IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32517-2-III

STATE OF WASHINGTON, Respondent,

v.

JASON MICHAEL TAIT, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

The trial court denied Tait's motion to suppress evidence resulting from a pretextual stop when the arresting officer stopped his vehicle for driving with a suspended license but, based on prior suspicion of drug possession, immediately exceeded the scope of a traffic stop by requesting that a K9 officer respond to conduct a sniff of the vehicle. Tait was subsequently convicted of possessing a controlled substance. In his judgment and sentence, the trial court found that Tait suffered from a chemical dependency and ordered him to participate in a drug treatment program and submit to urinalysis and/or polygraph testing upon request. Tait contends: (1) the trial court erred in concluding the stop was not pretextual under the facts presented, and (2) the trial court's chemical dependency finding is unsupported by evidence and the affirmative treatment and testing conditions imposed are, therefore, in excess of the trial court's authority.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Tait's motion to suppress evidence obtained from a pretextual stop.

ASSIGNMENT OF ERROR 2: The trial court exceeded its authority in imposing affirmative treatment and testing requirements in the absence of evidence supporting a chemical dependency finding.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is a mixed-motive traffic stop pretextual when it is not reasonably limited in scope to investigating the initial suspicions?

ISSUE 2: Does a request for a K9 officer to respond to the scene of a stop for a licensing offense in order to conduct a sniff of the stopped vehicle exceed the scope of the stop?

ISSUE 3: Is there sufficient evidence in the record from which the court could find that Tait suffered from a chemical dependency to support the imposition of treatment and testing conditions under RCW 9.94A.607?

IV. STATEMENT OF THE CASE

Police stopped Jason Tait's vehicle after observing him driving, knowing that his license had previously been suspended. RP 3-5; CP 57-58. Upon stopping the vehicle, patrol officer Jeremy Pellicer contacted K9 officer Gunner Fulmer to perform a sniff of Tait's vehicle while Pellicer wrote the DWLS citation. RP 2, 5, CP 58. Pellicer had had contacts with Tait in the past when Tait possessed drugs and

paraphernalia, but did not have any information that Tait possessed drugs or paraphernalia at this time, and Tait did not appear to be under the influence of anything. RP 6, 13, 21. Pellicer claimed that the police "always have another officer respond if we are going to arrest a subject," but did not explain why he specifically requested the K9 officer other than the "possibility" that drugs would be present. RP 16-17, 13. Pellicer also acknowledged that he wanted to search Tait and/or his vehicle before he made the stop. RP 25.

Fulmer arrived at the scene and approached Tait while Pellicer went back to his car to work on documents. RP 31. Pellicer advised Fulmer that he had information Tait was dealing or possessing drugs, but did not say when he got the information or who he got it from. RP 38, 42. Fulmer then contacted Tait to ask if there was anything illegal inside the vehicle or on his person, and Tait denied it. RP 32. Tait refused Fulmer permission to search the vehicle. RP 32. Fulmer then advised Tait that he was going to deploy his K9 to the vehicle. RP 32. He did not ask permission to apply the dog. RP 40. The K9 alerted to the vehicle twice. RP 33-34.

Tait was then advised that the vehicle would be seized based on the K9 alert and he would be arrested for driving with a suspended license.

RP 34-35. The vehicle was towed to the police impound to await a search warrant. RP 35. Pellicer searched Tait incident to arrest and found a glass smoking pipe with residue that tested presumptively positive for methamphetamine. RP 9. When the vehicle was later searched, police located a prescription bottle containing hydrocodone. CP 2.

The State charged Tait with two felony counts of possessing a controlled substance based on the hydrocodone found in the car and the methamphetamine residue in the pipe, one count of using drug paraphernalia, and one count of driving with a suspended license. CP 6. Following a 3.6 hearing on Tait's motion to suppress, the trial court held that the contraband located by police was admissible at trial. CP 59. The parties then stipulated to facts for purposes of preserving Tait's right to appeal the order denying his motion to dismiss. CP 61-62.

The court found Tait guilty of possessing methamphetamine based upon the residue contained in the pipe. CP 64. Tait was sentenced to 30 days' confinement converted to community service and 12 months' community custody. CP 71. The court entered a finding that Tait had a chemical dependency that contributed to the offense and ordered that he participate in an outpatient drug program at his expense and submit to a

polygraph or urinalysis test upon the request of his supervision officer. CP 66, 75. Tait timely appeals. CP 81.

V. ARGUMENT

I. The stop of Tait's vehicle was pretextual when the arresting officer exceeded the scope of the initial detention by immediately requesting a K9 officer to respond to investigate unrelated suspicions.

Pretextual traffic stops violate Article 1, Section 7 of the Washington State Constitution. *State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999). Whether a stop was pretextual is determined on the totality of the circumstances, considering both the subjective intent of the officer and the reasonableness of the officer's behavior. *Id.* at 358-59. A trial court's ruling on whether a stop is pretextual is reviewed *de novo*. *State v. Myers*, 117 Wn. App. 93, 96, 69 P.3d 367 (2003).

A "pretextual stop" describes a stop in which an alleged violation is "a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement." *Ladson*, 138 Wn.2d at 358. It is "a false reason used to disguise a real motive." *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Moreover, it represents

an abuse of a law enforcement officer's discretion to establish enforcement priorities:

> Given the complicated nature of police work and the regulation of traffic in particular, police must exercise discretion in determining which traffic infractions require police attention and enforcement efforts. Yet in a pretextual traffic stop, a police officer has not properly determined that the stop is reasonably necessary in order to address any traffic infractions for which the officer has a reasonable articulable suspicion; instead, the traffic stop is desired because of some other (constitutionally infirm) reason—such as a mere hunch regarding other criminal activity or another traffic infraction—or due to bias against the suspect, whether explicit or implicit.

State v. Arreola, 176 Wn.2d 284, 295-96, 290 P.3d 983 (2012).

In *Arreola*, the Washington Supreme Court held that a traffic stop would not be considered pretextual when the officer has mixed motives for initiating the stop so long as the officer "actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction . . . is reasonably necessary in furtherance of traffic safety and the general welfare." 176 Wn.2d at 298. The stop is, therefore, justified even when the officer's primary motivation is a hunch or some other legally insufficient reason and the legitimate reason is secondary. *Id.* "In such a case, an officer's motivation to remain observant and potentially advance a related investigation does not taint the legitimate basis for the stop, so long as discretion is appropriately

exercised and the scope of the stop remains reasonably limited based on its lawful justification." *Id.* at 299 (emphasis added).

In the present case, Pellicer denied that his primary purpose in making the stop was to investigate drug-related suspicions and testified that he would have arrested Tait for the driving charge regardless of the outcome of the K9 search. RP 5, 13-14. He did admit that he wanted to search Tait and his vehicle before he made the stop. RP 25. Thus, the case may properly be considered a mixed-motive case subject to the evaluation set forth in *Arreola.*

In *Arreola*, an officer responding to a tip concerning a suspected DUI followed the vehicle for half a mile and did not observe any signs of DUI, but stopped the vehicle for having an illegal altered exhaust. 176 Wn.2d at 288-89. After approaching the vehicle, the officer observed signs of intoxication and "treated the stop just like any other traffic stop." *Id.* at 290. Under the facts of *Arreola*, the officer's independent rationale for conducting the stop was held to justify the stop under Article 1, Section 7, even though the officer admitted he was primarily motivated to look for evidence of DUI. *Id.* at 289-90.

Unlike in *Arreola*, in the present case, Pellicer did *not* treat the stop just like any other traffic stop. Pellicer admitted that the K9 unit is not

summoned to every traffic stop, and that he specifically requested the K9 officer because of the possibility of finding drugs. RP 13, 18. Pellicer's actions in immediately seeking to investigate entirely unrelated suspicions were not reasonably related to the initial stop for driving with a suspended license, and was not, therefore, "reasonably limited based on its lawful justification." *Arreola*, 176 Wn.2d at 299. Thus, *Arreola*'s stated exception to taint when there exists a legitimate basis for the stop does not apply.

While Pellicer subjectively denied that his purpose for stopping the vehicle was to investigate suspected drug activity, his actions in immediately summoning a drug-detection dog to the scene of the stop is objectively unreasonable in light of the initial justification for the stop. Under the totality of the circumstances, the conduct in immediately seeking grounds to search belies the intent to do so. Under the totality of the circumstances, the stop was a pretext to search for drugs and the trial court erred in denying Tait's motion to dismiss on those grounds.

II. Because insufficient evidence supports a finding that chemical dependency contributed to the offense, the drug treatment and testing requirements exceed the trial court's jurisdiction.

Under RCW 9.94A.607, when a court finds that the defendant "has a chemical dependency that has contributed to his or her offense," the court is authorized to require participation in rehabilitative programs and other affirmative conduct related to rehabilitation. Absent authorization from the legislature, the sentencing court lacks authority to impose conditions of the sentence. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013).

Chemical dependence is a defined mental disorder with specific symptoms that are necessary for diagnosis. In *State v. Hutsell*, 120 Wn.2d 913, 917, 845 P.2d 1325 (1993), the Washington Supreme Court observed,

> Dependence is a mental disorder, distinct from the direct physiological effects of psychoactive substance use, i.e., intoxication and withdrawal. American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 165 (3d rev. ed. 1987) (DSM–III–R). Dependence has nine characteristic symptoms, three of which are necessary for diagnosis. DSM–III–R, at 166–67. Some of these symptoms include: unintended excessive substance use (e.g., intending to take only one drink, but nevertheless drinking until severely intoxicated), unsuccessful efforts to reduce or control substance use, preoccupation with activities necessary to obtain and pay for the substance (e.g., theft), and persistent use despite recognition of the resulting physical, psychological, and social problems. DSM–III–R, at 166–68.

Persistent and pathological use of drugs is, as described in *Hutsell*, the characteristic of chemical dependence that distinguishes it from

simple use. Abuse and dependency are not presumed to be interchangeable terms. *See, e.g., Warnock*, 174 Wn. App. at 613. Moreover, we presume that in choosing to use the term "dependency" rather than use or abuse, that the legislature said what it meant and meant what it said. *See Morris v. Palouse River and Coulee City R.R., Inc.*, 149 Wn. App. 366, 371, 203 P.3d 1069 (2009).

A contrary interpretation would require disregarding the legislature's chosen language and render the imposition of drug treatment and testing a foregone conclusion in any sentence for felony drug possession. Were "use" interchangeable with "dependency," there is no reasonably conceivable set of circumstances in which a drug offender's use would not contribute to the offense of possession, as required under the statute.

In the present case, there is a dearth of evidence of persistent and pathological use of drugs that would distinguish Tait's possession of drugs from mere use. Tait underwent no examination or evaluation sufficient to establish any of the symptoms of dependency. There was no evidence that Tait was under the influence of drugs at the time of his arrest, and his

judgment and sentence reflects no prior convictions for possession of drugs that might indicate a persistent problem. CP 66. Because there is insufficient evidence to support a finding of chemical dependency, the finding is erroneous and the treatment and testing conditions imposed in Tait's judgment and sentence should be stricken.

VI. CONCLUSION

For the foregoing reasons, Tait respectfully requests that the court reverse and dismiss the conviction on the grounds that the stop of his vehicle was pretextual, or, in the alternative, to remand the case to the trial court to strike the drug treatment and urinalysis and polygraph conditions.

RESPECTFULLY SUBMITTED this 6th day of October, 2014

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 6th day of October, 2014 in Walla Walla, Washington.

Breanna Eng