Supreme Court No. 90087-6
(COA No. 30893-6-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

JOANNE ALYSSE CREED
aka JOANNE ALYSSE NEYMAN,

Respondent.

STATE OF WASHINGTON'S PETITION FOR REVIEW

JAMES P. HAGARTY
Prosecuting Attorney

Tamara A. Hanlon
Senior Deputy Prosecuting Attorney
WSBA #28345
Attorney for Petitioner
128 N. Second Street, Room 329
Yakima, WA 98901
(509) 574-1210

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A. IDENTITY OF PETITIONER

The Petitioner is the State of Washington.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals [Division III] published decision filed on February 20, 2014, in which the court affirmed the trial court's decision to suppress evidence in Joanne Creed's trial on one count of possession of a controlled substance-heroin. A copy of the decision is attached hereto as **Appendix A**. No party filed a motion for reconsideration.

C. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err when it found that Officer Ramos lacked lawful authority to try to identify an item that he saw the defendant toss into her back seat as he walked up to her car to tell her she was free to leave?

Assuming *arguendo* that his actions were illegal, did the Court of Appeals err when it found that the drugs were fruits of Officer Ramos' actions and that the connection was not so attenuated as to dissipate any taint of prior illegality?

The State submits that the court should grant the petition for review because the decision of the Court of Appeals is in conflict with

other decisions of the Washington State Supreme Court, as well as with prior decisions of the Court of Appeals. RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

While on patrol at 12:30 a.m. on August 14, 2011, Officer Gabe Ramos of the Yakima Police Department made a routine check of the license plate number on a vehicle he observed at the intersection of McKinley and Oregon in Yakima. **(RP 2-3)**

The plate on the vehicle was 154 YDK, but Officer Ramos mistakenly read it as 154 YMK. **(RP 3-4)** Upon entering that number into the WASIC database, he learned that 154 YMK was stolen. **(RP 4-5)**

He initiated a traffic stop of the vehicle by activating his overhead emergency lights. The suspect vehicle pulled into and stopped in an alleyway. **(RP 5)** The patrol car was behind it, forming a 'T'. Officer Ramos exited his vehicle, and the driver started to get out of her vehicle, asking "[w]hat did I do?" Ramos instructed the driver to remain in the car. **(RP 5-6; 13; Ex. A)** At that point, he looked at the license plate and realized that it was not the same number he had run through the database. He returned to his vehicle, entered the correct number, and confirmed that the plates on the vehicle were not stolen. **(RP 5-6)**

Once he realized his mistake, he approached the driver of the stopped vehicle in order "[t]o notify the person that I had made a mistake

and they were free to go." **(RP 7)** He did not move his car, nor did he turn off the emergency lights. **(RP 13)**

However, as Officer Ramos was approaching the driver, he observed her "toss something directly behind her driver's seat onto the floorboard behind her seat." **(RP 7)** Officer Ramos was approximately at the trunk of the stopped vehicle when he observed this action. The object appeared to be round. **(RP 8)** On cross-examination, Officer Ramos estimated that the total duration of the contact between the initial stop and the time at which he approached the window was approximately two minutes. **(RP 13)**

The officer continued to the driver's side window in order to inform the driver of the reason for the stop, and as he began to speak to her, he looked down at the floorboard and recognized the "tar like substance inside the baggies." **(RP 8)** He believed the substance inside to be heroin. **(RP 8)** During the contact with the driver, he illuminated the interior of the vehicle with his flashlight. **(RP 15)**

Joanne Creed, the driver, was then placed under arrest for possession of narcotics. She got out of the car at the officer's direction, was placed in handcuffs, and secured in the patrol car. **(RP 8-9)**

After being advised of her Miranda and Ferrier warnings, Creed stated that the substance in her car was heroin, and consented in writing to

a search of her car. Officer Ramos retrieved the heroin. **(RP 9; 16)** Later, during an inventory search of Creed's purse, officers retrieved two loaded syringes. **(RP 17)** Creed was charged with a single count of possession of a controlled substance-heroin, under Yakima County Superior Court cause number 11-1-01150-5. **(CP 1)** She filed a motion to suppress, arguing that her seizure by means of the traffic stop was not lawful, as it was not based on objective facts supporting a reasonable inference of criminal activity. **(CP 2-4; 5-16)** The State responded, and the defense filed a reply brief. **(CP 17-30; 31-40)**

The court heard testimony on April 3, 2012 and granted the motion to suppress, and dismissed the action without prejudice. **(CP 42)** The court subsequently entered findings of fact and conclusions of law, concluding that the initial stop of Ms. Creed was unlawful, as the officer's misreading of the license plate number did not provide a reasonable articulable suspicion, based on objective facts, that she had committed a violation of the law. **(CP 80-82)**

A motion for reconsideration was denied. **(CP43-78; 79)**

The State timely appealed. **(CP 83)** The Court of Appeals affirmed the trial court's decision. No motion for reconsideration was filed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or another decision of the Court of Appeals. RAP 13.4(b). The court is asked to review a decision in which the Court of Appeals affirmed a trial court's decision to suppressed drug evidence based on the "fruit of the poisonous tree" doctrine.

1. The Court of Appeals misapplied relevant case law in affirming the trial court's decision.

a. The Court of Appeals erred when it found that Officer Ramos lacked lawful authority to try to identify an item that he saw the defendant toss into her back seat as he walked up to her car to tell her she was free to leave.

It is well-settled that a warrantless search and seizure is *per se* unreasonable under both the Fourth Amendment and Art. I, sec. 7 unless the search falls within a specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). Once a seizure has been established, it is the State's burden to show that the seizure was justified. State v. Ladson, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999); State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

Courts have long recognized that crime prevention and detection are legitimate purposes for investigative stops or detentions. Terry v.

Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). An officer may detain a suspect for an investigative stop even though the officer does not have probable cause to believe the suspect has committed a crime. Id. A Terry stop is justified under both the Fourth Amendment and art. I, s. 7 if a police officer is able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21; State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997), *cited in* State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999); State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007).

A Terry stop requires a well-founded suspicion that the defendant engaged in criminal conduct. State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Also, a reasonable, articulable suspicion means that there "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).

An officer must have a "well-founded suspicion not amounting to probable cause" upon which they may stop a suspect, identify themselves, and ask for identification and an explanation of his or her activities. 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).

A court must look at the totality of the circumstances known to the officer at the time of the stop in evaluating the reasonableness of the stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). Also, a reviewing court takes into account, and gives deference to, an officer's training and experience when determining the reasonableness of a Terry investigative detention. Glover, 116 Wn.2d at 514.

As the term "articulable suspicion" cannot encompass all the myriad factual situations which may arise, a court must look to the totality of circumstances in determining whether an investigative stop is lawful. State v. Stroud, 30 Wn. App. 392, 398, 634 P.2d 316 (1981). See, also, United States v. Cortez, 449 U.S. 411, 66 L. Ed.2d 621, 101 S. Ct. 690, 695, (1981). Further, a court must weigh "(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." Id. at 397.

Subsequent evidence that the officer was in error regarding some of his facts will not render a Terry stop unreasonable. State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) ("The Fourth Amendment does not proscribe 'inaccurate' searches only 'unreasonable' ones".)

The Washington Supreme Court has recently reiterated this point in State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012), holding that a traffic stop based upon the infraction of driving without headlights was reasonable, even though the stop occurred some 24 minutes after sunset, and such conduct was not strictly in violation of the relevant statute: " . . . the question of a valid stop does not depend upon Wright's actually having violated the statute. Rather, if Gregorio had a reasonable suspicion that he was violating the statute, the stop was justified." Id. at 198.

This court has addressed the narrow issue of whether a law enforcement officer could continue to detain a driver, and ask for identification, even after it became apparent that the driver could not have been the registered owner, and thus the officer no longer had a reasonable articulable suspicion that the driver was driving with a suspended license. State v. Penfield, 106 Wn. App. 157, 22 P.3d 293 (2001). The court held that the officer had no other reason to ask for identification from the driver, and the continued detention was an unreasonable seizure. Id. at 162-63.

The holding in Penfield is an exception, as clarified in State v. Phillips, 126 Wn. App. 584, 588, 109 P.3d 470 (2005), which reiterated that an officer may stop a vehicle registered to a person whose license is suspended, and there is no apparent reason to believe the driver might not

be the owner: "[i]t is, then appropriate and permissible for the officer to dispel his or her suspicion by identifying the driver." Id.

Here, the seizure of Ms. Creed was based on inaccurate information, but it was not unreasonable. First, the suspicion of Officer Ramos was based on objective facts: 154 YMK was indeed a stolen plate. The stop was effectuated when the officer incorrectly entered the license plate number, but his actions were reasonable after he had discovered the error: he entered the correct number from his terminal, but he did not check Ms. Creed's driver's license status, or check for any warrants. The fact of the error did not render the stop unreasonable.

He approached the car but *not* to request her identification or conduct further investigation. His sole intent was to let Ms. Creed know why she had been stopped, and then *let her go on her way.* The length of time between the traffic stop until the discovery of heroin was only two minutes altogether.

A courtesy contact is not unreasonable, as supported by a case cited in Penfield, whose facts are similar to those present here. The Ohio Supreme Court held that an officer could not further detain a driver, and request the driver's identification after any suspicion was dispelled, "[a]lthough the police officer, as a matter of courtesy, could have

explained to appellee the reason he was initially detained . . . " State v. Chatton, 11 Ohio St. 3d 59, 63, 463 N.E.2d 1237 (1984).

While is officer is conducting a courtesy contact, he is in a lawful vantage point to make plain view observations. The use of a flashlight to illuminate something he can see in plain view does not elevate the use of a flashlight to a search. The use of a flashlight has been upheld under the open view theory in a number of contexts. State v. Rose, 128 Wn.2d 388, 397, 909 P.2d 280 (1996).

In the case at hand, the Court of Appeals indicated that after the officer realized his mistake, he looked at the item in the back seat "with the aid of his flashlight." He clearly did not lack any lawful authority to proceed with this action when he was in a place he had a right to be. Nothing prohibits an officer from using a flashlight during a traffic stop when they see the driver throw something to the back of the car.

The Court of Appeals also indicated that the officer never turned off his overhead lights as he approached the Defendant's car. This was not unusual given that it was very dark out, around 12:30 a.m. **(RP 3)** The officer was stopped in an alleyway behind the defendant's car that was parked in a parking lane. **(RP 5)** The front of his vehicle was perpendicular to her car and at the back end of her vehicle for officer safety reasons. **(RP 6)** Keeping the overhead lights on in this situation

would be simply common sense. An officer is parked in the middle of an alley way in the middle of the night. There would be no reason for him to turn off the lights while he goes to tell Creed she is free to go.

The Court of Appeals is thus incorrect in concluding that Officer Ramos took actions that were "inconsistent with" telling Creed she was free to leave. Officer Ramos took completely legal actions based upon the Defendant's action of throwing drugs into the backseat of her car. The court's decision misapplies Penfield and Phillips. As such, this Court should reverse the Court of Appeals decision as Officer Ramos did not lack lawful authority when he observed the drugs in this case.

b. Assuming *arguendo* that the officer's actions were illegal, the drugs are not "fruit of the poisonous tree" because the connection between the evidence and the officer's actions was so attenuated as to dissipate the taint of any illegality.

The attenuation doctrine defines the parameters of the "fruit of the poisonous tree" doctrine. Evidence is not "fruit of the poisonous tree" if the connection between the challenged evidence and the illegal actions of the police is "so attenuated as to dissipate the taint." State v. Eserjose, 171 Wn.2d 907, 921, 259 P.3d 172 (2011).

The court's decision in State v. Vangren, 72 Wn.2d 548, 433 P.2d 691 (1967), illustrates the appropriateness of applying the attenuation doctrine under article I, section 7. State v. Eserjose, 171 Wn.2d 907, 921

(2011). There, police officers arrested a person who was suspected of defrauding an innkeeper of $200 through the use of credit cards bearing a false name. Id. The police officers erroneously believed that what was in fact only a misdemeanor constituted a felony. Id. Because they had no warrant for the person's arrest, and the misdemeanor had not been committed in their presence, the arrest was unlawful. Id. The defendant argued that his subsequent confession at the police station was inadmissible as "fruit of the poisonous tree." Id. (citing Vangen, 72 Wn.2d at 552). The Court held that his confession was properly admitted. Id.

This approach was upheld in State v. Eserjose, 171 Wn.2d 907, 921 (2011):

> When a court determines that evidence is not the "fruit of the poisonous tree," a defendant's privacy rights are respected, the deterrent value of suppressing the evidence is minimal, and the dignity of the judiciary is not offended by its admission. An alternative "but for" principle would make it virtually impossible to rehabilitate an investigation once misconduct has occurred, granting suspected criminals a permanent immunity unless, by chance, other law enforcement officers initiate an independent investigation.

The "fruit of the poisonous tree" doctrine does not operate on a "but for" basis. Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct.

407, 9 L.3d 2d 441 (1963). As explained in Vangen, the illegal seizure must "have been an operative factor in causing or bringing about the confession." Vangen, 72 Wn.2d at 555. The record shows that it was not in this case.

The Court of Appeals found that it was reasonable for Officer Ramos to tell Ms. Creed she was free to go, but held that "his observations of baggies of a tar-like substance on the floor of the backseat before sending her on her way does not provide an independent basis for admitting the evidence." The Court of Appeals relied on State v. Penfield, 106 Wn. App. 157, 159, 22 P.3d 293 (2001), which held that an officer may not proceed with a traffic stop of a driver for having a suspended license, once it is manifestly clear that the driver is not the registered owner, and thus, not the person with the suspended license.

In Penfield, an officer, after stopping a car for suspended license, asked the male driver for his driver's license when the registered owner, and person with the suspended license, was female. The officer arrested the male driver for an arrest warrant. A marijuana bud was found during a search of the defendant's person incident to arrest. The officer then called for a K-9 drug search and a large amount of meth was found under the vehicle. The actions taken by Office Ramos are in stark contrast to the actions taken by the officer if Penfield.

The Court of Appeals is incorrect in its application of the Penfield case to the case at bar. Here, Officer Ramos saw her throw away heroin in his presence. This wasn't simply a case of Officer Ramos proceeding with a traffic stop, as in Penfield. Ms. Creed voluntarily threw the heroin. As explained in the dissenting opinion: "nothing the officer did required or encouraged her to expose the substance. Once she did expose it, the officer did nothing wrong in shining his light to confirm the identity of the item." One who leaves contraband in plain sight, visible through an unobstructed window to anyone standing outside, does not have a reasonable expectation of privacy in the visible area. Nor is the mere use of a flashlight an intrusive method of viewing. State v. Rose, 128 Wn.2d 388, 399 (1996).

Here, Ms. Creed's actions are sufficiently attenuated. See State v. Eserjose, 171 Wn.2d 907, 921 (2011). The State would submit that the Court of Appeals is incorrect in its conclusion otherwise. The Court of Appeals has misapplied Penfield and Phillips to the facts of this case.

F. CONCLUSION

The Court should grant the State of Washington's Petition for Review for the reasons outlined above and the Court of Appeals decision should be reversed.

Respectfully submitted this 21st day of March, 2014.

__/s Tamara A. Hanlon_____
TAMARA A. HANLON, WSBA 28345
Senior Deputy Prosecuting Attorney

APPENDIX A

FILED

February 20, 2014

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Appellant, v. JOANNE ALYSSE CREED aka JOANNE ALYSSE NEYMAN, Respondent and Cross Appellant.	)	No. 30893-6-III PUBLISHED OPINION

SIDDOWAY, J. — In *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012), the Washington Supreme Court held that a police officer's *Terry*[1] stop of a driver on a dark evening for failure to have his headlights illuminated was supported by a reasonable, articulable suspicion even though it was later demonstrated that the officer stopped the driver only 24 minutes after sunset, whereas the applicable statute, RCW 46.37.020, generally requires that headlights be illuminated beginning one-half hour after sunset. "[T]he question of a valid stop does not depend upon [a defendant's] actually having violated the statute," the court held, "[r]ather, if [the officer] had a reasonable suspicion that he was violating the statute, the stop was justified." *Snapp*, 174 Wn.2d at 198.

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

In this case, the state of Washington asks us to extend the holding in *Snapp* to a *Terry* stop by a police officer who misread a license plate number, obtained information that the wrong number he reported was associated with stolen plates, and on that basis stopped a car bearing different-numbered plates and detained its driver.

An officer may reasonably suspect that it is a half hour after sunset, thereby requiring illuminated headlights, even though later, more complete information reveals that he was mistaken. An officer cannot reasonably believe that a car bears stolen license plates based on a WACIC[2] report addressing an unrelated license plate number. We affirm the trial court, which properly granted the motion to suppress.

FACTS AND PROCEDURAL BACKGROUND

As part of a routine check during his nighttime patrol, Officer Gabe Ramos observed a car being driven by Joanne Creed and attempted to run its license plate number against the WACIC database. The WACIC database is a compilation of vehicle information and plate numbers from stolen vehicles and license plates, among other information. Although the number on Ms. Creed's license plate was 154 YDK, Officer Ramos misread it and entered "154 YMK" into his computer. The WACIC printout returned for license plate 154 YMK indicated that it was stolen. Based solely on this information, Officer Ramos initiated a traffic stop.

[2] Washington Crime Information Center.

After he activated his overhead lights and Ms. Creed pulled into a nearby parking space, Officer Ramos realized that he had misread the plate number. While Ms. Creed waited in her car at the officer's direction, he ran the correct plate number and learned that she was not, in fact, driving a car with stolen plates. He approached Ms. Creed's driver's side door to inform her of his mistake and tell her she was free to go.

As he approached, however, he saw Ms. Creed toss an item behind her driver's seat. He could not tell what it was. When he reached her door, he used his flashlight to illuminate the inside of her car. With the aid of his flashlight, he recognized the item on the floor behind her seat as a "'tar like' substance[ ]" inside small baggies, which appeared to be heroin. Clerk's Papers (CP) at 81. He placed Ms. Creed under arrest for possession of a controlled substance.

After Officer Ramos advised Ms. Creed of her *Miranda*[3] rights, she admitted that the substance in her car was heroin. She later consented in writing to a search of her car and officers seized the heroin. A later inventory search of Ms. Creed's purse produced two loaded syringes. Ms. Creed was charged with one count of possession of a controlled substance—heroin—under RCW 69.50.4013(1).

Ms. Creed moved to suppress the heroin seized arguing, first, that the traffic stop was unlawful because "the only basis for the stop was based on the officer's unreasonable

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

mistake of fact," and therefore "[a] reasonable suspicion of criminal activity did not exist" at the time of the seizure. CP at 2. Second, she argued that, even if the initial stop was justified, "the officer exceeded the [scope] of any permissible stop by continuing to detain Ms. Creed after the officer realized his mistake." *Id.*

The trial court granted the motion to suppress and dismissed the case. While finding that the officer's mistake was made in "good faith," it also found that the mistaken reading of the license plate was "[t]he sole reason for the initial stop of Ms. Creed's vehicle." CP at 81. The court further found that even after learning that he had entered the wrong plate number, the officer continued to engage in investigatory acts without lawful authority. It concluded that "[t]he officer's mistaken reading of the license plate did not provide a reasonable articulable suspicion, based on objective facts that Ms. Creed had committed a violation of the law," that his "good faith mistake does not provide a basis for the traffic stop," and that "[t]here is no exception to the exclusionary rule which would permit the court to find that there was a break in the series of events which would cleanse the taint of the initial unlawful stop of the vehicle." *Id.*

The State appeals.[4]

[4] Although Ms. Creed filed a notice of cross appeal, she is not an aggrieved party and appears to have abandoned the issue in her brief.

ANALYSIS

I. Reasonableness of the *Terry* Stop

Based on the holding in *Snapp* that "the question of a valid stop does not depend upon [a driver's] actually having violated the statute[; r]ather, if [the officer] had a reasonable suspicion that he was violating the statute, the stop was justified," the State argues that Officer Ramos reasonably suspected a violation, and Ms. Creed's motion to suppress should have been denied. 174 Wn.2d at 198. The State carries the burden of showing that a particular search or seizure falls within one of the exceptions to the warrant requirement. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (citing *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)). It is only the trial court's conclusions of law that the State asks us to review, so our review is de novo. *State v. Phillips*, 126 Wn. App. 584, 109 P.3d 470 (2005).

The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." CONST. art. I, § 7. A vehicle stop, "although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment and article 1, section 7 of the Washington Constitution." *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Terry*, 392 U.S. 1; *State v. Lesnick*, 84 Wn.2d 940, 530 P.2d 243 (1975); *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969)).

"A *Terry* investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on 'specific, objective facts,' that the person detained is engaged in criminal activity or a traffic violation." *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007) (citing *Duncan*, 146 Wn.2d at 172-74 (citing *Terry*, 392 U.S. at 21)). To satisfy the reasonable suspicion standard, the officer's belief must be based on objective facts. Charles W. Johnson & Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 SEATTLE U. L. REV. 1581, 1681 (2013) (citing *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003); *State v. Seitz*, 86 Wn. App. 865, 869-70, 941 P.2d 5 (1997)).

This "objective basis," or "reasonable suspicion," must consist of "'specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity.'" *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000) (quoting *United States v. Michael R.*, 90 F.3d 340, 346 (9th Cir. 1996)). "Each individual possesses the right to privacy, meaning that person has the right to be left alone by police unless there is probable cause based on *objective facts* that the person is committing a crime." *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008) (emphasis added).

In *Snapp*, there were objective facts correctly recognized by the arresting officer (time of year, time of day, how dark it was) from which he could reasonably, even if mistakenly, infer that it was the time by which drivers should have turned on their

headlights. The officer understandably did not know exactly what time the sun set on the day in question, and he proved to be incorrect in believing that he stopped the driver 30 minutes after sunset. Yet his suspicion was still reasonable based on the objective facts that he correctly perceived.[5]

Suppose, however, it had been a clear day in late June, the officer again was understandably unaware of the exact time for sunset (8:31 p.m., it would turn out), and based on mistakes on his part about objective circumstances, he stopped a driver for an unilluminated headlight violation at 7 p.m. In this second case, the officer's suspicion of a statutory violation would be unreasonable. As the example illustrates, the outcome in *Snapp* depended not on the officer's good faith yet unreasonable inference from objective facts; it depended on his ability to point to objective facts supporting his reasonable but mistaken suspicion. An officer's suspicion, even if mistaken, must still be reasonable in light of the objective reality with which he or she is presented.

In asking us to extend *Snapp* by concluding that an officer's reasonable suspicion can be based on his or her own innocent mistakes, the State is essentially asking us to factor good faith into the reasonable suspicion analysis. Settled law has rejected good faith as a factor. As a leading treatise on search and seizure law has observed, in

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[5] *Snapp* further recognizes that "the headlight statute also provides that headlights must be on 'at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of one thousand feet ahead.'" 174 Wn.2d at 198 (quoting RCW 46.37.020).

discussing *Terry* stops:

> Certainly it is clear beyond question that the "*reasonable* belief" required for arrest is not to be determined by what the arresting officer did or did not believe, but rather by whether the available facts would "warrant a man of reasonable caution in the belief" that the person arrested had committed an offense.

4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5(a), at 646 (5th ed. 2012). And in *State v. Afana*, 169 Wn.2d 169, 179-80, 233 P.3d 879 (2010), our Supreme Court refused to recognize a different sort of "good faith"[6] as an exception to the exclusionary rule.

Extending *Snapp* on the facts presented here would elevate the innocence or culpability of an officer over the real concern of article I, section 7: the right of citizens to be protected from unwarranted invasions and intrusions. As our Supreme Court explained in *Day*, "[w]e suppress [unlawfully seized] evidence not to punish the police, *who may easily have erred innocently.* We suppress unlawfully seized evidence because we do not want to become knowingly complicit in an unconstitutional exercise of power. *See generally Olmstead v. United States*, 277 U.S. 438, 484-85, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting)." 161 Wn.2d at 894 (emphasis added).

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[6] The "good faith" that the State advanced as an exception to the hearsay rule in *Afana* was an officer's objectively reasonable reliance on something that appeared to justify a search or seizure when it was made, such as a statute or search warrant that later proved invalid. Good faith of that sort is recognized as an exception to the federal exclusionary rule for evidence seized in violation of the Fourth Amendment. *Afana*, 169 Wn.2d at 179-80.

This means that while police may sometimes *reasonably* rely on incorrect information provided by third parties, they may not *reasonably* rely on their own mistaken assessment of material facts. *See, e.g.*, *State v. Mance*, 82 Wn. App. 539, 918 P.2d 527 (1996) (holding that police may not rely upon information that is incorrect or incomplete through their fault); *State v. O'Cain*, 108 Wn. App. 542, 31 P.3d 733 (2001) (holding that a police dispatch indicating vehicle driven by defendant had been reported stolen did not provide reasonable suspicion for investigatory stop); *State v. Sandholm*, 96 Wn. App. 846, 848, 980 P.2d 1292 (1999) (noting that "exclusive reliance on the WACIC stolen vehicle report would not have provided sufficient basis for the State to establish probable cause to arrest"); *cf. State v. Gaddy*, 152 Wn.2d 64, 71, 74, 93 P.3d 872 (2004) (distinguishing officers' right to rely on erroneous license information from Department of Licensing, which is not a police agency and whose information is presumptively reliable, from information subject to the "fellow officer rule").

Under the exclusionary rule, "[i]f the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree." *Kennedy*, 107 Wn.2d at 4 (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). The trial court properly granted the motion to suppress.

II. The Attenuation Doctrine as an Alternative Justification

It was, of course, reasonable for Officer Ramos to approach Ms. Creed, explain his actions, and tell her she was free to go once he realized his mistake. Contrary to the

argument of the State, his observation of baggies of a tar-like substance on the floor of the backseat before sending her on her way does not provide an independent basis for admitting the evidence.

In *State v. Penfield*, 106 Wn. App. 157, 159, 22 P.3d 293 (2001), an officer stopped the defendant after he ran a check on the license plate number of the car he was driving and found that the license of the registered owner—a woman—was suspended. It was as the officer approached the car that he first realized the driver was male. Nevertheless, the officer asked the driver for his license. This court ruled that the stop was unlawful, noting that the officer

> could not point to any articulable suspicion of criminal activity on the part of [the driver], once it became evident that he was not the registered owner of the vehicle. The fact the registered owner was a woman and the fact the driver here was a man indicated conclusively to Officer Vaughn that the driver was not the person who the Department of Licensing had reported as having a suspended license.

Id. at 161. As this court later explained in *Phillips*, "an officer may not, without additional grounds for suspicion, proceed with a stop based on a registration check once it is manifestly clear that the driver of the vehicle is *not* the registered owner." 126 Wn. App. at 588.

Similar facts were present in *State v. Chatton*, 11 Ohio St. 3d 59, 463 N.E.2d 1237 (1984), which both parties cite in their briefs. In that case, police stopped a vehicle because it had neither a front nor a back license plate. As the officer approached the

vehicle, he noticed a temporary license plate beneath the rear window, which was consistent with state law. The question in *Chatton* was whether the police officer had "continuing justification to detain [the driver] and demand production of his driver's license" once the officer observed the temporary tags in the rear of the vehicle. *Id.* at 60-61. The Ohio Supreme Court held that he did not.

This is not to say that Officer Ramos was required to "simply drive off without explanation once suspicion had been dispelled, leaving the driver to wonder what had occurred," as facetiously suggested by the State. Br. of Appellant at 11. *Phillips* recognized that in the case of a vehicle stop based on the revoked or suspended license of a vehicle's owner, an officer can detain the driver long enough to dispel suspicion that he or she is the registered owner. 126 Wn. App. at 588. *Chatton* observed that "as a matter of courtesy, [the officer] could have explained to [the driver] the reason he was initially detained" and sent him on his way. 11 Ohio St. 3d at 63. That sort of momentary, entirely noninvestigative contact would have been reasonable here, too. What *Chatton* held the officer could not do, and what was unlawful here, was to "unite [a] search" to that courtesy contact—in *Chatton,* by asking the driver to produce his driver's license. *Id.*

Here, the trial court found that after Officer Ramos realized he had no reasonable suspicion justifying Ms. Creed's detention, he took a number of actions inconsistent with what would have been the clearly permissible course of action of promptly telling her she

was free to leave. Instead, after realizing his mistake, the officer "ordered the driver . . . to remain in the vehicle"; "held her there for several seconds while he checked the proper license plate number"; "never turned off the overhead lights on his patrol vehicle"; and "with the aid of his flashlight, looked at the [unrecognizable item he had seen her toss into the backseat floor] from his position outside the vehicle," determining at that point that it was heroin. CP at 81. The State does not challenge these findings, which are verities on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009).

Under *Penfield* and *Phillips*, Officer Ramos lacked lawful authority to proceed with these actions once he realized that he lacked reasonable suspicion for the stop. The fruits of his improper conduct were, again, properly excluded by the trial court.

Affirmed.

Siddoway, J.

Siddoway, J.

I CONCUR:

Kulik, J.

Kulik, J.P.T.

KORSMO, C.J. (dissenting) — The majority nicely analyzes why the stop in this case is invalid and I agree with that portion of the opinion. An officer cannot manufacture probable cause through negligence. That said, I disagree with the conclusion that the evidence Joanne Creed tossed away in front of the officer was the fruit of the stop. As there was no exploitation of the illegality, the exclusionary rule has no application here. I would reverse and remand this matter for trial.

When illegal police behavior directly leads to evidence of a crime, the evidence will be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). However, when the evidence is not directly the fruit of the police illegality, but merely follows after it in time, the evidence need not be excluded. *Id.* at 491-92. This is known as the attenuation doctrine. *Id.* at 491 (citing *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)).

Washington likewise excludes evidence that is directly discovered as a result of police violation of article I, section 7. *State v. Bonds*, 98 Wn.2d 1, 9, 653 P.2d 1024 (1982). Washington has repeatedly rejected a "but for" test of causation that would require the suppression of any evidence discovered subsequent to an illegality. *E.g.*,

State v. Mierz, 127 Wn.2d 460, 474-75, 901 P.2d 286 (1995) (declining to suppress evidence of defendant's assault on officers following unlawful entry); *Bonds*, 98 Wn.2d at 10-14 (declining to suppress confession following illegal arrest and return from Oregon where officers had probable cause to make arrest); *State v. Vangen*, 72 Wn.2d 548, 554-55, 433 P.2d 691 (1967) (declining to suppress confession following allegedly improper arrest).

Officer Gabe Ramos did not exploit his mistake; instead, Ms. Creed made her own mistake by tossing the heroin to the backseat in his presence, putting it in open view. The officer simply walked to the car to tell her that he had erroneously stopped the vehicle when Ms. Creed acted. These facts are totally unlike those of the cases the majority relies upon—*State v. Penfield*, 106 Wn. App. 157, 22 P.3d 293 (2001), and *State v. Chatton*, 11 Ohio St. 3d 59, 463 N.E.2d 1237 (1984). As noted by the majority, in each of those cases the officer exploited the erroneous traffic stop by requesting and receiving the driver's license, checking on the driver's status, and then acting upon information about the driver's status.

There was no such exploitation here. The officer stopped the car and told Ms. Creed to remain in it. He then discovered his mistake and typed in the correct license number in order to determine the status of the vehicle. He then went to tell the driver of

the error and that she was free to go. Ms. Creed, however, decided to try and dispose of the heroin. Officer Ramos did not err in using his flashlight to identify the substance she threw away in his presence. The evidence was not discovered by the officer's actions. The only thing the officer arguably did wrong after realizing that he had typed in the wrong license plate number was to check the actual plate number before telling Ms. Creed that she could leave. The apparently brief[1] delay there preceded Ms. Creed's actions but it did not cause them.

Ms. Creed voluntarily threw the heroin; nothing the officer did required or encouraged her to expose the substance. Once she did expose it, the officer did nothing wrong in shining his light to confirm the identity of the item. He was in a place he had a right to be and simply responded to her action—and he did all of it while walking up to talk to her.

Ms. Creed's voluntary action in response to the officer's mistake was not the fruit of that mistake. This case is no different than if Ms. Creed had assaulted the officer as occurred in *Mierz*. The officer may have made the first mistake, but he did not cause her to take action. She made that choice herself.

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[1] The officer testified that it took only two minutes from the traffic stop to the discovery of the heroin.

The heroin was not discovered by the officer exploiting the erroneous traffic stop. Accordingly, the suppression ruling should be reversed and the matter remanded for trial. I respectfully dissent from the majority's contrary conclusion.

Korsmo, C.J.

IN THE COURT OF APPEALS STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Petitioner, vs. JOANNE A. CREED, Respondent.	Case No.: 30893-6-III DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on March 21, 2014, by agreement of the parties, I emailed a copy of the State's Petition for Review to Janet Gemberling at admin@gemberlaw.com and jan@gemberlaw.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21st day of March, 2014 at Yakima, Washington.

s/ Tamara A. Hanlon
TAMARA A. HANLON, WSBA #28345
Deputy Prosecuting Attorney
at Yakima, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us