90087-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

JOANNA CREED, Respondent

ANSWER TO PETITION FOR REVIEW

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STATUTES

A. IDENTITY OF ANSWERING PARTY

Respondent Joanna Creed answers the Yakima County Prosecutor's petition for review.

B. RELIEF REQUESTED

Ms. Creed asks this court to deny the petition for review.

C. ISSUES PRESENTED

1. After realizing that he lacked any factual basis for stopping the respondent's car, the officer approached the driver to acknowledge his error. As he did so, he saw the driver toss something into the back seat. Did the officer's ensuing effort to identify the nature of the object by looking into the area behind the driver's seat with the aid of a flashlight, prior to acknowledging his error, violate the driver's right to be free of an unreasonable search or seizure?

2. Assuming the officer's search of the passenger compartment of the vehicle in the course of an unlawful seizure violated the driver's constitutional rights, was the connection between the unlawful seizure and the officer's discovery of heroin

behind the driver's seat so attenuated as to dissipate the taint of the illegal seizure?

D. STATEMENT OF THE CASE

Officer Ramos saw Ms. Creed's car and attempted to check the license plate. (RP 2-4) He apparently misread the number, entered an incorrect number, and learned that the number he had entered was for a stolen license plate. (RP 4) Officer Ramos initiated a traffic stop. (RP 4-5) Ms. Creed turned into a nearby alley, parked her car, and Officer Ramos parked his patrol car directly behind hers. (RP 5-6)

Ms. Creed began to get out of her car. (RP 6) Officer Ramos got out of his car, ordered her to remain in her car, and then noticed that the license plate number on Ms. Creed's car was not the same number he had entered. (RP 6-7) Officer Ramos realized he had made a mistake. (RP 7)

On realizing his mistake, Officer Ramos ran a check on Ms. Creed's actual license plate number and determined that it was not stolen. (RP 7) He approached Ms. Creed, purportedly to tell her she was free to go. (RP 7) As he was reaching the trunk of her car he saw her toss an unidentified object behind her seat. (RP 7-8)

After seeing Ms. Creed toss something, Officer Ramos approached her, looked at the floor of the car behind her seat with the aid of a flashlight,

and observed what appeared to him to be baggies of heroin. (RP 7-8) He promptly placed her in handcuffs. (RP 8)

The State charged Ms. Creed with possession of narcotics. (CP 1) She moved to suppress the evidence obtained following her arrest. (CP 2-4) The trial court granted the motion to suppress and the State appealed that ruling. (CP 80-82) The Court of Appeals affirmed. Judge Korsmo authored a dissent in which he agreed that while the initial seizure of Ms. Creed's car was unlawful, the evidence Officer Ramos saw behind her seat was not the fruit of that stop and should not have been admissible.

E. ARGUMENT

Petitioner has failed to show that the Court of Appeals decision conflicts with any decision of this court or any other decision of the Court of Appeals.

1. THE DECISION BELOW, REQUIRING REASONABLE SUSPICION TO JUSTIFY A TRAFFIC STOP, IS CONSISTENT WITH EXISTING LAW, INCLUDING THE CASES CITED BY PETITIONER.

The State has not expressly presented for review the issue of whether the Court of Appeals erred in determining the initial stop was unlawful. Petition at 7-8. The State nevertheless argues this court should grant review because at the time he initiated the stop, Officer Ramos had an

articulable suspicion of criminal conduct. The State cites *State v. Seagull*, 95 Wn.2d 898, 908, 632 P. 2d 44 (1981), for the proposition that "[s]ubsequent evidence that the officer was in error regarding some of his facts will not render a *Terry* stop unreasonable. ('The Fourth Amendment does not proscribe 'inaccurate' searches only unreasonable ones.')" and argues this principal was extended in *State v. Snapp*, 174 Wn. 2d 177, 198, 275 P. 3d 289 (2012), to support the conclusion the traffic stop was justified if the officer "had a reasonable suspicion" the driver was "violating the statute". 174 Wn.2d at 198. Neither of these cases involved a mistake of fact that resulted from the arresting officer's negligent actions.

The Court of Appeals decision in the present case correctly applies the "reasonable suspicion" standard of *Seagull* and *Snapp*: "An officer cannot reasonably believe that a car bears stolen license plates based on a WACIC2 report addressing an unrelated license plate number." *State v. Creed*, -- Wn. App. --, 319 P. 3d 80, 81 (2014).

2. PETITIONER SUGGESTS OFFICER'S CONTINUED INVESTIGATION AND DETENTION OF MS. CREED, AFTER DISCOVERING HIS MISTAKE, WAS REASONABLE BECAUSE IT DID NOT EXTEND TO REQUESTING IDENTIFICATION.

The State cites *State v. Penfield,* 106 Wn. App. 157, 160–61, 22 P.3d 293 (2001) and *State v. Phillips*, 126 Wn. App. 584, 587,

109 P.3d 470, 472 (2005) for the proposition that after he discovered his mistake the officer's actions, including running a second license plate check as well as looking into the back of her car with the aid of a flashlight, were reasonable so long as they did not extend to his requesting Ms. Creed's identification. Petition at 8-9. Neither case provides any support for this claim.

Together, *Penfield* and *Phillips* stand for the proposition that even an otherwise lawful seizure ceases to be lawful once the officer has learned that his reasonable suspicion was based on a mistake of fact. In those cases, the initial stop was justified by a specific statute authorizing detaining of the driver of a car based on a report that the drivers license of the car's owner had been suspended and requiring the driver to display his license. RCW 46.20.349. The State cites no Washington case holding that the scope of an investigative stop includes a "courtesy contact" once the purpose of the stop has been accomplished.

"[T]he statute provides that the scope of the stop shall be limited to the sole purpose of ascertaining whether the driver has a valid license to operate the vehicle. *City of Seattle v. Yeager*, 67 Wn. App. 41, 48, 834 P.2d 73, 77 (1992). Such a stop is characterized as an investigative stop or seizure: "A seizure has occurred within the meaning of the Fourth Amendment when, by means of physical force or a show of authority, one's

freedom of movement is restrained" *Id.* at 47-48; see *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280, 1284 (1997)

The Court of Appeals majority acknowledges that "'as a matter of courtesy'" an officer could explain to a driver the reason for the initial detention and then send him on his way. *State v. Creed,* 319 P.3d at 85, *quoting State v. Chatton*, 11 Ohio St. 3d 59, 463 N.E.2d 1237 (1984). "That sort of momentary, entirely noninvestigative contact would have been reasonable here too." *Id.* Petitioner cites no authority for the proposition that a "momentary, entirely noninvestigative contact" may be expanded to permit the officer to continue the investigation by attempting to determine if there may be other identifiable grounds for further detention.

An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *State v. Wheeler,* 43 Wn. App. 191, 195-96, 716 P.2d 902 (1986) (*citing Florida v. Royer,* 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)). The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Wheeler,* 43 Wn. App. at 195–96 (*citing Royer,* 460 U.S. at 500).

The purpose of stopping Ms. Creed's car was to investigate the theft of vehicle license plates. Once the officer determined that there was no

factual basis for his suspicion that the plates were stolen, the purpose of the stop was attained; any further investigation necessarily exceeded the scope of the stop. Instead the stop was prolonged for a couple of minutes which, from the standpoint of an unlawfully detained citizen, is more than momentary. The officer used those minutes to engage in investigative conduct including running another license check, approaching Ms. Creed's car, flashlight in hand, and shining the flashlight into the back seat area to further investigate what he perceived to be a furtive gesture.

By continuing to detain Ms. Creed while he investigated the status of the actual license plate number on her car, Officer Ramos plainly exceeded the scope of any permissible investigation. Regardless of whether the initial seizure was lawful, the ensuing investigation was not and the sole remaining issue would be whether the evidence found in Ms. Creed's car was tainted by the unlawful seizure. *See Wong Sun v. United States,* 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (citation omitted); *State v. Cantrell,* 70 Wn. App. 340, 346, 853 P.2d 479 (1993), *overruled in part on other grounds*, 124 Wn.2d 183, 875 P.2d 1208 (1994).

The Court of Appeals opinion is fully consistent with *Penfield* and *Phillips* decisions.

3. PETITIONER CONTENDS THE HEROIN WAS NOT THE FRUIT OF THE ILLEGAL SEIZURE BECAUSE THE CONNECTION BETWEEN THE UNLAWFUL SEIZURE OF MS. CREED AND THE DISCOVERY OF HEROIN WAS TOO ATTENUATED.

Relying on *State v. Eserjose,* 171 Wn.2d 907, 919, 259 P.3d 172 (2011) and *State v. Vangen*, 72 Wn.2d 548, 433 P.2d 691 (1961), petitioner argues that the connection between Officer Ramos's continuing unlawful detention of Ms. Creed and his eventual discovery of the baggies behind the driver's seat was so attenuated as to dissipate the taint of the unlawful seizure. Petition at 11.

The validity of the attenuation doctrine under Const. Art. 1, § 7 is a matter of some dispute: "The concurrence's use of the attenuation doctrine is equally concerning because we have not explicitly adopted it under article I, section 7. *State v. Eserjose,* 171 Wash.2d 907, 919, 259 P.3d 172 (2011)." *State v. Smith*, 177 Wn.2d 533, 552, 303 P.3d 1047 (2013) (Madsen concurring in the result) "I recognize this court has shown some recent reluctance to adopt the attenuation doctrine." 177 Wn.2d 533 (Gonzalez, J., concurring in the result)

> This court has never adopted the attenuation doctrine and, in my view, it has no place under article I, section 7. I recognize the issue has badly split this court. In *Eserjose,* three justices gave their unqualified signatures to an opinion adopting it; four justices, including this dissenting justice, lent their

> unqualified signatures to an opinion rejecting ***560** it. *See* 171 Wash.2d at 929, 259 P.3d 172 (Alexander, J., lead opinion), 940 (C. Johnson, J., dissenting).

State v. Smith, 177 Wn.2d at 559-60 (Chambers, J. dissenting) Nor is this a case in which it would be helpful to revisit the issue.

In *Eserjose*, police arrested Mr. Eserjose in his parents' home, although they had not obtained a warrant or the parents' consent to enter beyond the entryway. *Id.* at 910. Officers twice advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *Id.* at 911. "[H]e initially denied any knowledge of the burglary, but he confessed after being told that his co-defendant had done so. Id. In finding that the connection between the defendant's unlawful arrest and his eventual confession was sufficiently attenuated to render the confession admissible, the court gave weight to the fact that although the initial arrest was unlawful, by the time Mr. Eserjose made his confession, "during the lawful custodial interrogation that occurred after the illegal seizure had ended." 171 Wn.2d at 924. "Eserjose's confession was obtained with the requisite 'authority of law,' the deputies having the legal authority based on probable cause developed independently of the illegal arrest to keep Eserjose in custody and to question him about the burglary." 171 Wn.2d at 926.

Here, Officer Ramos was aware that he had no lawful basis for detaining Ms. Creed, and Ms. Creed had no reason to believe she was free to

go. She had been, and remained, unlawfully detained at the time Officer Ramos approached her, flashlight in hand, to examine the interior of her car. The facts of this case provide no attenuation of the connection between the unlawful detention and the resulting discovery of incriminating evidence consistent with the reasoning in *Eserjose*.

The defendant in *Vangen* was unlawfully arrested and detained without a warrant on suspicion of a misdemeanor, "defrauding an innkeeper of $200," using of credit cards bearing a false name." 72 Wn. 2d at 552. Eventually the police contacted "the real Elmer J. Johnson in Minneapolis" whose name appeared on the credit cards and Mr. Vangen admitted his true identity. *Id.* at 553. The court found the confession admissible:

> Even though a detention is illegal, if the confession is truly voluntary and the causation factor of the illegal detention is so weak, or has been so attenuated, as not to have been an operative factor in causing or bringing about the confession, then the connection between any illegality of detention and the confession may be found so lacking in force or intensity that the confession would not be the fruit of the illegal detention. (151 Conn. p. 250, 196 A.2d p. 757)
>
> We think the foregoing quotation fits the present situation with tailor-like exactness, assuming the detention to have been illegal.

72 Wn.2d at 555. It is beyond cavil that Ms. Creed's remaining in a place where the interior of her car could be searched was not truly voluntary. Compare *State* v. *Mierz,* 127 Wn.2d 460, 474-75, 901 P.2d 286 (1995)

(defendant assaulted police officers who entered fenced yard without a warrant) To the extent that her action in tossing something into the back seat caused the officer to examine the interior of her car, the fact that she had been stopped by a police officer and ordered to remain in her car cannot be discounted as an operative factor in bringing about that activity.

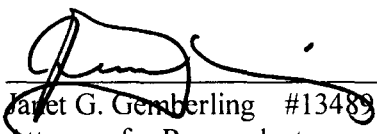
Assuming this court would apply the attenuation doctrine in the present case, the Court of Appeals decision is entirely consistent with the reasoning in the cases cited by petitioner.

E. CONCLUSION

Ms. Creed asks this court to deny the petition for review of the Court of Appeals decision, which is wholly consistent with other decisions of this court and the Court of Appeals.

Dated this 22nd day of April, 2014.

JANET GEMBERLING, P.S.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Petitioner,	)	No. 90087-6
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JOANNA CREED,	)	
	)	
Respondent.	)	

I certify under penalty of perjury under the laws of the State of Washington that on April 22, 2014, I served a copy the Answer to Petition for Review in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Tamara Hanlon
tamara.hanlon@co.yakima.wa.us

and I mailed a copy to:

Joanna Creed
1504 Fairbanks Ave
Yakima, WA 98902.

Signed at Spokane, Washington on April 22, 2014.

Janet G. Gemberling
Attorney at Law

OFFICE RECEPTIONIST, CLERK

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Please find attached Respondent Joanna Creed's answer to the State's petition for review, Supreme Court no. 900876.

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No human being is illegal.