68709-3

68709-3

No. 68709-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SMITH,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by ruling evidence found on Christopher Smith after an unconstitutional stop was admissible.

2. The trial court erred by concluding the deputy had a valid basis to stop Mr. Smith because he was looking into parked cars as he rode by them on his bicycle. Conclusion of Law A-2.

3. The trial court erred by concluding the deputy validly stopped Mr. Smith for violating the King County Board of Health regulation requiring bicycle helmets. Conclusion of Law A-1.[1]

4. The stop of Mr. Smith for violating the King County Board of Health regulation requiring bicycle helmets was pretextual. Conclusion of Law A-1.

5. The trial court erred by concluding the stop of Mr. Smith was not a pretext. RP 149-51.

6. The trial court erred by granting the State's motion to exclude evidence in support of a necessity defense.[2]

7. Appellant assigns error to Conclusions of Law 1-3 in support of the order excluding evidence of the necessity defense.

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[1] A copy of the Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Evidence and on CrR 3.5 Motion Regarding Admissibility of Defendant's Statements, CP 87-93, is attached to this brief as Appendix A.

[2] A copy of the court's Findings, Conclusions and Order Re Necessity Defense, CP 94-96, is attached as Appendix B.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 7 of the Washington Constitution protects citizens from warrantless seizures and those used as a pretext to avoid the warrant requirement. The trial court determined the deputy's stop of Mr. Smith was constitutional based upon the officer's observation that (1) Mr. Smith was looking into parked cars near an area where vehicle prowling had been reported earlier and (2) was riding a bicycle without a helmet.

a. A person riding a bicycle should check parked cars for drivers and passengers to avoid running into an opening car door. Did the officer's observation that Mr. Smith was looking into parked cars as he rode his bicycle combined with the officer's knowledge that vehicle prowling had been reported nearby in the past provide the specific, objective facts to support a reasonable suspicion that Mr. Smith had committed or was about to commit a crime?

b. The City of Shoreline has no law prohibiting people from riding bicycles without a helmet, and the King County Department of Health Code requires helmets only on street and bicycle paths in King County and the City of Seattle. Where Mr. Smith was riding his bicycle on the sidewalk in the City of Shoreline, did the

deputy have a valid reason to stop him for violating the county bicycle regulations?

c. In determining if a law enforcement officer's stop of a vehicle for a traffic infraction was a pretext to investigate other criminal activity, the court must look at the totality of the circumstances to determine the officer's subjective intent and the objective reasonableness of his actions. The trial court decided the sheriff's deputy's decision to stop Mr. Smith was not a pretext stop because the officer had sufficient facts to justify stopping Mr. Smith for car prowling. RP 150-51. The court did not, however, find the officer would have stopped Mr. Smith for the bicycle helmet infraction absent those suspicions. Does a de novo review of the totality of the circumstances demonstrate the deputy used the helmet infraction as a pretext to investigate the deputy's suspicions of other criminal activity?

2. The defendant has the constitutional right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I, § 7. Mr. Smith had a prior serious felony conviction and was not permitted to possess a firearm, but even a convicted felon may possess a firearm when necessary to protect himself or another person. Must Mr. Smith's conviction for unlawful possession of a weapon in the first degree be

reversed and remanded for a new trial court excluded evidence in support of a necessity defense?

C. STATEMENT OF THE CASE

Christopher Smith's fifteen-year-old son Kenneth left their Shoreline home without telling any family members where he was going after an argument on the evening of September 13, 2011. RP 16, 152-53, 156. A few weeks earlier, Kenneth had an encounter with other young men at a neighborhood park and a boy pulled a knife on Kenneth. RP 153-54. When Kenneth backed off, the boy called his father and Kenneth heard the father say he was coming to the park with a gun. RP 154. Kenneth returned home and told his father and mother about the incident. RP 155. After the incident, he rarely left his house unless going to school. RP 160.

Mr. Smith was concerned for his son's safety and went looking for his son on a bicycle. RP 59, 86-87, 161. King County Sheriff's Deputy Benjamin Callahan was working as a law enforcement officer for the City of Shoreline when he saw Mr. Smith on a bicycle on 5th Avenue Northeast. RP 11-12, 16, 17-18. He initially noticed that Mr. Smith was not wearing a bicycle helmet. RP 17-18. He continued to watch Mr. Smith and believed Mr. Smith was riding between parked

cars and looking into them. RP 18. Deputy Callahan said he had recently taken reports of auto-prowling incidents within about five blocks of the area where Mr. Smith was riding. RP 20-21. The deputy also noted that Mr. Smith looked surprised when he drove past in his patrol car. RP 15, 22. Deputy Callahan pulled over to the side of the road and tried to talk to Mr. Smith, but Mr. Smith continued riding. RP 24-25.

Believing Mr. Smith was intentionally avoiding him, Deputy Callahan decided to stop Mr. Smith, turned on the patrol car's lights, and made a u-turn to approach Mr. Smith. RP 26. Mr. Smith did not stop when the deputy yelled, "stop, police" and rode his bicycle across a lawn and into his own driveway. RP 28-32. Deputy Callahan followed, took Mr. Smith off the bicycle, and arrested him for obstructing a police officer. RP 33-34. The officer located a revolver in the fanny pack Mr. Smith was wearing. RP 36-38.

Mr. Smith told the officer he was looking for his son. RP 59. He admitted he was not supposed to have a firearm because of felony convictions, but explained the streets were dangerous and he needed the gun to protect his family. RP 43-44, 48. Mr. Smith also related that his

niece had been the victim of a rape and was being intimidated by the perpetrator. RP 46.

The King County Prosecutor charged Mr. Smith with unlawful possession of a firearm in the first degree. CP 1. Mr. Smith moved to suppress the firearm arguing that the stop was unconstitutional. CP 29-40. The State sought to introduce Mr. Smith's custodial statements at trial. RP 4. The court held a hearing addressing both motions at which Deputy Callahan, Mr. Smith's girlfriend Melissa Kennedy, and Mr. Smith testified. RP 11-129. The court denied Mr. Smith's motion to suppress the revolver, finding Deputy Callahan had a reasonable and articulable suspicion to justify stopping Mr. Smith based upon "the combination" of his observations that Mr. Smith was not wearing a bicycle helmet, he was "looking into cars," and his knowledge of recent car prowls not that far away. RP 128. The court added it was not a pretext stop. RP 149-51. The court also admitted the statements Mr. Smith made after the officer read the Miranda warnings. RP 126.

The State then moved to prevent Mr. Smith from presenting evidence of a necessity defense at trial. RP 129; SuppCP ___ (State's Trial Memo at pages 16-18) (sub. no. 67, 2/23/12). The parties agreed to address the issue in a pretrial offer of proof at which Kenneth

testified about the incident in the park. RP 145-48, 151-61. The court ruled that Mr. Smith had not met the requirement that Kenneth faced the threat of immediate harm and therefore could not present the defense of necessity. CP 94-96; RP 163-66;

Based upon the court's ruling, Mr. Smith waived his right to a jury trial and stipulated that the court could determine the case based upon stipulated evidence, including the police reports and Mr. Smith's agreement that he had a prior conviction for a "serious offense" as defined at RCW 9.41.010. CP 51-68; RP 167-81, 185; Exs. 1-4. The court found Mr. Smith guilty of possession of a firearm.[3] RP 185-86.

The court rejected Mr. Smith's request for an exceptional sentence below the standard range but, in light of Mr. Smith's failed defense of necessity, sentenced him to 87 months in prison, the low end of the standard sentence range. CP 80, 82; RP 214-15. This appeal follows. CP 97-98.

[3] No written findings of fact and conclusions of law in support of a guilty finding were entered.

D. ARGUMENT

1. **Mr. Smith's conviction must be reversed because the court improperly admitted evidence obtained as a result of an unconstitutional detention**

The trial court upheld Deputy Callahan's stop of Mr. Smith, finding the deputy had two reasons for the stop: (1) to issue a civil infraction for not wearing a bicycle helmet and (2) because Mr. Smith appeared to be peering into cars near an area with past vehicle prowling complaints. Conclusions of Law A-1, 2. The officer, however, lacked the reasonable suspicion based upon articulable facts necessary to support an investigative stop because a cautious bicycle rider looks carefully at all vehicle traffic, including parked cars, in order to avoid an accident. In addition, the City of Shoreline does not have a bicycle helmet law, and the King County bicycle helmet regulation does not cover the City of Shoreline or bicyclists riding on a sidewalk. The officer therefore lacked authority to issue a citation. Moreover, the civil infraction was a pretext because the officer actually stopped Mr. Smith to investigate the hunch that he was involved in vehicle prowling. Mr. Smith's motion to suppress the firearm obtained as a result of the unconstitutional stop should have been granted, and this Court should reverse his conviction.

a. Article 1, section 7 protects the right to privacy from government intrusion. The federal and state constitutions prohibit the government from detaining or searching an individual without a warrant or probable cause. U.S. Const. amends. IV, XIV; Const. art. 1 § 7. Article I, section 7 succinctly provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[4]

The protections of article I, section 7 are "qualitatively different" than those of the Fourth Amendment. State v. Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). It is well-settled that the Washington Constitution provides greater protection against warrantless seizures than the federal constitution. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); see State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (state constitution "clearly recognizes an individual's right to privacy with no express limitations") (quoting

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[4] The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, § 7 of the Washington Constitution provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). No Gunwall analysis is necessary before the appellate court will consider an article I, section 7 claim.[5] State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).

b. The stop was unconstitutional because the deputy did not have the information necessary to support an investigative stop. Warrantless searches are per se unreasonable. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State has the burden of proving one of the narrowly-drawn exceptions to the warrant requirement applies. Ladson, 138 Wn.2d at 349-50. The warrant requirement is especially important for an article I, section 7 analysis because "it is the warrant that provides the 'authority of law'" referenced in the constitution. Id. at 350.

One exception to the warrant requirement is an investigative stop. Gatewood, 163 Wn.2d at 539; Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A police officer may briefly detain a citizen if the officer has "a reasonable, articulable suspicion, based upon specific, objective facts, that the person seized has committed or is about to commit a crime." Greenwood, 163 Wn.2d at

[5] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

539 (emphasis in original) (quoting State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)). The officers' actions must be justified "at their inception." Id.; Ladson, 138 Wn.2d at 350. The State has the burden of demonstrating the legality of a warrantless investigative stop. Gatewood, 163 Wn.2d at 539.

The trial court found that Deputy Callahan had a reasonable suspicion that Mr. Smith was involved in the crime of vehicle prowling because Mr. Smith was peering into cars as he rode his bicycle down the street. Conclusion of Law A-1. This was based upon Mr. Smith's actions and the officer's knowledge of recent "car prowls" in the area. Findings as to Disputed Facts 2-5.

The court held that peering into car windows was "consistent with car prowling." Finding as to Disputed Facts 4. A Terry stop, however, may not be based upon innocuous conduct. The fact that Mr. Smith was in a crime area, for example, does not justify a Terry stop. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010); State v. Martinez, 135 Wn. App. 174, 180, 143 P.2d 855 (2006).

Nor do "innocuous facts" support an investigative stop. State v. Armenta, 134 Wn.2d 1, 13-14, 948 P.2d 1280 (1997); Martinez, 135 Wn. App. at 180. Bicycle riders are wise to be aware of any nearby

motor vehicles in order to protect themselves. This is even true of parked cars, as a driver or passenger may open a car door without checking for bicycle riders, resulting in a possibly fatal accident.[6] The best way to prevent being "doored" is "a continued eye scanning and seeking on the part of the biker to see if there are people in the upcoming parked cars, and to give enough room in case a door does swing open to avoid getting clipped." http://www.colbachlaw.com/portland_bicycle_lawyers.html (last viewed 12/3/12).[7]

An investigatory stop similar to the one here was found to violate article I, section 7 in Martinez because it was not based upon particularized suspicion of criminal activity by the defendant. Martinez, 135 Wn. App. at 181-82. A Richland police officer stopped Martinez in a "high crime neighborhood" where several vehicle prowls has been reported. Id. at 177. According to the officer, Martinez looked around nervously as he walked briskly away from a shadowy area where several cars were parked. Id. The officer asked Martinez

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[6] http://en.wikipedia.org/wiki/Door_zone (3% of fatal bicycle accidents in New York City between 1996 and 2005 occurred when bicyclist struck open car door or swerved to avoid the door) (last viewed 12/3/12); see e.g. http://gorthamist.com/2012/06/cyclist_fatality_doored_in_queens_no.phph (bicyclist killed after riding into car door) (last viewed 12/3/12).

[7] Accord http://bicycling.com/training-nutrician/injury-prevention/doored (last viewed 12/3/12).

whether he lived in the neighboring apartments and stopped Martinez when he said he did not. Id. at 177-78. During a pat-down search for weapons, the officer discovered a container containing methamphetamine. Id. at 178.

The Court of Appeals found that the totality of the circumstances did not justify the investigative stop. Martinez, 135 Wn. App. at 181-82. The court noted that vehicle prowls had been reported at the apartment complex in the past, but not on the night when Martinez was stopped. Id. at 180. Because the State must demonstrate "some suspicion of a particular crime or a particular person, and some connection between the two," the court concluded the officer's "generalized suspicions that Mr. Martinez may have been up to no good" did not support the stop. Id. at 182.

Also instructive is the Washington Supreme Court's opinion in Doughty. Police officers observed Doughty approach a house at 3:20 a.m., remain inside for about two minutes, and then drive away. Doughty, 170 Wn.2d at 59-60. The police were aware of complaints from neighbors about the large amount of "short stay traffic" at the house, and they stopped Doughty because they suspected he was involved in drug activity. Id. After checking Doughty's records, the

officer arrested him for driving with a suspended operator's license, searched his car, and found methamphetamine. Id. at 60. The Supreme Court held the investigatory stop was unconstitutional, as the totality of the circumstances known to the police did not provide a reasonable suspicion he was involved in criminal activity. Id. at 65. "The Terry-stop threshold was created to stop police from this very brand of interference with people's everyday lives." Id. at 64.

The facts of Mr. Smith's case similarly do not provide the reasonable suspicion that he was engaged in criminal activity. Mr. Smith was riding a bicycle on a sidewalk near his home.[8] Deputy Callahan knew of reports of vehicle prowls in the area in the past, but not that evening. See Martinez, 135 Wn. App. at 180 (vehicle prowls had been reported in the area, but not that evening). The fact that Mr. Smith appeared to be looking into parked cars as he drove down the sidewalk is innocuous. Id. at 180-81 (walking through a dark parking lot innocuous). Deputy Callahan lacked the particularized suspicion that Mr. Smith was engaged in criminal activity necessary to justify an investigatory stop.

[8] It is legal to ride a bicycle on the sidewalk in a residential area. WAC 308-330-555.

Since Deputy Callahan's stop of Mr. Smith was unlawful, "the subsequent search and fruits of that search are inadmissible." Gatewood, 163 Wn.2d at 542 (quoting State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 455 (1986)). The firearm found on Mr. Smith when he was arrested must be suppressed and his conviction for unlawful possession of a firearm reversed and dismissed. Id.

c. The stop was unconstitutional because the deputy lacked authority to issue a civil infraction for not wearing a bicycle helmet and the civil infraction was a pretext to investigate unrelated criminal activity. The trial court also found the deputy's stop of Mr. Smith was justified because Mr. Smith was not wearing a bicycle helmet. Finding as to Undisputed Fact 6; Conclusion of Law A-1. The City of Shoreline, however, does not have a bicycle helmet law. Moreover, looking at the officer's subjective motive and objective actions, the investigative stop was a pretext to search for evidence of other criminal activity. The firearm found on Mr. Smith as a result of the unconstitutional detention should have been suppressed.

i. *Deputy Callahan did not have authority to issue a citation for a King County helmet violation in the City of Shoreline*. The King County Health Board bicycle helmet regulations require

anyone riding a bicycle "on a public roadway, bicycle path or on any right-of-way or publicly owned facilities located in King County including Seattle" to wear a bicycle helmet. Code of the King County Health Board §§ 9.01.020(A), 9.10.010(A) (hereafter Health Board Code). Violation of this regulation is a civil infraction punishable by a fine that may not exceed $30.00. Health Board Code § 9.15.010(A), (C) (2003).

By its language, however, this code applies only to public roadways in King County and City of Seattle, not the City of Shoreline. Health Board Code § 9.10.010(A). When a statute lists only one city, it is impliedly excluding others. See State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (statutes construed pursuant to the rule "expression unius est exclusion alterus").

In addition, code language does not include people riding on sidewalks. Health Board Code § 9.10.010(A). In Washington, a "roadway" does not include a sidewalk. RCW 46.04.500 (defining "roadway" as the portion of a highway designed or used for vehicular traffic "exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles."

Shoreline has its own municipal code with regulations governing health, traffic, and sidewalks. Shoreline Municipal Code Titles 8, 10, 12. No Shoreline law or regulation makes it illegal to ride a bicycle without a bicycle helmet in that city.

Thus, it is legal to ride a bicycle on the sidewalk without a helmet in King County and to ride a bicycle without a helmet anywhere in Shoreline. Deputy Callahan was operating as a City of Shoreline officer in the city. He lacked authority to issue a citation for a civil infraction to Mr. Smith for violating a helmet regulation while riding on a Shoreline sidewalk. The trial court thus erred by upholding the unconstitutional stop of Mr. Smith on this basis.

ii. *Article I, section 7's protection against warrantless seizures is violated when a stop for a civil infraction is used as a pretext to avoid the warrant requirement*. As mentioned above, any warrantless seizure is per se unreasonable. Ladson, 138 Wn.2d at 349. The warrant requirement is especially important for article I, section 7 analysis because "it is the warrant which provides the 'authority of law' referenced therein." Ladson, 138 Wn.2d at 350.

The Ladson Court explained that a traffic stop is a seizure for purposes of constitutional analysis, even if the detention is brief.

Ladson, 138 Wn.2d at 349. Under the Fourth Amendment, the police may stop a car for a traffic violation even if the traffic stop is a pretext to investigate unrelated criminal activity. Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 1774-76, 135 L. Ed. 2d 89 (1996). Washington residents, however, have a constitutionally protected interest against warrantless seizures used as a pretext to dispense with the warrant requirement. Ladson, 138 Wn.2d at 358.

"Pretext is, by definition, a false reason used to disguise a real motive." Ladson, 138 Wn.2d at 359 n. 11 (quoting Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 Temp. L. Rev. 1007, 1038 (1996)).

> Thus, a warrantless traffic stop based on mere pretext violates article I, section 7 of the Washington Constitution because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest.

State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Recognizing the particular exigencies of evaluating improper motives, the Ladson Court departed from the purely objective standard

mandated for Terry stops under the Fourth Amendment and articulated a new test:

> When determining whether a given stop is pretextual, the court should 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.

Ladson, 138 Wn.2d at 358-59. The court explained, "What is needed is a test that tests real motives. Motives are, by definition, subjective." Id. at 359 n. 11 (quoting Leary & Williams).

The trial court did not directly address Mr. Smith's argument that the stop based upon violations of bicycle regulations was a pretext in its written findings of fact and conclusions of law, but impliedly rejected the argument by finding the bases for the stop adequate.[9] Conclusions of Law A-1 to A-4. As argued above, the officer did not have a valid basis for an investigative stop, leaving only the purported bicycle helmet violations. However, "it is not enough for the State to show there was a traffic violation. The question is whether the traffic violation was the real reason for the stop." State v. Montes-Malindas, 144 Wn. App. 254, 261, 182 P.3d 999 (2008) (quoting State v. Meckelson, 133 Win. App. 431, 437, 135 P.3d 991 (2006), rev. denied,

[9] Orally, the court found the stop was not a pretext because an investigative stop was proper based upon the officer's observation of Mr. Smith looking into cars and his knowledge of earlier vehicle prowling. RP 150-51.

159 Wn.2d 1013 (2007)). The trial court thus missed the point because it failed to "look beyond the formal justification of the stop to the actual one" as required by article 1, section 7. State v. Myers, 117 Wn. App. 93, 97, 69 P.3d 367 (2003), rev. denied, 150 Wn.2d 1027 (2004).

Evidence of the officer's improper subjective intent will invalidate an otherwise-lawful stop. Nichols, 161 Wn.2d at 10-11; Ladson, 138 Wn.2d at 353; Montes-Malindas, 144 Wn. App. at 260-62; Meckelson, 133 Wn. App. at 437; State v. DeSantiago, 97 Wn. App. 446, 451-52, 983 P.2d 1173 (1999). Indeed, this is the axiomatic principle that animates Ladson's holding: that the basis for the stop is itself lawfully sufficient is beside the point, as "our constitution requires we look beyond the formal justification for the stop to the actual one." Ladson, 138 Wn.2d at 353.

In Ladson, gang emphasis officers testified that while they did not make routine traffic stops on patrol, they utilized the traffic code to pull over people in order to initiate contact and questioning. Ladson, 138 Wn.2d at 346. The officers in Ladson were familiar with Ladson's co-defendant because of an unsubstantiated street rumor that he was involved in drugs, and accordingly stopped his vehicle on the grounds that his license plate tabs were expired. Id. They used this pretext to

arrest Ladson's co-defendant and search Ladson. Id. The Washington Supreme Court reversed the conviction, holding the pretextual stop violated the Washington Constitution. Id. at 352-53.

Similarly, in Arreola, a police officer on routine patrol learned of a citizen compliant of a possible drunk driver on a state highway and found a car in the area that matched the description provided by the citizen. State v. Arreola, 163 Wn. App. 787, 790, 260 P.3d 985 (2011), rev. granted, 173 Wn.2d 1013 (2012). When he followed the car for over a half mile, however, the officer did not observe any driving indicating the driver was under the influence of alcohol. Arreola, 163 Wn. App. at 790-91. He then stopped the vehicle for a muffler violation. Id. at 791, 791-92. The stop led the driver's arrest for driving while under the influence of alcohol and outstanding warrants in addition to a citation for the modified muffler infraction. Id. at 791.

The Court of Appeals looked at the totality of the circumstances to conclude the stop was pretextual. Although the trial court concluded the officer probably would have stopped Arreola for the muffler violation even without the report of a drunk driver, the Court of Appeals explained the critical concern was the officer's actual or primary reason for the stop – the suspected driving while under the

influence. Arreola, 163 Wn. App. at 796-97. "[A] traffic stop is without authority of law where it cannot be constitutionally justified for its primary reason (speculative criminal investigation) but only for some other reason (enforcing the traffic code) which is at once lawfully sufficient but only a secondary reason." Id. at 797.

This Court also looked at the totality of the circumstances to determine the officer's subjective intent and the objective reasonableness of his actions in Montes-Malindas, finding a pretext stop when an officer stopped a vehicle for driving without its headlights. The officer in Montes-Malindas was in a parking lot investigating an unrelated case when he noticed people in a van acting nervously and changing vehicles and seats within a vehicle; he decided to watch them when he completed his interview. Montes-Malindas, 144 Wn.App. at 256. The officer saw the people enter and leave a drug store and followed as their car traveled down the street without its headlights on. Id. at 256-57. The officer stopped the car for the headlight infraction, but not until after the headlights were activated. Id. at 257.

The officer's conduct deviated from a traditional stop for a traffic infraction, as he approached the car from the passenger side so

that he could see inside. Montes-Malindas, 144 Wn.App. at 257-58. He then learned the driver did not have a valid operator's license, arrested the driver, and removed and searched two passengers. Id. a 258. The driver was charged with possession of methamphetamine in his hand when arrested and possession of a firearm found in the car. Id.

Although the trial court believed the officer's testimony that he did not follow the van in hopes of finding a legal reason to stop it, this Court found his testimony about his subjective intent was not dispositive. Montes-Malindas, 144 Wn.App. at 260. The officer had testified he was suspicious of the activity he saw earlier and admitted those suspicions were in his mind when he decided to stop the van. Id. at 261. This Court also looked to the objective facts, such as the officer's action in going to the passenger side of the van and speaking to the passengers rather than the driver, and stopping the car only after it had turned on its headlights, which suggested he was conducting surveillance on the van. Id. at 261-62. Based on the totality of the circumanstances, this Court therefore concluded it was a pretext stop. Id. at 262.

Here, Deputy Callahan testified he was interested in Mr. Smith because he was looking into the parked cars as he rode by them on his

bicycle. While the deputy had the authority to stop Mr. Smith because he was not wearing a helmet, the stop was motivated by the officer's concern that Mr. Smith was involved in vehicle prowling. "[T]he reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation." Ladson, 138 Wn.2d at 349. The same is certainly true of a stop to enforce bicycle helmet regulations.

When a police officer's original stop is pretextual, it is without authority of law, and any evidence seized as a result of the stop must be suppressed as fruit of the poisonous tree. Ladson, 138 Wn.2d at 359-60; Arreola, 163 Wn. App. at 798. Deputy Callahan stopped Mr. Smith because he believed Mr. Smith may have been involved in vehicle prowling, not because he was not wearing a bicycle helmet. The firearm found on Mr. Smith therefore should have been suppressed.

d. Mr. Smith's conviction must be reversed. The stop of Mr. Smith was unconstitutional because the officer did not have sufficient evidence to support an investigative detention, Mr. Smith was not in violation of a helmet regulation, and the helmet regulation was a pretext to investigate other criminal activity. Without this evidence, the

State cannot prove Mr. Smith possessed a firearm, and his conviction for unlawful possession of a firearm must reversed and remanded for dismissal. Ladson, 138 Wn.2d at 360; DeSantiago, 97 Wn. App. at 453.

2. **The trial court's refusal to instruct the jury on the defense of necessity violated his constitutional right to present his defense.**

While a person with felony a conviction is legally prohibited from possessing a firearm, he does have the right to use a firearm if necessary to defend himself or another person. The trial court ruled that Mr. Smith would not be entitled to a jury instruction explaining the defense of necessity. Mr. Smith, however, would have testified that he was acting in defense of his son, and the court's ruling violated Mr. Smith's constitutional right to present his defense. His conviction for unlawful possession of a firearm in the first degree must be reversed and remanded for trial.

a. The accused is entitled to have the jury instructed on his theory of the case. The federal and state constitutions provide the accused the right to present a defense.[10] U.S. Const. amends. VI, XIV;

[10] The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . to

Const. art. I, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). "Whether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes, 547 U.S. at 324 (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)).

In order to honor this constitutional right, the defendant is entitled to have the jury instructed on his theory of the case, and the trial court's failure to do so is reversible error. State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997). If supported by evidence, a proposed instruction should be given if it properly states the law, is not misleading, and allows the party to argue his theory of the case. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

"[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63, 108 S.

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be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Ct. 883, 99 L. Ed. 2d 54 (1988). When a defendant raises an affirmative defense, such as necessity, he is entitled to have the jury instructed as to the defense if he produces sufficient admissible evidence to support the instruction. State v. Ginn, 128 Wn. App. 872, 878-79, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006). In evaluating whether the evidence is sufficient to support a jury instruction, the court must "interpret the evidence most strongly in favor of the defendant" as it is the job of the jury, not the court, to weigh the evidence and evaluate witness credibility. Id. at 879.

This Court reviews a trial court's decision not to give a defendant's proposed instruction de novo if the refusal is based on a ruling of law, but reviews for an abuse of discretion if the decision is based upon factual reasons. State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007). A denial of the right to present a defense, however, is reviewed under the constitutional harmless error rule. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010). The State must demonstrate a constitutional error is harmless beyond a reasonable doubt. Id.

b. The trial court ruled that Mr. Smith would not be entitled to present evidence supporting a necessity defense. The State moved to exclude any evidence relevant to a necessity defense, and the court granted the motion based upon the testimony of Mr. Smith's son and evidence produced at the suppression hearing. The trial court ruled it would not instruct a jury on necessity because Mr. Smith had not shown by a preponderance of the evidence that (1) he or his son was under a present, unlawful threat of death or serious bodily injury, (2) that he had no alternative to carrying a weapon, and (3) that he did not recklessly place himself in a position where he was forced to carry a gun. Conclusions of Law Re Necessity Defense 1-3. CP 94-95; See RP 165-66 (oral ruling based only on immediacy requirement).

c. The trial court erred by refusing to permit Mr. Smith from pursing the defense that he was acting out of necessity to protect his son. Necessity is a common law defense that excuses otherwise criminal conduct when it is necessary to avoid a greater harm. State v. Jeffrey, 77 Wn. App. 222. 224, 889 P.2d 805 (1998); Shaun P. Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. 1527 (2005).

> The necessity defense essentially permits an accused to admit the elements of an offense but avoid punishment if her illegal acts were designed to obtain a greater good. A driver may exceed the speed limit to rush an injured

> person to the hospital. An onlooker is permitted to destroy a home to prevent a fire from spreading. A prisoner may leave a burning jail. A captain may enter an embargoed port in a storm.

Martin, The Radical Necessity Defense, 73 U. Cin. L. Rev. at 1727-28. The necessity defense is a long-standing component of the Anglo-American criminal law that has been adopted in every American jurisdiction. Id. at 1532-33, 1535-36; Laura Schulkind, Applying the Necessity Defense to Civil Disobedience Cases, 64 N.Y.U. L.Rev. 79, 83 (1989).

Moreover, both the federal and the state constitutions guarantee citizens the right to bear arms. U.S. Const. amends. II, XIV; Const. art. I, § 24.[11] Article I, section 24 of Washington's Constitution provides, in pertinent part, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired . . ." The right to arm oneself in self-defense has been recognized as a basic right from ancient times to the present, and this right is particularly important in Washington. McDonald v. City of Chicago, ___ U.S. ___, 130 S. Ct. 3020, 3036-42, 177 L. Ed. 2d 894 (2010); State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 995 (2010) (art. I, § 24 "means what it says. From

[11] The Second Amendment applies to the states through the Fourteenth Amendment. McDonald, 130 S. Ct. at 3050.

time to time, people of the West had to use weapons to defend themselves and were not interested in being disarmed") (quoting Hugh Spitzer, Bearing Arms in Washington State 9 (Proceedings of the Spring Conference of Municipal Attorneys (4/24/97)). The State, however, may reasonably regulate the right to bear arms to protect the public safety or welfare. State v. Spiers, 119 Wn. App. 85, 93, 79 P.3d 30 (2003).

Mr. Smith was charged with unlawful possession of a firearm in the first degree, RCW 9.41.040(1)(a). CP 1. The elements of the crime are that (1) the defendant knowingly had a firearm in his possession or control, (2) in the State of Washington, and (3) the defendant had a prior conviction for a "serious offense." RCW 9.41.040(1)(a); State v. Hartzell, 156 Wn. App. 918, 945, 137 P.3d 928 (2010); see State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000) (requiring knowledge for unlawful possession of a firearm in the second degree). Mr. Smith stipulated that he had a conviction for a "serious offense" as defined at RCW 9.41.010(16). CP 48-50. His defense to the charge of unlawful possession of a firearm was that of necessity.

Necessity is an available defense to the crime of unlawful possession of a weapon. State v. Stockton, 91 Wn. App. 35, 43-44, 955

P.2d 805 (1998); Jeffrey, 77 Wn. App. at 225-26. This defense applies when the defendant acts in defense of another as well as when he acts in self-defense. United States v. Newcomb, 6 F.3d 1129, 1135-36 (6th Cir. 1993); United States v. Paolello, 951 F.2d 537, 542 (1991) (defendant knocked gun out of man's hand to prevent him from attacking defendant's stepson, retained gun to prevent being shot himself).

Thus, in Newcomb, the defendant's conviction for possession of an unregistered firearm and being a felon in possession of ammunition were reversed because the district court did not instruct the jury it could find the possession was justified. The defendant's witnesses established that he was watching television in his girlfriend's home when she informed him her son, Louis, had grabbed a gun and was threatening to kill someone. Newcomb, 6 F.3d at 1131. Because Louis had harmed people in the past, Newcomb, his girlfriend, and Louis's brother were afraid Louis would actually harm someone. Id. When they found Louis in a nearby alley, Newcomb unloaded Louis's weapon and put the weapon in abandoned couch. Id. Newcomb's conviction for possession of the weapon in the couch was reversed

because the jury should have been instructed on the justification, or necessity, defense. Id. at 1139.

In Jeffrey, the defendant's wife saw someone outside their window in the evening, and the couple called the police who searched the surrounding area. Jeffrey, 77 Wn. App. at 223. Jeffrey called a friend who stayed at their home for an hour and then left a handgun under the Jeffrey's couch. Id. When Jeffrey heard noises and saw a silhouette outside the bedroom window, he retrieved his friend's gun, fired a shot, and directed his wife to call the police. Id. When the police arrived, Jeffrey was still holding the gun and was charged with unlawful possession of a firearm. Id. The Jeffrey Court found a necessity instruction was not appropriate because Mr. and Mrs. Jeffrey were not in danger and were capable of calling the police. Id. at 227. In so ruling, the court made it clear that a felon is not required to forgo the use of a weapon if he is threatened with immediate danger.

> We agree it is clear that handgun legislation in Washington is designed to prohibit and punish potentially dangerous felons from possessing handguns. However, the statute does not address the unforeseen and sudden situation when an individual is threatened with impending danger. Certainly, the Legislature did not intend for a person threatened with immediate harm to succumb to an attacker rather than act in self-defense.

Id. at 226.

d. Mr. Smith's conviction for unlawful possession of a weapon must be reversed and remanded for trial. The trial court's ruling that Mr. Smith could not present evidence relevant to a necessity defense denied him his constitutional right to present his defense. The denial of a defendant's opportunity to present his defense is a constitutional issue, and the constitutional harmless error standard thus applies. Jones, 168 Wn.2d at 724. Constitutional error is presumed prejudicial, and this Court must reverse unless the State demonstrates the error is harmless beyond a reasonable doubt. Id; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1976).

Without a necessity defense instruction, Mr. Smith had no opportunity to defend against the charge of unlawful possession of a firearm. This Court cannot be convinced beyond a reasonable doubt that a reasonable jury would have convicted Mr. Smith if it had heard the evidence and been providing with a necessity instruction. Mr. Smith's conviction for unlawful possession of a firearm must be reversed and remanded for a new trial. Jones, 168 Wn.2d at 724-25 (reversing rape conviction because trial court excluded evidence of contemporaneous sexual conduct); Redmond, 150 Wn.2d at 495

(reversing conviction due to failure to provide no duty to retreat instruction).

E. CONCLUSION

The deputy's stop of Mr. Smith was unconstitutional because (1) the deputy did not have a reasonable suspicion based upon articulable facts that Mr. Smith was engaged in criminal activity, (2) he lacked authority to issue a citation based upon county bicycle helmet regulations, and (3) basing the stop upon Mr. Smith's failure to wear a bicycle helmet was a pretext to investigation other suspected criminal activity. The trial court erred by admitting the evidence obtained as a result of the unconstitutional stop, and without this evidence the State could not prove he unlawfully possessed a firearm. The conviction must be reversed and dismissed. In the alternative, Mr. Smith's conviction should be reversed and remanded for a new trial because the trial court's decision not to instruct the jury on the necessity defense violated Mr. Smith's constitutional right to present a complete defense.

Respectfully submitted this 4th day of December 2012.

Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX A

WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.6 MOTON TO SUPPRESS EVIDENCE AND ON CrR 3.5 MOTON REGARDING ADMISSIBILITY OF DEFENDANT'S STATEMENTS

CP 87-93

FILED
KING COUNTY, WASHINGTON

APR 25 2012

SUPERIOR COURT CLERK
BY Geylar Greer
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. CHRISTOPHER MICHAEL SMITH, Defendant,	No. 11-1-07703-5 SEA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO SUPPRESS EVIDENCE AND ON CrR 3.5 MOTION REGARDING ADMISSIBILITY OF DEFENDANT'S STATEMENTS

A hearing on the admissibility of physical and oral evidence under CrR 3.6 and a hearing on the admissibility of the defendant's statements under CrR 3.5 was held on February 23, 2012 before the Honorable Judge Michael Trickey.

After considering the evidence submitted by the parties and hearing argument, the court makes the following findings of fact and conclusions of law as required by CrR 3.6 and CrR 3.5:

I. THE UNDISPUTED FACTS: The court makes the following findings of fact:

1. On September 13, 2011, at approximately 8:32 p.m. in King County Sheriff's Deputy Benjamin Callahan was driving a marked patrol car south on 5th Avenue N.E., in Shoreline, King County Washington.

2. It was dark outside.

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3. The deputy was familiar with the area and knew that there had been numerous car prowls recently in the area. He himself had taken two car prowl reports recent to September 13th, within five blocks of the scene of this incident.

4. At approximately the 1600 block of 5th Avenue, the deputy saw the defendant, Christopher Michael Smith.

5. Smith was riding a bicycle.

6. Smith was not wearing a helmet.

7. Smith was arrested for obstruction.

8. Smith was wearing a fanny pack around his waist. Deputy Callahan searched this fanny pack and found a loaded .38 caliber Smith and Wesson handgun.

9. Deputy Callahan asked the defendant if he had a concealed weapons permit. This question occurred after the defendant was arrested, but before he was advised of his Miranda rights.

10. Deputy Callahan advised the defendant of his Miranda Rights. He did this by reading from his KCSO issued Miranda rights card. A copy of this card was admitted into evidence. This card contains the rights which must be told to the defendant prior to any custodial interrogation.

11. After the officer read the defendant his Miranda rights the defendant indicated he understood those rights. The deputy made no threats or promises to the defendant to induce him to make any statements. The defendant expressed no confusion about his rights; he did not ask for a lawyer.

12. After being advised of his Miranda rights, Deputy Callahan asked Smith if he was supposed to have a gun. The defendant stated, "No." The officer also asked the defendant where he bought the gun. The defendant stated "from a guy." The deputy asked the defendant if the gun was stolen. The defendant stated "maybe."

II. THE DISPUTED FACTS:

Deputy Smith's Testimony:

1. Deputy Smith testified that as he was coming south down 5th Avenue, he noticed Smith who was riding his bicycle northbound on the street. Smith caught his attention because he was not wearing a helmet and his bicycle did not have a front light.

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2. Deputy Callahan testified that as he watched, Smith drove in serpentine motion around parked cars on the street. As he drove past the cars, Smith peered into the car windows.

3. Deputy Callahan knew that there had been a rash of car prowls in the area recently. He had personally taken two car prowl reports in the vicinity recent to September 11, 2011. In his training and experience he knew that peering into car windows along a row of parked cars was consistent with casing cars to prowl them.

4. Deputy Callahan testified that as he passed Smith, Smith looked up at the officer with a surprised look on his face, and almost lost his balance on the bicycle.

5. Deputy Callahan testified that he then found a safe place to turn his car around. He intended to stop Smith and investigate the helmet and light infractions and also investigate what Smith was doing peering into the cars.

6. Deputy Callahan testified that when he turned his car northward, he was surprised to see that Smith had turned around too, and was now traveling southbound on the sidewalk of 5th Avenue. The deputy pulled his car over to the east side of the street and parked several yards in front of Smith, who was coming towards him on the sidewalk. The deputy did not have his flashing lights or siren on.

7. Deputy Callahan testified that got out of his car and called out "hey" to Smith. Smith did not respond. Instead he drove straight past Deputy Callahan with his eyes straight ahead, not looking at the officer. The deputy testified that there was no one else on the street between him and Smith whom Smith could have thought the officer was talking to.

8. Deputy Callahan testified that when Smith rode right past him, the deputy then turned his car around again, and headed southwards. He activated his overhead lights and drove along side of Smith, within four feet of him. His lights were reflecting off of Smith's face. The deputy rolled down his window and yelled, "Stop Police."

9. Deputy Callahan testified that Smith did not stop. The officer yelled, "Stop" again. Smith then veered off of the sidewalk and rode across a yard in a southeast direction, picking up speed.

10. Deputy Callahan testified that he then got out of his car and proceeded to run after Smith. Smith kept on going. He turned into a driveway at 15816 5th Ave. N.E. The deputy continued to follow, yelling, "Stop, now." Smith looked over his shoulder at the officer and continued to ride down the driveway around the back of the house.

11. Deputy Callahan testified that he followed Smith and caught up to him at the back of the driveway. He grabbed Smith by his arm and escorted him back to his patrol car, where he placed him under arrest for obstruction.

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The defendant's testimony:

12. The defendant testified that he was out looking for is son and was riding his bike northbound on the sidewalk heading towards 160th Street.

13. The defendant testified that as he was riding his bike he was talking on a cordless phone to his mother. He testified that he did not want to go too far from his house, as the phone connection would be lost and also because he was hoping his son would be coming back. The defendant testified that as he was riding northbound; his mother told him his son had gone southbound, so the defendant turned around and started to head southbound.

14. The defendant testified that as he was riding on the sidewalk southbound he noticed the police car coming southbound on 5th Avenue. The defendant testified that Deputy Callahan turned on his emergency equipment, veered across the northbound lane and tried to strike him with his police car.

15. The defendant testified that when the officer tried to strike him with his police car, this caused him to veer off the sidewalk and ride across his neighbor's lawn. He testified that he did not stop immediately because the brakes on the bike 'grabbed.' He testified that he drove into his own driveway, put the kickstand down, parked the bike and then turned and walked back towards the officer. He testified that the officer then grabbed him; dragged him back to the patrol car and placed him under arrest for not wearing a helmet and for obstruction and eluding.

16. The defendant testified that there were no cars parked along the street, except for two cars parked in front of his own house, belonging to people he knew.

17. The defendant denied riding his bike in a serpentine motion around cars parked along 5th Avenue.

18. The defendant testified that at no time during this incident did he ride his bike on the street; rather he was riding on the sidewalk.

19. The defendant and his girlfriend testified that the bike was equipped with a front headlight; that the light was turned on and working on that night. The defense admitted photos of a bike with a headlight, which the defendant and his girlfriend testified was the bike the defendant had been riding at the time of this incident.

III. FINDINGS AS TO THE DISPUTED FACTS:

1. The court is not persuaded that the bike shown in the photographs admitted by the defense is the same bike the defendant was riding at the time of the incident. The court is also not persuaded that the defendant was riding in the street in a serpentine motion around cars.

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2. The court finds, however, that there were cars parked along 5th Avenue at the time of the incident.

3. The court finds that as the defendant rode along the sidewalk, he was peering into windows of cars parked along the street.

4. The court finds that the defendant's action of peering into cars as he rode along was consistent with car prowling. a reasonable basis to conclude this WAS MJ

5. The court finds that Officer Callahan was familiar with a rash of car prowls in the area recent to September 13, 2011and that the officer had personally investigated car prowl reports recently in the area.

6. The court finds that the officer did not try to strike the defendant with his patrol car.

7. The court finds that the officer did turn on his lights, stop his car and tell the defendant to "stop."

8. The court finds that the defendant heard this command and knew the officer was trying to stop him.

9. The court finds that the defendant did not obey this command to stop. The court does not find the defendant's testimony that he parked his bike and came back towards the officer to be credible. The court finds that in response to the order to stop the defendant ignored this command and kept on riding his bike away from the officer.

10. The court finds that the officer ran after the defendant, physically seized him and placed him under arrest for obstruction.

11. The court finds that after being placed under arrest for obstruction the officer searched the fanny pack which was hooked around the defendant's waist, and found a loaded handgun.

4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

a. PHYSICAL EVIDENCE:

1. Deputy Callahan had a basis to stop the defendant for the infraction of not wearing a helmet, in violation of Section 9.10.010 of the King County Code of Health which sets out the requirement that all bicycle riders in King County are required to wear helmets.

2. Deputy Callahan had a reasonable suspicion, based on articulable facts, to detain the defendant to investigate his action of peering into cars as he rode along the street. The

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deputy's attempt to stop the defendant to investigate was a reasonable "Terry" stop, given the defendant's actions and the information the officer knew about recent car prowls in the area.

3. When the defendant did not obey the command to stop, the officer had probable cause to arrest the defendant for the crime of obstruction. Recent case law makes it clear that a person cannot be arrested for obstruction for merely refusing to speak to an officer. In this case, however, the defendant did not stop when told to do so. This gave the officer probable cause to arrest him for obstruction.

4. The search of the defendant and the discovery of the gun in his fanny pack was a lawful search incident to arrest.

The defendant's motion to suppress physical and oral evidence under CrR 3.6 is hereby denied.

b. DEFENDANT'S STATEMENTS:

1. When the defendant was asked by Deputy Callahan if he had a concealed weapons permit, he was in custody and being interrogated by a state agent, however he had not yet been advised of his right to remain silent and his other Miranda rights.

This question and his response are not admissible.

2. When the defendant was asked by Deputy Callahan if he was supposed to have a gun; where he got the gun and if the gun was stolen, the defendant was in custody; however he had been properly advised of his Miranda rights prior to being asked these questions. He freely and voluntarily answered the deputy's questions after proper advisement of his rights.

These questions and the defendant's answers are admissible in this case.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 25th day of April, 2012.

Michael J. Trickey, Judge

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Presented by:

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APPENDIX B

FINDINGS, CONCLUSIONS AND ORDER RE NECESSITY DEFENSE

CP 94-96

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. CHRISTOPHER MICHAEL SMITH, Defendant.	NO. 11-1-07703-5 SEA FINDINGS, CONCLUSIONS AND ORDER RE NECESSITY DEFENSE

This matter came on for trial before the undersigned judge on February 23 and February 28, 2012; the defendant being charged with the crime of Unlawful Possession of a Firearm in the First Degree. The defense sought to introduce evidence at trial supporting a defense of necessity. The state made a motion to exclude this evidence. The parties requested a pretrial ruling regarding whether the proffered evidence would be admissible to support such defense.

After hearing testimony from Kenneth Michael Smith, the defendant's son, and after hearing an offer of proof from the defense, the court makes the following:

FINDINGS OF FACT

1. The defendant was arrested on September 13, 2011. A loaded handgun was found on his person. The court incorporates herein its findings of fact and conclusions of law entered on April 25, 2012, regarding the facts of that arrest.

2. Approximately two weeks prior to September 13, 2011, the defendant's son, Kenneth Smith, age 15, had gotten into an altercation at a park with another teenager. The other

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teenager had pulled out a knife and had tried to fight with Kenneth. When Kenneth refused to fight, the other teenager called his father. Kenneth could overhear the father say that he was going to come to the park with a gun.

3. Kenneth then left the park. He did not see any gun.

4. Kenneth went home and told his father, the defendant, what had happened at the park.
5. Approximately two weeks later, on September 13, 2011 the defendant got into an argument with Kenneth. Kenneth left the house.

6. The defendant went out to look for Kenneth. He carried a loaded handgun with him in a fanny pack around his waist.

7. The defendant had owned the gun for at least a month prior to September 13th. Kenneth had seen him carry the gun in a fanny pack.

8. The defendant did not find Kenneth when he went out to look for him on September 13, 2011.

9. The defendant did not see the other teenager or the other teenager's father on September 13.

10. The defendant was not confronted or threatened in any way by anyone on September 13th, other than being arrested by Deputy Callahan, as articulated in the court's findings and conclusions regarding the defense CrR 3.6 motion entered in this case.

11. The court accepts that the defendant was concerned about his son having run away from the argument and concerned that Kenneth might go back to the park where he was threatened; however the earlier incident occurred two weeks before September 13, 2011.

12. When the defendant put the gun in his fanny pack and went out to look for his son on September 13, 2011, there was no immediate and present threat to either Kenneth or the defendant.

13. The defendant took no alternative action such as calling the police.

Based upon the foregoing findings of fact, the court hereby makes the following:

CONCLUSIONS OF LAW

1. The defense has not shown by a preponderance of the evidence that he or his son was under an unlawful and present threat of death or serious injury at the time he was found in possession of a loaded handgun on September 13, 2011.

2. The defendant has not shown by preponderance of the evidence that he had no alternative but to carry the gun on September 13, 2011.

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3. The defendant has not shown by a preponderance of the evidence that he did not recklessly place himself in a position where he would be forced to carry a gun on September 13, 2011.

ORDER

The evidence proffered by the defense does not create a necessity defense in this case.

The state's motion to exclude this evidence is granted.

Signed this 27 day of April, 2012.

Michael J. Trickey, Judge

Presented by:

Margaret E. Nave 19004
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER SMITH, Appellant.	)))))))))	NO. 68709-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING 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] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] CHRISTOPHER SMITH 737255 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 98326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF DECEMBER, 2012.

X_____

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