70496-6

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NO. 70496-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY DEON BROWN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State violated article I, section 7 when it used a misdemeanor arrest warrant as a pretext for a speculative narcotics investigation.

a. Because the police did not obtain a search warrant for the motel room prior to entry, *State v. Hatchie* controls.

Jeffrey Brown was convicted of two counts of possession with intent within 1000 feet of a school bus stop after the State unlawfully used a misdemeanor arrest warrant as a pretext to perform a speculative narcotics investigation and obtain a search warrant for Mr. Brown's motel room. CP 110, 112-13, 115.

In its response, the State argues that Mr. Brown cannot raise a pretext argument when law enforcement had preexisting lawful authority to enter a residence. Resp. Br. at 12. It relies on State v. Lansden, 144 Wn.2d 654, 30 P.3d 483 (2001), State v. Busig, 119 Wn. App. 381, 81 P.3d 143 (2003), State v. Goodin, 67 Wn. App. 623, 838 P.2d 135 (1992), and State v. Davis, 35 Wn. App. 724, 669 P.2d 900 (1983) for its claim. Resp. Br. at 13. These cases, all of which predate State v. Hatchie, are easily distinguished from the facts present here. 161 Wn.2d 390, 392, 166 P.3d 698 (2007).

In Davis, police placed the defendant under arrest as he was leaving the airport. 35 Wn. App. at 726. The court noted the rule that "an arrest may not be used as a mere pretext to search for evidence of another crime" but found that in this case the arrest and resulting search of the defendant's person was valid because the defendant had a preexisting arrest warrant. Id. However, unlike here, in Davis the police performed the arrest in a public place. Where the police enter living quarters to make the arrest, Hatchie controls. 161 Wn.2d at 392.

In Busig, the police observed the defendant, who had two outstanding arrest warrants, come and go freely from a motor home and detached apartment. 119 Wn. App. at 384. They obtained a search warrant to enter and search the premises for the defendant. Id. Because the police obtained the warrant to search the premises before entering the property and arresting the defendant, the court declined to apply a pretext analysis. Id. at 389.

Similarly, in Goodin, the police obtained a search warrant for the residence to search for a co-occupant. 67 Wn. App. at 624. The Court upheld the trial court's denial of the defendant's motion to suppress, finding that the police lawfully seized the contraband they observed in plain view during the course of the lawful search of the

residence for the co-occupant. Id. at 629. Once again, the "preexisting" lawful authority was the search warrant obtained before entering the residence in order to effectuate the arrest warrant. It has no applicability to the case at bar, because here the State entered the residence only with a warrant for Mr. Brown's arrest, not after obtaining a warrant to search the premises.

The case the State primarily relies on, Lansden, is also inapplicable to the facts here. In Lansden, a code inspector was investigating a property for possible violations of the Yakima County Code. 144 Wn.2d at 483. He informed the sheriff's office that he would be seeking a search warrant for the property, something he frequently did in the process of enforcing the code. Id. at 484. The sheriff's office told the code inspector there was a suspicion of drug activity on the property, but the sheriff did not have probable cause to request a warrant to search for drugs. Id. Law enforcement accompanied the code inspector in the search of the property for "safety" reasons and discovered chemicals and equipment they recognized to be used to make methamphetamine. Id. at 486. The sheriff used this information to obtain a second search warrant for the home, where additional drug evidence was discovered. Id.

The defendant argued that the initial warrant was a pretext to search for evidence of drugs but the court rejected that argument, finding it would not apply a pretext analysis to searches pursuant to a valid warrant. Id. at 487. However, like the other cases the State cites, the valid warrant at issue was a search warrant for the defendant's property, not a bench warrant for his arrest.

When the police just have a warrant for the defendant's arrest, they may enter the defendant's living quarters only under limited circumstances. Hatchie, 161 Wn.2d at 392. The police may enter a residence as long as the entry is reasonable, it is not a pretext for conducting an unauthorized search or investigation, and the police have probable cause to believe the person named in the arrest warrant is a resident of the home and present at the time of entry. Id. The court took "pains to point out" that an arrest warrant only permits the officers to enter the residence, find the suspect, arrest him and leave. Id. at 400. Any deviation from this authority is unlawful. Id. In this case, the officers unlawfully deviated from the authority they were granted by the arrest warrant when they entered the motel room and conducted a narcotics investigation by questioning the women who were with Mr. Brown. Pretrial Ex. 4 at 4.

Because Mr. Brown properly raises a pretext argument under Hatchie, this Court should find guidance in State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999). Under Ladson, to determine whether a stop is a pretext for an unauthorized investigation, a court must "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." Id. at 359. As discussed in the Appellant's Opening Brief, evidence of Detective Pearson's subjective intent and the objective reasonableness of his actions demonstrates that Mr. Brown's arrest in his motel room was used as a pretext to conduct a speculative investigation of whether Mr. Brown was currently selling drugs. Op. Br. at 9-14.

b. The police conducted an unauthorized narcotics investigation and used the unlawfully obtained information to secure the search warrant for the motel room.

The State argues the Court should reject Mr. Brown's argument because there is no "causal link" between the illegally obtained evidence and the subsequent issuance of the search warrant based on this evidence. Resp. Br. at 18. This argument fails, as there is a clear causal link between the evidence obtained while conducting the

unauthorized investigation during Mr. Brown's arrest and the issuance of the search warrant for the motel room.

Hatchie requires that once the police locate the suspect, they must arrest him and leave. 161 Wn.2d at 400. The police are not permitted to "use arrest warrants as a guise or pretext to otherwise conduct a speculative criminal investigation or search." Id. at 401. When the officers unlocked the door to the motel room they saw Mr. Brown and two women in the room. 3/26/13 RP 26; Pretrial Ex. 4 at 4. After ordering everyone out, they placed Mr. Brown under arrest. 3/26/13 RP 27; Pretrial Ex. 4 at 4.

The State claims, without citation to the record, that "[i]t is only when the officers asked the two women why nobody opened the door that information of another crime was provided to the officers." Resp. Br. at 20. This statement contradicts Detective Pearson's search warrant affidavit, in which he states he directly questioned the women based on his belief that Mr. Brown was selling drugs. In his affidavit, Detective Pearson described ordering the women and Mr. Brown out of the room, searching Mr. Brown, and then questioning the two women. He stated:

> I had information that Jeffrey might be selling drugs, so I asked Catherine and Amy if they had seen Jeffrey selling drugs. Both said they have seen him sell drugs and that is how he makes his money. I asked what drugs he sells. Catherine said that Jeffery sells cocaine, heroin and methamphetamine. Both girls said that they use drugs, or have in the past. I asked Catherine if there were more drugs in the room. Catherine said that while we were knocking Jeffery through [sic] a bag of heroin at her and asked if she would hold on to it for him.

Pretrial Ex. 4 at 4 (emphasis added).

The officers used the arrest warrant to conduct a drug investigation and subsequently obtained a search warrant with the information they gained from this unauthorized, speculative investigation. Because this is unlawful under Hatchie, the Court must reverse. 161 Wn.2d at 401.

c. *State v. Ladson* requires that this Court consider both the subjective intent of the officer and objective reasonableness of his behavior.

The State further argues that in order for Mr. Brown to be successful on appeal, this Court must weigh the evidence and make credibility determinations. Resp. Br. at 20. However, in support of this claim, it cites only to Mr. Brown's argument that the plan to arrest Mr. Brown in the parking lot was implausible. Id.

First, Mr. Brown's success on appeal is not dependent on this Court's adoption of that one argument. Second, this is a proper consideration under Ladson, which directs that the objective reasonableness of the officer's behavior should be considered when determining whether a stop is pretextual. 138 Wn.2d at 359. As explained in Appellant's Opening Brief, the totality of the circumstances, including Detective Pearson's subjective intent and the objective reasonableness of his behavior, indicates that the arrest was a pretext for an unauthorized drug investigation. Ladson, 138 Wn. 2d at 358-59; Op. Br. at 9-14. Thus, this Court must reverse pursuant to Hatchie.

2. The trial court violated Mr. Brown's right to equal protection by allowing the State to strike the only remaining African American juror.

The State struck the only remaining African American juror from the venire, citing the juror's distrust of police officers as its reason. 3/21/13 RP 33. In its response, the State argues that State v. Vreen is instructive because the State provided a valid race-neutral explanation for its peremptory challenge. 99 Wn. App. 662, 994 P.2d 905 (2000), aff'd. 143 Wn.2d 923 (2001); Resp. Br. at 31. In Vreen, the defendant exercised a peremptory challenge against the only

African American juror in the venire. 99 Wn. App. at 663. The defense explained the juror was a pastor and retired military man, who it feared would favor the prosecution. Id. at 667. The Court found that the defense's reason for the challenge, which was rejected by the trial court, was a race-neutral explanation sufficient to rebut the presumption of discrimination. Id.

The reasoning provided for the challenge in Vreen is far different than the State's explanation in this case. In deciding whether the exercise of a peremptory challenged violates equal protection, the court must not take the State's race-neutral explanation at face value. Batson v. Kentucky, 476 U.S. 79, 97-98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); Miller-El v. Dretke, 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Here, the State indicated that it had struck Juror No. 5 because "she said she would have difficulty trusting police officers and law enforcement in general, and would look negatively on them." 3/21/13 RP 33.

It is not uncommon for African Americans to have negative experiences with law enforcement. United States Department of Justice, Civil Rights Division, Investigation of the Seattle Police Department (December 16, 2011) at 6. Thus, unlike a juror's military

service or work as a pastor, the State is not permitted to exclude an African American juror based on the fact she does not think highly of police officers. United States v. Bishop, 959 F.2d 820, 825 (9th Cir. 1992) (overruled on other grounds in United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010)); Turnbull v. State, 959 So.2d 275, 277 (Fla. Ct. App. 2006).

Juror No. 5 indicated that she could be fair and apply the law as directed. 3/20/13 RP 203-04. In its response, the State emphasized Juror No. 5's statement that she was going to take the officers' testimony for what she thought it was worth and that she could not change her personal opinion of them. Resp. Br. at 26; 3/20/13 RP 204. She indicated this opinion was based on things that have happened to her in her life. 3/20/13 RP 204.

"A facially race-neutral reason is one that is not based on race at all." Turnbull v. State, 959 So.2d 275, 277 (Fla. Ct. App. 2006). Striking an African American woman from the venire because of her distrust of police officers is not a reason devoid of race. The trial court erred in allowing the State to dismiss the sole remaining African American juror and this Court should reverse Mr. Brown's convictions and remand for a new trial.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Brown respectfully requests this Court reverse his convictions and remand for dismissal based on the violation of his article I, section 7 rights. In the alternative, he respectfully requests this court reverse his convictions and remand for a new trial because the State violated his equal protection rights under Batson v. Kentucky.

DATED this 15th day of May, 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. JEFFREY BROWN, Appellant.	)))))))))	NO. 70496-6-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DENNIS MCCURDY, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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