No. 46645-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHANE AHEARN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The trooper did not have probable cause to place Mr. Ahearn under arrest and all evidence obtained subsequent to the arrest must be suppressed.

a. Contrary to the State's assertions, a reasonably cautious person would not have been warranted in believing an offense was being committed.

Probable cause to arrest requires more than a "bare suspicion of criminal activity." *State v. Gillenwater*, 96 Wn. App. 667, 670, 980 P.2d 318 (1999). The State claims the totality of the circumstances in this case warranted a reasonably cautious person to believe an offense was being committed, arguing that Mr. Ahearn "grossly minimizes" the trooper's observations prior to the stop. *Id.*; Resp. Br. at 17. However, the record shows Mr. Ahearn's description is accurate. Trooper Kyle Dahl observed Mr. Ahearn's vehicle cross the skip line "just once." 7/21/14 RP 18. He saw it cross the fog line only twice. Ex. 1 at 1. Although the officer did observe the vehicle weave within the lane, the law requires that a vehicle "be driven *as nearly a practicable* entirely within a single lane" and brief lane incursions do not violate the statute. RCW 46.61.140(1) (emphasis added); *State v. Jones*, 186 Wn. App. 786, 792, 347 P.3d 483 (2015); *State v. Prado*, 145 Wn. App. 646, 649, 186 P.3d 1186 (2008).

In addition, Mr. Ahearn's driving must be considered in context, which includes the fact it was foggy that night. 7/21/14 RP 145. The State questions this fact, claiming Mr. Ahearn was wrong to assert that "there was no contradiction of his supposed testimony that visibility was poor" that night. Resp. Br. at 18. This claim is invalid. First, Mr. Ahearn testified the conditions that night were "really foggy, very foggy," so it is unclear why the State suggests this was "his *supposed* testimony." 7/21/14 RP 145 (emphasis added). Second, Trooper Dahl's testified that he did not *recall* fog that night, not that there was *not* fog that night. 7/21/14 RP 186. Despite not recalling fog, the trooper acknowledged that fog does tend to settle in that area, even when it is "clear everywhere else." 7/21/14 RP 186.

The State's dispute with Mr. Ahearn's description of the trooper's observations that night fails to appreciate that no matter how the details are characterized, the evidence does not provide a sufficient basis to warrant a reasonably cautious person to believe Mr. Ahearn was driving under the influence. This is particularly true given that Mr. Ahearn performed well on the field sobriety tests and the trooper could, not recall whether he had offered Mr. Ahearn the opportunity to be evaluated by a drug recognition expert, as would be his typical practice.

7/21/14 RP 74, 104; Op. Br. at 14-16 (describing Mr. Ahearn's performance on the field sobriety tests).

The State disputes Mr. Ahearn's assertion that he did well on the field sobriety tests, and claims – without citation to the record – that Mr. Ahearn's expert has made a profession out of "testifying on behalf of DUI defendants." Resp. Br. at 24. In fact, Mr. Missel's testimony fully supports Mr. Ahearn's description of his performance on the tests.

Mr. Missel testified that the walk and turn test could be used for observational purposes only because it was performed on a moderate grade rather than a flat surface as required. 7/21/14 RP 131. Thus, it did not allow the trooper to make a determination about the probability of whether Mr. Ahearn was impaired. 7/21/14 RP 131. Mr. Missel further testified that not enough "clues" were observed during the one-legged stand to suggest Mr. Ahearn was impaired, and that Mr. Ahearn's internal clock fell within the acceptable range of 25-35 seconds during the Romberg balance test. 1/21/14 RP 131. Finally, there was no dispute that Mr. Ahearn passed the horizontal gaze nystagmus test. 7/21/14 RP 34; Ex. 1 at 2. The State's suggestion that the tests demonstrated Mr. Ahearn was impaired is misleading.

No mechanical rule exists for establishing probable cause. *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 43 P.3d 43 (2002). The Court must look to the facts of each case. *Id.* Here, the facts would not have caused a reasonably cautious person to conclude Mr. Ahearn was driving under the influence. *See State v. Ruem*, 179 Wn.2d 195, 202, 313 P.3d 1156 (2013).

b. <u>Suppression is required.</u>

The State argues that even if Trooper Dahl did not have probable cause to arrest Mr. Ahearn, the evidence found in Mr. Ahearn's car subsequent to the arrest should not be suppressed because Mr. Ahearn's consent to search the vehicle was not tainted by the illegal seizure. It relies on *State v. Gonzalez*, 46 Wn. App. 388, 731 P.2d 1101 (1986) and *State v. Jensen*, 44 Wn. App. 485, 723 P.2d 443 (1986) for this argument. Resp. Br. at 30. However, in *Gonzales*, the defendant volunteered his consent. 46 Wn. App. at 398. In contrast, Mr. Ahearn testified that the trooper asked him several times if he would consent to search of the vehicle before he acquiesced. 7/21/14 RP 165, 167-68. Although the trooper did not recall having to ask Mr. Ahearn multiple times, there was no evidence that Mr. Ahearn spontaneously volunteered consent as the defendant did in *Gonzales*.

46 Wn. App. at 398-99. Similarly, in *Jensen*, the defendant signed a written consent form and, before doing so, had orally consented twice and been given the opportunity to consult with his sister. 44 Wn. App. at 491.

The facts of this case are more analogous to *State v. Sistrunk* where the defendants were read their *Miranda* rights and felt pressured to consent to the search. 57 Wn. App. 210, 212-13, 787 P.2d 937 (1990). In *Sistrunk*, this Court held that the defendant's subsequent consent to search the car was tainted because it was obtained by the prior illegal seizure. *Id.* 216. Like In *Sistrunk*, the trooper searched the car immediately following Mr. Ahearn's arrest and there were no significant intervening factors. *See State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997). This Court should reverse and suppress the evidence obtained subsequent to Mr. Ahearn's unlawful arrest.

2. The State concedes this Court should remand Mr. Ahearn's case for the entry of findings of fact and conclusions of law for the bench trial as required by CrR 6.1(d).

The State concedes error. Resp. Br. at 32. This Court should remand Mr. Ahearn's case for the entry of findings of fact and conclusions of law pursuant to CrR 6.1(d).

3. There was insufficient evidence to find Mr. Ahearn guilty of driving under the influence.

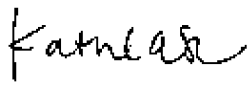
The State argues Mr. Ahearn's claim of insufficient evidence is premature and should be raised after the findings and conclusions are entered on remand. Mr. Ahearn agrees this issue should be addressed after the findings and conclusion are entered on remand. Op. Br. at 22 n.2.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse the trial court's CrR 3.6 order and suppress the evidence obtained subsequent to Mr. Ahearn's arrest. In the alternative, it should vacate the judgment and sentence and remand for the trial court to enter written findings of fact and conclusions of law.

DATED this 18th day of September, 2015.

Respectfully submitted,



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