No. 308936

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Appellant,

vs.

JOANNE ALYSSE CREED,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF APPELLANT
(AMENDED)

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I.
ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that an officer's mistaken reading of the license plate number on Ms. Joanne Creed's car did not provide a reasonable articulable suspicion that the plate was stolen, and thus there was no basis for a traffic stop of the car. **(CP 81, Conclusion of Law No. 1)**

2. The trial court further erred in concluding that there was no exception to the exclusionary rule which would permit the court to find a break in the sequence of events which would cleanse the taint of an initial unlawful stop of Ms. Creed's vehicle. **(CP 81, Conclusion of Law No. 2)**

II.

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Whether a *Terry* traffic stop is rendered unlawful by the fact that the officer mistakenly entered the license plate number of the vehicle driven by the defendant, and thus believed that the plate on the vehicle had been stolen?

2. Whether, once the officer's suspicions have been dispelled by the discovery of his error, the detention of the defendant was extended unlawfully when the officer simply approached the driver to inform her that she was free to leave?

III.

STATEMENT OF FACTS

While on patrol during the early morning hours of August 14, 2011, Officer Gabe Ramos of the Yakima Police Department routinely checked the license plate number on a vehicle he observed at the intersection of McKinley and Oregon in Yakima. **(RP 2-3)**

The plate on the vehicle was 154 YDK, but Officer Ramos mistakenly read it as 154 YMK. **(RP 3-4)** Upon entering that number into the WASIC database, he learned that 154 YMK was stolen. **(RP 4-5)**

He initiated a traffic stop of the vehicle, initiating his overhead emergency lights. The suspect vehicle pulled into and stopped in an alleyway. **(RP 5)** The patrol car was behind it, forming a 'T'. Officer Ramos exited his vehicle, and the driver started to get out of her vehicle, as well, asking "[w]hat did I do?" Ramos instructed the driver to remain in the car. **(RP 5-6; 13; Ex. A)** At that point, he looked at the license plate and realized that it was not the same number he had run through the database. He returned to his vehicle, entered the correct number, and confirmed that the plates on the vehicle were not stolen. **(RP 5-6)**

Once he realized his mistake, he approached the driver of the stopped vehicle in order "[t]o notify the person that I had made a mistake and they were free to go." **(RP 7)** He did not move his car, nor did he turn off the emergency lights. **(RP 13)**

However, as Officer Ramos was approaching the driver, he observed her "toss something directly behind her driver's seat onto the floorboard behind her seat." **(RP 7)**

Officer Ramos was approximately at the trunk of the stopped vehicle when he observed this; the object appeared to be round. **(RP 8)**

On cross-examination, Officer Ramos allowed that the total duration of the contact between the stop and the time at which he approached the window was some two minutes. **(RP 13)**

The officer continued to the driver's side window in order to inform the driver of the reason for the stop, and as he began to speak to her, he looked down at the floorboard and recognized the "tar like substance inside the baggies", believing the substance inside to be heroin. **(RP 8)** He illuminated the interior of the vehicle with his flashlight. **(RP 15)**

Joanne Creed, the driver, was then placed under arrest for possession of narcotics. She got out of the car at the officer's direction, was placed in handcuffs, and secured in the patrol car. **(RP 8-9)**

After being advised of her *Miranda* and *Ferrier* warnings, Creed stated that the substance in her car was heroin, and consented in writing to a search of her car. Officer Ramos retrieved the heroin. **(RP 9; 16)**

Later, during an inventory search of Creed's purse, officers retrieved two loaded syringes. **(RP 17)**

IV.

STATEMENT OF PROCEDURE

Creed was charged with a single count of possession of a controlled substance-heroin, under Yakima County Superior Court cause number 11-1-01150-5. **(CP 1)**

She filed a motion to suppress, arguing that her seizure by means of the traffic stop was not lawful, as it was not based on objective facts supporting a reasonable inference of criminal activity. **(CP 2-4; 5-16)** The State responded, and the defense filed a reply brief. **(CP 17-30; 31-40)**

The court heard testimony on April 3, 2012, granted the motion to suppress, and dismissed the action without prejudice. **(CP 42)** The court subsequently entered findings of fact and conclusions of law, concluding that the initial stop of Ms. Creed was unlawful, as the officer's misreading of the license plate number did not provide a reasonable articulable suspicion, based on objective facts, that she had committed a violation of the law. **(CP 80-82)**

A motion for reconsideration was denied. **(CP43-78; 79)**

The State timely appealed. **(CP 83)**

V.

STANDARD OF REVIEW

A reviewing court will review *de novo* a trial court's conclusions of law following a suppression hearing. State v. Armenta, 134 Wn. 2d 1, 9, 948 P2d 1280 (1997); State v. Carneh, 153 Wn.2d 272, 281, 103 P.3d 743 (2004).

VI.

ARGUMENT

A. The *Terry* stop was lawful, and Ms. Creed was not unlawfully detained.

It is well-settled that a warrantless search and seizure is *per se* unreasonable under both the Fourth Amendment and Art. I, sec. 7 of the Washington State Constitution, unless the search falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). Once a seizure has been established, it is the State's burden to show that the seizure was justified. State v. Ladson, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999); State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

Courts have long recognized that crime prevention and detection are legitimate purposes for investigative stops or detentions.

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). An officer may detain a suspect for an investigative stop even though the officer does not have probable cause to believe the suspect has committed a crime. Id. A *Terry* stop is justified under both the Fourth Amendment and art. I, s. 7 if a police officer is able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id., 392 U.S. at 21; State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997), *cited in* State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999); State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007).

A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Also, a reasonable, articulable suspicion means that there "is a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

An officer must have a "well-founded suspicion not amounting to probable cause" upon which they may stop a suspect, identify themselves, and ask for identification and an explanation of his or her activities. State v. Little, 116 Wn.2d 488, 495, 806 P.2d 749 (1991), *citing* State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

A court must look at the totality of the circumstances known to the officer at the time of the stop in evaluating the reasonableness of the stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); State v.Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). Also, a reviewing court takes into account, and gives deference to, an officer's training and experience when determining the reasonableness of a Terry investigative detention. Glover, 116 Wn.2d at 514.

As the term "articulable suspicion" cannot encompass all the myriad factual situations which may arise, a court must look to the totality of circumstances in determining whether an investigative stop is lawful. State v. Stroud, 30 Wn. App. 392, 398, 634 P.2d 316 (1981). *See, also,* United States v. Cortez, 449 U.S. 411, 66 L. Ed.2d 621, 101 S. Ct. 690, 695, (1981). Further, a court must weigh "(1) the gravity of the public concern, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty." Id., at 397.

Subsequent evidence that the officer was in error regarding some of his facts will not render a *Terry* stop unreasonable. State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) ("The Fourth Amendment does not proscribe 'inaccurate' searches only 'unreasonable' ones".)

The Washington Supreme Court has recently reiterated this point in State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012), holding that a traffic stop based upon the infraction of driving without headlights was reasonable, even though the stop occurred some 24 minutes after sunset, and such conduct was not strictly in violation of the relevant statute: " . . . the question of a valid stop does not depend upon Wright's actually having violated the statute. Rather, if Gregorio had a reasonable suspicion that he was violating the statute, the stop was justified." Id.,at 198.

This court has addressed the narrow issue of whether a law enforcement officer could continue to detain a driver, and ask for identification, even after it became apparent that the driver could not have been the registered owner, and thus the officer no longer had a reasonable articulable suspicion that the driver was driving with a suspended license. State v. Penfield, 106 Wn. App. 157, 22 P.3d 293 (2001). The court held that the officer had no other reason to ask for identification from the driver, and the continued detention was an unreasonable seizure. Id., at 162-63.

The holding in Penfield is an exception, as clarified in State v. Phillips, 126 Wn. App. 584, 588, 109 P.3d 470 (2005), which reiterated that an officer may stop a vehicle registered to a person whose license is suspended, and there is no apparent reason to believe the driver might not be the owner: "[i]t is, then appropriate and permissible for the officer to dispel his or her suspicion by identifying the driver." Id.

Here, the seizure of Ms. Creed was based on inaccurate information, but it was not unreasonable. First, the suspicion of Officer Ramos was based on objective facts: 154 YMK was indeed a stolen plate. The stop was effectuated when the officer incorrectly entered the license plate number, but his actions were reasonable after he had discovered the error: he entered the correct number from his terminal, but he did not check Ms. Creed's driver's license status, or check for any warrants. The fact of the error did not render the stop unreasonable.

He approached the car not to request her identification or conduct further investigation. His intent was to let Ms. Creed know why she had been stopped, then *let her go on her way*. This process took approximately two minutes.

That such a courtesy contact is not unreasonable is supported by a case cited in Penfield, whose facts are similar to those present here. The Ohio Supreme Court held that an officer could not further detain a driver,

and request the driver's identification after any suspicion was dispelled, "[a]lthough the police officer, as a matter of courtesy, could have explained to appellee the reason he was initially detained . . . " State v. Chatton, 11 Ohio St. 3d 59, 63, 463 N.E.2d 1237 (1984).

As Ms. Creed inquired as to the reason for her stop, Officer Ramos' actions in contacting her to send her on her way did not constitute an unlawful detention. To the contrary, the trial court's decision here, as a logical extension, would require an officer to simply drive off without explanation once suspicion had been dispelled, leaving the driver to wonder what had occurred, and whether they were free to leave themselves.

VII.

CONCLUSION

For all the foregoing reasons, this court should reverse the order of suppression and dismissal, and remand this matter to the Superior Court for trial.

Respectfully submitted this 5th day of October, 2012.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Respondent via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4) and upon the Respondent via U.S. Mail.

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Dated at Yakima WA this 10th day of October, 2012.

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