acting in bad faith or engaged in a "frolic" of their own. ***State v. Hudson***, 56 Wn.App. 490, 496–97, 784 P.2d 533 (1990).

In ***Mierz***, the court "h[e]ld that 'official duties' as used in RCW 9A.36.031(1)(g) encompasses all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own." This Court noted that an officer is acting in his official duties when making an arrest, even if that arrest later turns out to be unlawful. ***Mierz***, 127 Wn.2d at 475; see also ***State v. D.E.D.***, 200 Wn. App.

484, 497, 402 P.3d 851 (2017) (similar).

In ***Hoffman***, 116 Wn.2d 51, 804 P.2d 577 (1991), a defendant argued that an officer was not performing his official duties because the officer had (allegedly) illegally attempted to arrest the defendant without a search warrant. *Id.* at 99-100. The Supreme Court disagreed, ruling that as long as the officer was not engaged in a "frolic of his or her own," the officer was still performing his official duties even if the arrest was improper or had lacked probable cause. *Id.* at 100.

In this case, instead of being engaged in "official duties" of protecting English Ridge, his testimony shows that Deputy Crawford was on a 'frolic' when he stopped the Kia, and that he was acting outside the course of his official duty of providing private security for English Ridge. The ***Terry*** stop took place on 112th Street East, approximately two and a half miles from the English Ridge neighborhood. The Kia was travelling westbound and heading away from English Ridge when stopped. There was no evidence the car was associated in any way with English Ridge, that the car had travelled through English Ridge, or that Myers presented a threat

to the security of English Ridge by driving with a suspended license.

The conclusion that Deputy Crawford was on a frolic is illuminated by the almost comical lengths the deputy took in his testimony to obscure his location and direction of travel relative to English Ridge. The deputy, whom the State describes as a "sophisticated law enforcement officer," (1RP at 100) was unwilling to concede that he was over two miles away from the entrance to English Ridge on Woodland Avenue when he stopped the Kia on 112th Street East. The following exchange took place during cross examination of Deputy Crawford during the suppression hearing:

> [DEPUTY CRAWFORD]: So part of my duties would be to patrol the homeowners' association, inside of it as well as the exterior, to provide sort of a barrier of deterrence. Yes.
>
> [DEFENSE COUNSEL]: And you testified the car that you observed was traveling westbound on 112th Street, past Woodland Avenue, continue to go west; is that right?
>
> [DEPUTY CRAWFORD]: Correct. Towards 112th Street Cannabis, where he was stopped.
>
> [DEFENSE COUNSEL]: Right. So driving in that

direction, is that driving towards or away from where English Ridge is?

[DEPUTY CRAWFORD]: It would be westbound from Woodland.

[DEFENSE COUNSEL]: So again, is that towards or away from English Ridge?

[DEPUTY CRAWFORD]: In relation – I mean, technically, it's west – it would be closer toward the neighborhood if you were looking westbound of it. You know, if you understand what I'm saying, from a bird's – you know, from a crow fly, so it would be closer.

[DEFENSE COUNSEL]: Right. What I'm asking is the direction the car was driving?

[DEPUTY CRAWFORD]: Was it driving into the neighborhood, is that what you're asking?

[DEFENSE COUNSEL]: Was it driving into the neighborhood or in the direction of the neighborhood?

[DEPUTY CRAWFORD]: So you're asking if it was driving on Woodland towards the neighborhood? No.

[DEFENSE COUNSEL]: Okay. It was driving westbound on 112th Street, right?

[DEPUTY CRAWFORD]: Correct. Which I explained to you would be mathematically closer. It's driving closer into the neighborhood because it's west – the neighborhood is west of Woodland.

[DEFENSE COUNSEL]: Right. But he's on 112th Street.

[DEPUTY CRAWFORD]: Correct.

[DEFENSE COUNSEL]: And Woodland is on 131st and – or English Ridge is 131st and Woodland?

[DEPUTY CRAWFORD]: Correct.

1RP at 50-51.

Under the totality of the circumstances the traffic stop was an unlawful pretext stop and took place outside the sphere of the deputy's official duties to provide security for English Ridge Homeowner's Association. The deputy was engaged in a "frolic," and not within the lawful discharge of his duties. Although uniformed and giving the impression of being and on-duty officer,

the off-duty deputy was acting outside scope of what he was employed to do at the time he stopped the Kia and engaged in a personal frolic of his own. The traffic stop was without authority of law because the investigatory reason for the stop was not exempt from the warrant requirement. The unlawful stop and resulting search led to the discovery of the drugs and other items in the car and lock box, which under the fruit of the poisonous tree doctrine, should have been suppressed. ***Wong Sun v. United States***, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Division 2 did not address this issue regarding deputy's frolic and lark and misapprehended the thrust of the petitioner's argument. ***Myers***, slip. op. at *7. The petitioner submits that the Court's unpublished opinion affirming the trial court's suppression ruling is contradictory to other decisions of this Court and the Court of Appeals and that Division Two has erred by affirming the conviction. This Court should accept review for the purpose of reviewing the deputy's traffic stop as a violation of ***Ladson***.

F. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the conviction.

DATED: March 15, 2023.

Certification of Compliance with RAP 18.17:

This petition contains 3003 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: March 15, 2023.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835

CERTIFICATE OF MAILING

The undersigned certifies that on March 15, 2023, that this Petition for Review was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 909 A Street, Ste. 200, Tacoma, WA 98402, ant to Britt Ann Halverson, Pierce County Prosecuting Attorney, and a copy was mailed by U.S. mail, postage prepaid, to the appellant at the following address:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 15, 2023.

PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 14, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON Respondent, v. BARRETT JONATHAN MYERS, Appellant.	No. 56451-3-II UNPUBLISHED OPINION

GLASGOW, C.J.—An officer stopped Barrett Jonathan Myers on suspicion that he was driving with a suspended license. After the officer placed Myers under arrest, the arresting officer asked to search Myers's vehicle. Myers consented but initially limited the scope of the search to exclude the trunk and a locked box within the vehicle. The arresting officer told Myers that the car would be impounded and a search warrant would be obtained. Myers then consented to a full search of the vehicle. Inside the locked box, the officer found a significant amount of heroin.

At trial, Myers moved to suppress the evidence found inside the vehicle, but the trial court denied his motion. A jury convicted Myers of unlawful possession of a controlled substance with intent to deliver. Myers appeals arguing that the trial court erred by denying his CrR 3.6 motion to suppress the evidence found in his vehicle. He argues that the traffic stop was pretextual and that he did not voluntarily give consent to search the vehicle. We disagree and affirm.[1]

[1] Myers also argued that the trial court failed to enter written findings and conclusions, but the trial court has since done so.

FACTS

Deputy Bradley Crawford was working off duty for a homeowners' association. He was wearing his department-issued uniform and driving his department-issued patrol vehicle. The trial court found the following facts about Crawford's stop of Myers and his search of Myers's car.

Around 2:00 a.m., Crawford noticed a white Kia Optima traveling on the same street where he was driving in Pierce County. When he ran the vehicle's license plate he discovered the vehicle was registered to Myers and that Myers's driver license was suspended. Crawford drove alongside the vehicle and confirmed the driver matched the Department of Licensing record photograph of Myers. Crawford initiated a stop of the vehicle, informed Myers he was stopped for driving while his license was suspended, and placed Myers in handcuffs outside of the vehicle.

Crawford noticed several hypodermic needles in the door pocket of the driver's door. After confirming Myers's license was suspended, Crawford read Myers his *Miranda*[2] rights, which Myers acknowledged and waived. Myers told Crawford that the needles were his and that he used them to ingest methamphetamine earlier in the night. Myers denied that there were any other drugs in the vehicle. When Crawford ran the license plates on the vehicle, he noticed that there had been an arrest associated with the vehicle a few weeks prior. He asked Myers if he was the one arrested, and Myers answered that it was another person who had been arrested. Crawford asked Myers if he consented to a search of the vehicle, and Myers verbally consented but wanted to limit the scope of the search to exclude a locked box located under the front passenger seat, which he claimed belonged to someone else. Myers said he did not know what was inside.

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

Crawford told Myers that the vehicle would be impounded and a search warrant requested. Myers then agreed to allow a search of the entire vehicle, including the locked box. Crawford read Myers *Ferrier*[3] warnings including his rights to refuse the search, restrict the scope of the search, and to revoke consent at any time, which Myers both acknowledged and waived.

Crawford then used a key from Myers's keychain to unlock the locked box. Inside Crawford found 25.2 grams of suspected heroin in a plastic bag, 8.0 grams of suspected heroin in a rubber container, a digital narcotics scale, a large number of plastic baggies, two plastic drug baggies containing suspected methamphetamine, and a fentanyl test kit. Myers asked Crawford to retrieve his money from the dashboard of the vehicle, and Crawford found $706 in cash inside the dash compartment.

The State charged Myers with unlawful possession of a controlled substance with intent to deliver, second degree possession of stolen property, third degree possession of stolen property, and third degree driving while in suspended or revoked status. The State later moved to dismiss without prejudice the driving in suspended or revoked status charge.

Myers moved to suppress the evidence found inside the vehicle including the locked box. The trial court held a hearing considering testimony from Crawford and oral arguments from both parties. The trial court concluded that Crawford had probable cause to stop Myers for driving while his license was suspended and that the stop was not pretextual. The trial court concluded that Crawford read Myers his *Ferrier* warning and that based on the totality of the circumstances, Myers made a knowing, intelligent, and voluntary waiver of those rights and consented to the search of his vehicle. The trial court denied Myers's motion to suppress.

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[3] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

The trial court granted Myers's motion to dismiss the second and third degree possession of stolen property charges. The jury found Myers guilty of unlawful possession of a controlled substance with intent to deliver.

Myers appeals.

ANALYSIS

I. WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW

As an initial matter, Myers argues that remand is necessary for entry of written findings of fact and conclusions of law as required by CrR 3.6. This rule requires the trial court to enter written findings of fact and conclusions of law. CrR 3.6(b). Typically, the failure to do so requires remand. *State v. Head*, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). After Myers filed his opening brief, the trial court entered written findings and conclusions. Consequently, remand is unnecessary.

Although the practice of submitting late findings of fact and conclusions of law is disfavored, findings and conclusions may be submitted and entered even while an appeal is pending if the defendant is not prejudiced by the belated entry of findings. *State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984). "We will not infer prejudice . . . from delay in entry of written findings of fact and conclusions of law." *Head*, 136 Wn.2d at 625. Rather, "a defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is strong indication that findings ultimately entered have been 'tailored' to meet issues raised on appeal." *Id.* at 624–25. Myers makes no such argument. Moreover, we note that the trial court's findings are consistent with its oral rulings following the CrR 3.6 hearing. Accordingly, no appellate relief on this issue is appropriate.

II. SUPPRESSION RULING

Myers argues that the trial court erred by denying his motion to suppress all evidence found during the search of the vehicle because the initial stop was pretextual and he did not voluntarily consent to the search of the vehicle. We disagree.

We review the trial court's denial of a CrR 3.6 suppression motion to determine "whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Here, the parties do not dispute the facts surrounding the traffic stop and search. Whether undisputed facts constitute a violation of article I, section 7 of the Washington State Constitution is a question of law. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). We review the trial court's conclusions of law de novo. *Garvin*, 166 Wn.2d at 249.

A. Pretextual Stop

Myers argues that Deputy Crawford's traffic stop was pretextual. We disagree.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution, a police officer generally cannot seize a person without a warrant. *See State v. Ladson*, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999).A lawful *Terry*[4] stop is one of the exceptions to the warrant requirement. *Id.* at 349.

"For a *Terry* stop to be permissible, the State must show that the officer had a 'reasonable suspicion' that the detained person was, or was about to be, involved in a crime." *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015) (quoting *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)). *Terry* stops have been extended to traffic infractions. *State v. Duncan*, 146 Wn.2d

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

166, 173-74, 43 P.3d 513 (2002). For a traffic stop, an officer may detain a person for a reasonable time to identify them, check for warrants, and check the status of their driver's license, among other things. *Id.* at 174-75.

But the traffic stop must not be pretextual. *Ladson*, 138 Wn.2d at 358. A traffic stop is pretextual when an officer relies on some legal authorization as a mere pretext to justify the seizure when the true reason for the seizure is not constitutionally justified. *Id.* "[A] traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction (or multiple infractions), for which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop." *State v. Arreola*, 176 Wn.2d 284, 297, 290 P.3d 983 (2012).

The trial court's findings support its conclusion that Crawford's stop of Myers was not a pretext for a criminal investigation outside of his reasonable suspicion that Myers was driving with a suspended license. The trial court found that when Crawford ran the vehicle's license plate he discovered the vehicle was registered to Myers and that Myers's driver's license was suspended. Crawford drove alongside the vehicle and confirmed the driver matched the photograph of Myers.

Myers argues that the true reason Crawford initiated the stop was because he knew that someone associated with the vehicle had been arrested on a warrant a few weeks prior. However, the evidence does not support this speculation. Crawford did not initiate the traffic stop until after he ran the vehicle's license plate number and learned that the registered owner—Myers—had a suspended license and after confirming via photograph that Myers was driving the vehicle. Crawford testified that had the license check not shown that Myers had a suspended license, he would not have stopped Myers because he would have had no reason to.

Moreover, even if Crawford's initial decision to run the license plate was motivated by a hunch or some other illegitimate reason to support a traffic stop, that does not necessarily make the stop in this case pretextual. A mixed motive traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction, for which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop. "[D]espite other motivations or reasons for the stop, a traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare." *Arreola*, 176 at 297-98.

Finally, Myers points out that Crawford was off duty at the time and working for a private homeowners' association as a security guard. Myers seems to agree that an off duty officer is still performing their official duties if they conduct a traffic stop while off duty, pointing out that the fact that Crawford was off duty was "of little moment for purposes of this analysis." Br. of Appellant at 20-21. But then Myers argues that Crawford was acting outside of his duties *as a private security guard* at the time he stopped Myers. The trial court found that Crawford was in uniform and in a marked police car and that he had nonpretextual reasons for the stop. The scope of Crawford's duties as a security guard do not support pretext or otherwise undermine the trial court's conclusions.

The factual findings establish that Crawford had a reasonable, articulable suspicion that Myers was driving the vehicle with a suspended license and that making the traffic stop was

reasonably necessary in furtherance of traffic safety and the general welfare. Accordingly, we hold that the trial court did not err in concluding the stop was not pretextual.

B. Consent to Search

Myers also argues that the search of his vehicle was unconstitutional because he did not voluntarily give consent. We disagree.

Warrantless searches are presumed unreasonable subject to a few exceptions that are narrowly drawn. *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013). The State bears the burden of establishing an exception by clear and convincing evidence. *Garvin*, 166 Wn.2d at 250. One of the exceptions to the warrant requirement is consent to search. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). The State must show the consent was voluntary, the person had the authority to consent, and the search did not exceed the scope of the consent. *Id.* Only the voluntariness of Myers's consent is at issue here.

Whether consent was voluntary or instead the "product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). "[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that [the State] demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248. The State need not show that the defendant knew he could refuse to consent, but the defendant's knowledge is a factor in evaluating voluntariness. *Id.* at 249; *see also State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

Other factors that may be considered include whether *Miranda* warnings were given, the defendant's level of education and intelligence, and whether police advised the defendant of their right to refuse consent. *State v. Russell*, 180 Wn.2d 860, 871-72, 330 P.3d 151 (2014). Washington courts have also considered whether the person was cooperative or initially refused consent, whether law enforcement had to repeatedly request consent, and the extent to which the defendant was restrained. *State v. Dancer*, 174 Wn. App. 666, 676, 300 P.3d 475 (2013). No single factor is dispositive. *Id.* "'Consent' granted 'only in submission to a claim of lawful authority' is not given voluntarily." *O'Neill*, 148 Wn.2d at 589 (quoting *Schneckloth*, 412 U.S. at 233)).

This case is similar to *State v. Smith*, 115 Wn.2d 775, 790, 801 P.2d 975 (1990). There, the Washington Supreme Court found that Smith's consent was voluntary. *Id.* Smith was read his *Miranda* rights and placed under arrest. *Id.* Then he asked the officers what would happen if he refused to consent to them searching the trunk of his car. *Id.* After the officers replied that they would impound his car and request a search warrant if he did not consent, Smith consented. *Id.* The court held Smith's consent was voluntary because it appeared from Smith's questions that he understood what he was doing, and he signed a written consent that included specific language explaining his right to refuse. *Id.*

The trial court concluded that Crawford read Myers his *Ferrier* warning and that based on the totality of the circumstances, Myers made a knowing, intelligent, and voluntary waiver of those rights and consented to the search of his vehicle. We hold that the trial court's findings support this conclusion.

Like in *Smith*, the trial court found that Myers was read his *Miranda* rights, which he waived. He appeared to understand that he could limit the search when he initially consented to a

search of the vehicle excluding the lockbox and trunk. As in *Smith*, Crawford told Myers that the vehicle would be impounded and a search warrant requested. Myers contends that providing that information was coercive and precludes a finding his later consent was voluntary. We disagree. The trial court found that Crawford provided Myers *Ferrier* warnings, which Myers expressly waived. Subsequent to that warning, Myers directed Crawford to the key for the lockbox that was on his keychain. From these findings, the trial court could legitimately conclude that Myers knew what he was doing, weighed the options of consenting to the full search against having the vehicle impounded and a search warrant requested, acknowledged his right to refuse or limit his consent to search, and nonetheless consented. We agree with the trial court's conclusion that under the totality of the circumstances described in the trial court's findings, Myers's consent was voluntary.[5]

We affirm.

[5] We note that a *Ferrier* warning was not required here because this case involved the search of a car, not the search of a home, and there is nothing in the record to indicate Meyers lived in his car. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998); *see also State v. Witherrite*, 184 Wn. App. 859, 864, 339 P.3d 992 (2014).

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.

Glasgow, CJ

Glasgow, C.J.

We concur:

J., J.

Lee, J.

Veljacic, J.

THE TILLER LAW FIRM

March 15, 2023 - 2:59 PM

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Appellate Court Case Number:	56451-3
Appellate Court Case Title:	State of Washington, Respondent v. Barrett Jonathan Myers, Appellant
Superior Court Case Number:	19-1-03755-7

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