68709-3

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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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

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

Christopher Smith was unconstitutionally stopped by a police officer who lacked (1) the reasonable and articulable suspicion needed to justify an investigative stop and (2) the authority to cite Mr. Smith for a violating a King County Health Board bicycle helmet regulation occurring on a sidewalk in the City of Shoreline. In addition, the alleged bicycle helmet violation was a pretext to stop Mr. Smith to investigate the officer's hunch that he was involved in vehicle prowling. This Court should reject the State's arguments to contrary and reversed Mr. Smith's conviction for unlawful possession of a firearm.

Under both the federal and state constitutions, warrantless searches and seizures are per se unreasonable unless an exception to the warrant requirement applies. State v. Loewen, 97 Wn.2d 562, 565, 647 P.2d 489 (1982); State v. Lennon, 94 Wn. App. 573, 579, 976 P.2d 121, rev. denied, 138 Wn.2d 1014 (1999). However, article I, section 7 of the Washington Constitution more broadly protects the "private affairs" of each person than does the Fourth Amendment. Const. art. I, § 7;

U.S. Const. amend. IV; e.g., State v. Arreola, __ Wn.2d __, 290 P.3d 983 (2012). "Under article I, section 7, the right to privacy is broad, and the circumstances under which that right may be disturbed are limited." Arreola, 290 P.3d at 988. Thus, "[w]arrantless disturbances of private affairs are subject to a high degree of scrutiny." Id. This Court reviews the constitutionality of a warrantless stop de novo. Id. at 987; State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

a. The warrantless stop was unconstitutional because the deputy did not have the information necessary to support an investigative stop. One exception to the warrant requirement is that the law enforcement officer have "a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime." Gatewood, 163 Wn.2d at 539 (quoting State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)); accord Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The State has the burden of demonstrating the legality of a warrantless investigative stop. Gatewood, 163 Wn.2d at 539.

The facts supporting Deputy Callahan's decision to stop Mr. Smith do not meet this standard. The court found that the deputy had a reasonable suspicion that Mr. Smith was involved in the crime of

vehicle prowling because he was riding a bicycle on the sidewalk looking into the windows of parked cars. Conclusion of Law A-2 (CP 91-92); Findings as to Disputed Facts 2-4 (CP 91). The deputy was aware there had been car prowls in that neighborhood, but not on the night in question. Finding as to Disputed Fact 5 (CP 91).

The State attempts to bolster these findings with the police officer's testimony that Mr. Smith looked surprised when he saw the patrol car, nearly lost his balance, and rode away from the officer and later avoided eye contact when Deputy Callahan tried to talk to him. BOR at 10 (citing RP 22-25). The facts, however, were not found by the trial court and thus were not used to support its legal conclusion. See Findings as to Disputed Facts 1-11 (CP 90-91). Moreover, looking surprised or walking away from a police officer does not warrant a warrantless detention. Gatewood, 163 Wn.2d at 540 (investigative stop not constitutional where defendant widened eyes upon seeing patrol officers, twisted his body as if trying to hide something, and left the area by jaywalking); State v. Mendez, 137 Wn.2d 208, 223-24, 970 P.2d 722 (1999) (Terry stop of vehicle passenger not justified because he got out of the car and walked away when the car was stopped by the police).

The State also argued the facts of Terry demonstrate the validity of Deputy Callahan's decision to stop Mr. Smith. BOR at 13. The facts of Terry, however, show the absence of a reasonable suspicion I this case.

The police officer in Terry watched two men for a period of time in which he formed the suspicion that they were about to commit a crime. The officer first observed the two men standing on a street corner. Terry, 392 U.S. at 5. One man left and walked down the street past some stores, paused to look in a store window, walked a short distance, and then turned around and walked back to his companion, pausing as he did so to again look in the store window. Id. at 6. The two men conferred briefly, and the second man copied the first, going down the same street and looking twice in the same store window. Id. The two men then repeated their trip five or six times each, for a total of approximately a dozen trips. Id. After approximately ten minutes, the two men walked down the other street, following the steps of a third man who had met with them on the street corner during their trips down the street. Id. The court found that the men's actions were consistent with the officer's suspicion that they were planning a robbery, and the officer was justified in searching them for weapons. Id. at 28.

In Mr. Smith's case, however, the officer only briefly observed Mr. Smith riding a bicycle and looking into car windows. Unlike the defendants in Terry, this action was not repeated over and over again, and the trial court specifically rejected the officer's testimony that Mr. Smith was riding in a "serpentine motion" around parked cars. Finding as to Disputed Fact 1 (CP 90). Finally, as mentioned in the appellant's opening brief, anyone riding a bicycle in an urban area should be cognizant of the possibility of colliding with an opening car door, thus making the defendant' actions innocuous. AOB at 11-12.

Unlike the police officer in Terry, Deputy Callahan lacked the particularized suspicion that Mr. Smith was engaged in criminal activity necessary to justify an investigatory stop. 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. Gatewood, 163 Wn.2d at 542.

b. The stop was unconstitutional because the deputy lacked authority to issue a civil infraction for not wearing a bicycle helmet. The King County Health Code requires people to wear bicycle helmets when 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." King County Board of Health Code § 9.10.010(A) (hereafter Health Board Code). The health regulation thus applies to King County and the City of Seattle, but not the City of Shoreline, where Mr. Smith resided and was stopped by Deputy Callahan.

The City of Shoreline is a code city with its own municipal code that addresses traffic and public health among many other areas. Shoreline Municipal Code Titles 8, 10;[1] www.cityofshoreline.com/index/aspx?page=97. The State provides this Court with no authority for its assertion that the county health board code applies within the Shoreline city limits.

The State also argues that the county health board code applies to people riding on the sidewalk. BOR at 16-17. The State points to the definition of sidewalk found at RCW 35.70.010, but that definition only applies to chapter 35.70. RCW 35.70.010 ("the term sidewalk as used in this chapter . . .) (emphasis added). Moreover, RCW 35.70 addresses only sidewalk construction in second class cities and towns. As a code city, Shoreline is not by governed by Title 35.70. This Court should reject the State's argument that the county health board code applies to cities within the county other than Seattle.

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[1] The Shoreline Municipal Code is available at www.codepublishing.com/wa/shoreline/?ShorelineNT.html (last viewed 3/7/13)

c. The court's suppression ruling cannot be based upon facts not found by the trial court. The State suggests this Court could affirm the lower court on an alternative basis – that the officer could have stopped Mr. Smith because the bicycle did not have a light. BOR at 17. Whether there was a light on the bicycle Mr. Smith was riding that evening was disputed at the suppression hearing, and the trial court did not resolve the factual dispute. Disputed Facts 1, 19 (CP 88, 90); Findings as to Disputed Facts 1-11 (CP 90-91).

As the State argued, part of the appellate court's role in reviewing a suppression ruling is to determine if the facts found by the trial court are supported by substantial evidence. BOR at 8 (citing State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), rev. denied, 145 Wn.2d 1016 (2002)); accord Gatewood, 163 Wn.2d at 539. The appellate court did not view the witnesses' testimony and is not in a position to make additional factual findings. Thus, this Court cannot uphold the suppression ruling on the alternative basis that the officer could have cited Mr. Smith for riding a bicycle after dark without a head lamp.

d. The stop was unconstitutional because the deputy used the alleged civil infraction as a pretext to investigate unrelated criminal

activity. Article I, section 7 prohibits law enforcement from conducting a traffic stop as a pretext to investigate suspected criminal activity. State v. Ladson, 138 Wn.2d 343, 358, 979 P.3d 833 (1999). "A pretextual traffic stop occurs when a police officer relies on some legal authorization as 'a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirements.'" Arreola, 290 P.3d at 989 (quoting Ladson, 138 Wn.2d at 358). In short, the "police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving." Ladson, 138 Wn.2d at 349. Washington's "constitution requires we look beyond the formal justification for the stop to the actual one." Id. at 353.

The Arreola Court noted the traffic code is extensive and complicated and it is commonly accepted that it is both impossible and undesirable to fully enforce it. Arreola, 290 P.3d at 989; Ladson, 138 Wn.2d at 358 & n.10. "Virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter." Ladson, 138 Wn.2d at 358 n.10. Thus, traffic stops are ripe for being abused as the "legitimate" basis for a pretextual, warrantless seizure. The courts must ensure that the police exercise—

but not abuse—discretion in determining which traffic infractions require police attention and enforcement efforts. See Arreola, 290 P.3d at 990-91. The same logic applies to violations of bicycle regulations. While the health code is not as complicated as our traffic laws, bicycle regulations are still ripe for abuse. The deputy in this case admitted that he rarely cited people for helmet infractions and none was issued here. RP 18, 65. This Court similarly must ensure that King County Health Board code violations governing bicycle helmets and other bicycle regulations are not used to justify unconstitutional stops.

Since the filing of Mr. Smith's opening brief, the Washington Supreme Court announced a new rule that a "mixed motive traffic stop" in Arreola, supra. In that case the police officer admitted he followed a vehicle that matched the description of a possible driving under the influence (DUI) in progress, did not observe any signs of DUI, but observed the vehicle had an altered exhaust in violation of RCW 46.37.390. Id. at 986-87. At that point the officer pulled over the vehicle and seized the driver, observed signs of alcohol use, and discovered the driver had outstanding warrants, on which basis he arrested the driver. Id. at 987. The Supreme Court held that such a mixed-motive traffic stop is not unconstitutionally pretextual so long as

the lawfully-based motive for the stop was actual, independent and conscious. Id. at 991. Both subjective intent and objective circumstances must be considered in determining whether there was an actual, independent and conscious legal basis for the stop in addition to the unconstitutional, pretextual basis. Id. at 992.

Here, the deputy testified he noticed that Mr. Smith was riding a bicycle without a helmet or light, but he did not decide to stop Mr. Smith until he saw him look into car windows and until Mr. Smith appeared startled when he saw the police car. RP 18, 22, 54, 64. Deputy Callahan never mentioned the helmet infraction when he talked to Mr. Smith, instead asking questions concerning the possible vehicle prowling and unlawful possession of a firearm. RP 34, 39, 43-44, 46-48, 59-60, 65. Furthermore, failing to wear a bicycle helmet is not a violation that endangers public safety beyond the individual rider. This distinguishes the suspected infraction here from the vehicle exhaust irregularity noted by the officer in Arreola, 290 P.3d at 987, 989.

This Court must look beyond the reason proffered by the officers to determine whether it was the actual basis for the stop. Ladson, 138 Wn.2d at 353. A review of the officer's stated motive as well as his actions proves the stop was not based on constitutional

grounds—it was calculated pretext to circumvent the narrow exceptions to the warrant requirement.

e. 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, the officer lacked authority to issue a citation for violating the county health board regulation, and the health code violation 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.

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

Mr. Smith had the constitutional right to present a defense. U.S. Const. amends VI, XIV; Const. art. I § 22; State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Mr. Smith was charged with unlawful possession of a firearm. CP 1. Even though he was legally prohibited from possessing a firearm, Mr. Smith retained the limited right to use a firearm if necessary to defend himself or another person. State v. Stockton, 91 Wn. App. 35, 43-44, 955 P.2d 805 (1998); United States

v. Newcomb, 6 F.3d 1129, 1135-36 (6th Cir. 1993). Mr. Smith testified that he was carrying a gun because he was afraid for his son, who had been threatened with a weapon a few week earlier. Finding of Fact 1 (CP 94). Mr. Smith was thus entitled to have the jury instructed on the defense of necessity.

The State argues that the trial court correctly ruled that Mr. Smith was not entitled to a necessity instruction because he admitted obtaining the weapon earlier, he was not directly threatened by anyone on the day of his arrest, and he could have used other means to protect his son. BOR at 23. In deciding whether to instruct the jury on a defense, however, the trial court must look at the evidence in the light favorable to the defendant. State v. Ginn, 128 Wn. App. 872, 879, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d. 1010 (2006); State v. May, 100 Wn. App. 478, 482, 997 P.2d 956, rev. denied, 142 Wn.2d 1004 (2000). The trial court must remember that it is the jury's job to weigh the evidence and evaluate witness credibility, and the court may not substitute its judgment for the jury's. Id.

Mr. Smith's constitutional right to present his defense was violated when the trial court refused to give a necessity instruction. His conviction for unlawful possession of a firearm must be reversed and

remanded for a new trial. See State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003).

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Christopher Smith asks this Court to reverse and dismiss his conviction because the trial court should have suppressed evidence obtained as the result of an unconstitutional stop. In the alternative, he asks that the conviction 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.

DATED this 8th day of March 2013.

Respectfully submitted,

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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 ANA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF MARCH, 2013, 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:

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