30893-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

JOANNE A. CREED, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

RESPONDENT'S/CROSS-APPELLANT'S BRIEF

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State assigns error to the trial court's conclusion that an officer's mistaken reading of the license plate number on Joanne Creed's car did not provide a reasonable articulable suspicion that the plate was stolen, and there was no basis for a traffic stop of the car.

2. The State assigns error to the trial court's conclusion that there was no exception to the exclusionary rule that would permit the court to find a break in the sequence of events that would cleanse the taint of an initial unlawful stop of Ms. Creed's vehicle.

B. ISSUES

1. An officer mistakenly enters an incorrect license plate number into the Washington Crime Information Center system and the response indicates the plate is stolen. Based on this information the officer initiates an investigative stop. Does the stop violate the constitutional rights to privacy and to be free of unreasonable searches.

2. Upon discovering the mistake the officer leaves his overhead lights on, runs another check using the correct

plate number, then approaches the driver to explain the reason for the stop. Is evidence the officer observes when he approaches the driver subject to the exclusionary rule as the fruit of an unlawful seizure?

C. STATEMENT OF THE CASE

Officer G. Ramos saw a car driven by Joanne Creed. (CP 80) He obtained information from the Washington Crime Information Center (WACIC) showing the license plate 154 YMK was stolen. (CP 80) But the officer had misread the number; the license plate on Ms. Creed's car was 154 YDK. (CP 80) Based solely on the information from WACIC, Officer Ramos followed the car as Ms. Creed drove into a parking lot, activated his overhead lights and parked behind her, blocking her from exiting the parking space. (CP 80-81).

He realized he had misread the license plate and ordered Ms. Creed back in her car while he checked the correct license plate number. (CP 81) He left his overhead lights on and approached Ms. Creed's car. As he did so, he saw her toss something on the floor behind her seat. (CP 81) He continued to approach, looked through the car window using his flashlight, and saw what appeared to be heroin. (CP 81) He then arrested Ms. Creed. (CP 81)

Ms. Creed moved to suppress the evidence obtained following her arrest. The trial court granted the motion and dismissed the case, concluding that the stop of Ms. Creed's car was not justified by a reasonable articulable suspicion that she had violated the law and that no break in the ensuing events cleansed the taint of the initial unlawful stop. (CP 81)

On June 4, 2012, the State filed a notice of appeal from the trial court's ruling.

D. ARGUMENT

1. A SUSPECT'S SEIZURE BASED SOLELY ON ERRONEOUS INFORMATION OBTAINED FROM RECORDS MAINTAINED BY LAW ENFORCEMENT IS UNLAWFUL.

An officer must have a "well-founded suspicion not amounting to probable cause" to justify seizing a suspect. *State v. Little*, 116 Wn.2d 488, 495, 806 P.2d 749 (1991), *citing State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Here, the court is asked to decide whether the result of a records check based on the officer's mistaken entry of an incorrect license number can give rise to such a well-founded decision.

Generally, under the Fourth Amendment, a warrantless seizure is not rendered invalid by an officer's reasonable mistake of fact. *See Illinois v. Rodriguez,* 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); *Maryland v. Garrison,* 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987); *Hill v. California,* 401 U.S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971). Washington's courts have adopted the approach that:

> a search is lawful when it is based on a reasonable but mistaken belief by police that a third party has authority over the place searched. 3 W. LaFave, *Search and Seizure* § 8.3(g), at 261 (2d ed. 1987); *State v. Christian,* 26 Wash.App. 542, 613 P.2d 1199 (1980), *aff'd,* 95 Wash.2d 655, 628 P.2d 806 (1981); *Illinois v. Rodriguez,*497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

State v. Birdsong, 66 Wn. App. 534, 539, 832 P.2d 533 (1992); *see State v. Baker*, 4 Wn. App. 121, 125, 480 P.2d 778 (1971).

The courts have, however, recognized an exception to this rule when the mistake results from information "communicated through police channels." *See* Wayne R. LaFave, 2 SEARCH AND SEIZURE § 3.5 (4th ed.). Unlike information derived from an informant, witness or the officer's direct observation, such information "is frequently unaccompanied by a complete elaboration of the underlying circumstances

. . . ." *Id.* This is often the case in situations in which an officer relies on information provided by a "fellow officer" whose information lacks a factual basis. *See Whiteley v. Warden, Wyo. State Penitentiary,* 401 U.S. 560, 565 n. 8, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971); LaFave, § 3.5(b).

No Washington court has directly addressed the issue of whether a seizure was rendered unlawful when based on a clerical error such as entering an incorrect license number, but other jurisdictions that have considered the issue found that it was. *See State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005*), disapproved on other grounds, State v. McCulloch,* 274 Neb. 636, 742 N.W.2d 727 (2007); *Commonwealth v. Gaynor*, 33 Va. Cir. 250, 1994 WL 1031064 (1994).

In *Allen,* although the officer requested a record check on the correct license plate number, the dispatcher ran the wrong number and, as a result, the information relayed to the officer was erroneous. The court concluded the resulting stop was unlawful: "Thus, the record reflects that neither [the officer] nor any other law enforcement personnel possessed any true fact which would support the reasonable suspicion necessary to justify an investigative stop. The stop was therefore an unreasonable seizure in violation of the Fourth Amendment." 690 N.W.2d at 590.

In *Gaynor*, the officer entered the incorrect license plate number himself, and received information that the license belonged to a different

vehicle. After obtaining the vehicle registration from the driver, the officer realized his mistake, and continued to detain the defendant while he ran the correct number and discovered the defendant was driving with a suspended license. Noting that "courts have drawn a distinction between situations in which an independent entity is responsible for the erroneous information provided to police and those in which the information is derived from the police department's own inaccurate or incomplete records," the *Gaynor* court concluded that the error caused by the officer's own negligence required suppression of the evidence derived from the seizure. 33 Va. Cir. 250.

In Washington, the general rule is that when a law enforcement officer relies on information provided by other officers or law enforcement agencies, that information cannot, without more, provide probable cause for an arrest unless the State provides evidence of the factual basis for the information. *See State v. Nall*, 117 Wn. App. 647, 650, 72 P.3d 200 (2003); *State v. Mance,* 82 Wn. App. 539, 542, 918 P.2d 527 (1996).

Likewise, when an investigative seizure is based on data obtained from reports or data provided by other officers, the State must provide the court with evidence of the sufficiency and reliability of the underlying information. *State v. O'Cain*, 108 Wn. App. 542, 31 P.3d 733 (2001); *State v. Sandholm*, 96 Wn. App. 846, 848, 980 P.2d 1292 (1999). This

court has held that a seizure based on the officer's mistaken belief that a warrant existed for the defendant was unlawful. *State v. Barnes*, 96 Wn. App. 217, 225, 978 P.2d 1131 (1999).

Here, the State provided no relevant information as to the source of the information conveyed to Officer Ramos. Information as to the basis for the report regarding the erroneous license plate number could not provide a reliable basis for suspecting Ms. Creed, and information relating to the license plate on Ms. Creed's car did not provide any factual basis for suspecting that it was stolen.

As the State suggests, in assessing whether an investigative stop is lawful the court should consider three factors: "(1) the gravity of the public concern, (2) the degree to which the seizure advances the public interest, and (3) the severity of the interference with individual liberty." (App. Br. at 8, *quoting State v. Stroud*, 30 Wn. App. 392, 397, 634 P.2d 316 (1981)).

The public interest is well served by law enforcement's efforts to apprehend individuals who have stolen cars, but that is surely outweighed by the public interest in ensuring that law enforcement officers use reasonable care in performing clerical duties that, when done negligently, may result in a serious invasion of the public interest in protecting the citizens' right to privacy. Here, Ms. Creed was stopped in a public place,

blocked by a police car so that she could not leave, ordered to remain in her car and left there, even after the officer had discovered his mistake, while he performed another records check, and returned to speak to her, all the while with his overhead emergency lights activated. Even if his initial error was excusable, which it was not, the officer continuing to detain Ms. Creed while he conducted further investigation indubitably violated her right to privacy and her right to be free of unreasonable seizures.

2. APPROACHING THE DETAINED INDIVIDUAL TO EXPLAIN HIS MISTAKE DOES NOT REMOVE THE TAINT OF AN OFFICER'S INITIAL UNLAWFUL STOP.

The State argues that, even if the initial stop was unreasonable, once he realized his mistake the officer was privileged to approach Ms. Creed to explain the reason for the stop. *Citing State v. Chatton*, 11 Ohio St. 3d 59, 63, 463 N.E.2d 1237 (1984). Consistent with this court's decision in *State v. Penfield*, 106 Wn. App. 157, 22 P.3d 293 (2001), the Ohio court held that once an officer has discovered that the initial seizure was based on his mistake, further investigation must cease. The court then reasonably suggested that the officer could explain the reason for the detention "as a matter of courtesy." *Id.* The courts, having held that upon discovering his mistake the officer must cease the

investigation, cannot have intended to permit the officer to conduct some further investigation in the course of providing such an explanation.

Officer Ramos did not promptly acknowledge and explain his mistake. Instead he prolonged the detention while conducting further investigation, and then made an arrest based on his observations prior to and during the course of explaining his mistake to Ms. Creed.

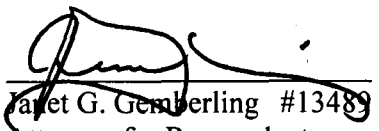
The exclusionary rule applies to all evidence derived from an unlawful seizure. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005); *State v. Le*, 103 Wn. App. 354, 361, 12 P.3d 653 (2000). Such evidence must be suppressed unless the State can show "that (1) intervening circumstances have attenuated the link between the illegality and the evidence or (2) the evidence was discovered through a source independent from the illegality." *State v. Smith*, 165 Wn. App. 296, 309, 266 P.3d 250 (2011); *citing State v. McReynolds*, 117 Wn. App. 309, 322, 71 P.3d 663 (2003) (*quoting Le*, 103 Wn. App. at 361, 12 P.3d 653). Here, the evidence was derived directly from the illegal seizure. The only arguably intervening circumstance was the officer's observation of something being thrown into the back of the car. This observation was the direct result of Ms. Creed's continued unlawful detention after Officer Ramos had realized his mistake, and possibly the illumination provided by his overhead lights.

E. CONCLUSION

The sole basis for seizing Ms. Creed derived directly from the officer's clerical mistake. The trial court correctly concluded that the stop was not based on any reasonable suspicion and nothing that occurred in the course of the stop could serve to render the tainted evidence admissible. The trial court should be affirmed.

Dated this 28th day of December, 2012.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON, Appellant, vs. JOANNE A. CREED, Respondent.	)))))))))	No. 30893-6-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington that on December 28, 2012, I served a copy of the Respondent's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Kevin Eilmes
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I certify under penalty of perjury under the laws of the State of Washington that on December 28, 2012, I mailed a copy of the Respondent's Brief in this matter to:

Joanne A. Creed
1504 Fairbanks Ave
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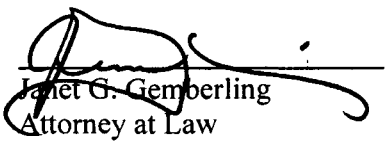
Signed at Spokane, Washington on December 28, 2012.



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