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

APPELLANT/CROSS-RESPONDENT REPLY BRIEF

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmes
Deputy Prosecuting Attorney
WSBA #18364
Attorney for Respondent
211, Courthouse
Yakima, WA 98901
(509) 574-1200

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Federal Cases

Additional Cases

I. INTRODUCTION

The Appellant, State of Washington, timely appealed the trial court's order granting the defendant Ms. Creed's motion to suppress evidence and dismiss. The State filed an opening brief, and Ms. Creed, the Respondent here, has filed a response brief.

Ms. Creed filed a cross appeal in the superior court. However, the issue raised on the cross appeal notice is one on which Ms. Creed prevailed before the trial court. She assigns no error to any of the court's findings in her response brief.

II. STATEMENT OF FACTS

The State incorporates its previous statement of the facts, contained in the opening brief.

III. ARGUMENT

1. As Officer Ramos rationally believed that Ms. Creed's vehicle had stolen license plates on it, the *Terry* stop was not unlawful.

In her response, the Respondent argues that as it was not true that the plates on Ms. Creed's car were, in fact, stolen, Officer Ramos's *Terry* stop was unlawful at its inception, since he could not have had an articulable suspicion of criminal activity.

This is inconsistent with the recent case of State v. Snapp, 174 Wn.2d 177, 198, 275 P.3d 289 (2012), where the Supreme Court held that

it was not necessary that a traffic violation for failing to use headlights actually be committed to justify a *Terry* stop, as long as the officer could rationally believe that a traffic violation was being committed. Id.

Likewise, though the officer here incorrectly typed in the plate number into his computer terminal, he could rationally believe that he had observed criminal activity before he discovered his mistake. Pursuant to the authorities cited in the opening brief, the officer could detain Ms. Creed long enough to confirm or dispel his suspicions. Information from his WACIC inquiry indicated that plate number 154 YMK was indeed stolen. **(Exhibit A)**

A valid *Terry* stop is permissible if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In reviewing the propriety of a *Terry* stop, a court evaluates the totality of the circumstances. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

Ms. Creed's reliance upon a Nebraska case with somewhat similar facts is misplaced. In State v. Allen, 269 Neb. 69, 690 N.W.2d 582 (2005), it was a police dispatcher who erroneously entered a license plate number, and informed the officer following the vehicle that the plate

belonged to another vehicle. A stop was initiated, and the driver taken into custody after exhibiting some signs of impairment. Id., at 71-72.

The error was soon discovered, even as the officer and the arrestee arrived at the police station, but the officer continued to investigate; a further check revealed that the driver's license was suspended. Id., at 72.

The State argued that the exclusionary rule should not apply, since the officer had acted in good faith. That argument was rejected by Nebraska's court in part because:

> This is not a case in which police possess factual information supporting a reasonable suspicion of criminal activity which, upon further investigation, proves to be unfounded. Here, there was no factual foundation for the information which the dispatcher transmitted to Sautter, as it is undisputed that the information was false due to the dispatcher's mistakes in running the wrong license plate number. Sautter had no other reason for initiating the stop. Thus, the record reflects that neither Sautter nor any other law enforcement personnel possessed any true fact which would support the reasonable suspicion necessary to justify an investigative stop. The stop was therefore an unreasonable seizure in violation of the Fourth Amendment.
>
> Id., at77-78.

Here, unlike the facts in Allen, where there was no actual violation, only a discrepancy between the plate number and the description of the vehicle which was stopped, there was a "true fact" that justified an investigative stop: the plates associated with

154 YMK were stolen, and Officer Ramos had a duty to investigate. Further, whereas the driver in Allen was arrested before the mistake was discovered, Officer Ramos was clear in his testimony that, after he had discovered his error, his only purpose in approaching Ms. Creed was to explain what happened, and send her on her way. He had conducted no further investigation as to her, her driving status or anything similar; his suspicion being dispelled, he was ending the encounter.

Another case cited by Ms. Creed is also similar in its facts, but also still distinguishable. In Commonwealth v. Gaynor, 33 Va. Cir. 250 (1994), a patrol officer stopped the defendant's vehicle after erroneously entering the license plate number, which returned to a different vehicle. It was only after requesting identification and registration information from the driver, and determining that the driver's license was suspended, that the officer discovered his mistake. Id.

The Virginia court held that since the error was of the officer's own doing, the good faith exception to the exclusionary rule was not applicable.

In Gaynor, as well, it must be noted that the further investigation, including a request for the vehicle's registration,

occurred while the officer was still under the mistaken belief that a violation had occurred with respect to the license plates. The evidence in question was obtained after the point at which the error should have been discovered, and the officer's suspicions dispelled.

The Respondent's reliance upon State v. Sandholm, 96 Wn. App. 846, 980 P.2d 1292 (1999), is also misplaced. In that case, the Court of Appeals held that exclusive reliance upon a WACIC stolen vehicle report would have been insufficient to support probable cause to arrest the driver, without the State making a further showing as to the source of the stolen vehicle report, as well as the procedures followed in entering the report. Id., at 848. However, the decision is not applicable to a *Terry* stop, and the articulable suspicion standard.

As the State has submitted in its opening brief, Officer Ramos, once his suspicions about the stolen license plate had been dispelled, could lawfully approach Ms. Creed to explain why she had been stopped, and send her on her way.

He was then at a vantage point from which he could see that the item tossed by Ms. Creed was open view, and appeared to

be narcotics. State v. Rose, 128 Wn.2d 388, 392 , 909 P.2d 280 (1996).

IV. CONCLUSION

The trial court erred in granting the motion to suppress.

Respectfully submitted this 16th day of April, 2013.

/s/ Kevin G. Eilmes
WSBA # 18364
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney
128 N. 2nd St., Room 211
Yakima, WA 98901
Telephone: (509) 574-1200
FAX: (509) 574-1201
kevin.eilmes@co.yakima.wa.us

Certificate of Service

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

Janet Gemberling
2920 S. Grand Blvd., #132
Spokane, WA 99203
admin@gemberlaw.com

Joanne Creed
1504 Fairbanks
Yakima, WA 98902

Dated at Yakima, WA this 16th day of April, 2013.
/s/ Kevin G. Eilmes