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DECEMBER 8, 2014
Court of Appeals
Division III
State of Washington

32517-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

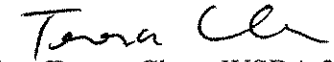
JASON MICHAEL TAIT,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the trial court err in denying the motion to suppress where the the officer intended and did arrest the Defendant for DWLS and the stop did not exceed the scope of the lawful investigation?
2. Did the court abuse its discretion in imposing a condition of substance abuse treatment where the Defendant was found in possession of methamphetamine in a glass pipe in his coat pocket and unprescribed hydrocodone in his car?

IV. STATEMENT OF THE CASE

This appeal challenges the lower court's denial of the defense motion to suppress, which argued that the stop was pretextual.

On January 25, 2013, at about four in the afternoon, Walla Walla

police officer Jeremy Pellicer observed a car parked on the street, which he recognized as belonging to the Defendant Jason Tait. RP 3-4. Officer Pellicer knew the Defendant to have a chronically suspended driver's license. RP 3-4. Five minutes later, the Defendant got into the car, drove, and was promptly pulled over by the officer. RP 4-5. From the outset, the officer had determined to arrest the Defendant and book him into jail, because the Defendant's driving violations had become habitual. RP 5, 7-8, 22. Officer Pellicer contacted Officer Gunner Fulmer to assist in the arrest. RP 5, 31.

Officer Pellicer testified that he called Officer Fulmer, because it was policy to always call for backup in an arrest. RP 16-17. He testified that he knew there was a possibility that the Defendant may be in possession of controlled substances. RP 13-14. The officer candidly admitted to wanting to search the car. RP 25. However, he testified that it would be incorrect to say that a major motivation for the stop was to search the Defendant for controlled substances. RP 13-14. Regardless of any search, his intent was to arrest for the repeated driving violations. RP 5, 7-8, 15, 26-27. Officer Pellicer told Officer Fulmer that he had stopped the Defendant for driving while suspended; he did not advise that he had stopped the Defendant in order to search the car. RP 40. Officer Pellicer

then wrote out the driving citation as Officer Fulmer contacted the Defendant. RP 7-8, 31, 40.

From numerous contacts with the Defendant, Officer Pellicer knew Tait to carry drugs and drug paraphernalia. RP 6. A few days earlier, Officer Pellicer received information that the Defendant may be using or dealing methamphetamine; he had passed this information on to Officer Fulmer, who is the canine officer. RP 5, 10, 21, 38.

When Officer Fulmer arrived, the Defendant denied having anything illegal in the car and refused to give consent to search the car. RP 18, 32. Officer Fulmer then took his canine around the vehicle to sniff the outside of the car for drugs. RP 8. After the dog alerted, a tow company was called to impound the car while police applied for a search warrant. RP 8, 33-35.

The Defendant was placed under arrest. RP 9, 35. Officer Pellicer found a glass pipe on the Defendant's person in his coat pocket. RP 9. The residue in the pipe tested positive for methamphetamine. RP 9.

After obtaining a search warrant, the officers searched the car and found 36 hydrocodone pills in a bottle with defaced label. CP 2, 4-5; RP 9.

The superior court denied the Defendant's motion. CP 57-59; RP 55. The court made the following findings: There was a lawful basis to

stop and to arrest the Defendant for DWLS (driving with a suspended license). CP 59. The officer would have conducted the stop regardless of any desire to search the Defendant for drugs. CP 59. "[B]ased on Officer Pellicer's testimony," the stop was not pretextual. RP 55. The detention for the canine sniff did not exceed the amount of time it took to write the citation. RP 55. Therefore, the detention was reasonable and did not exceed the scope of the lawful investigative stop. RP 55. The court noted that the methamphetamine was found on the Defendant's person during a search incident to arrest, therefore, any challenge to the canine sniff "is for another later case." RP 55. The search of the Defendant was valid as incident to arrest. CP 59.

The Defendant Jason Michael Tait was charged with possessing hydrocodone, possessing methamphetamine, use of drug paraphernalia, and driving with a suspended license. CP 6-8. The parties reached an agreement in which the Defendant stipulated to facts necessary for conviction on count two, and the State dismissed the remaining charges. RP 64. After reviewing the stipulated findings, the court convicted the Defendant of possessing methamphetamine. CP 61-64.

The court found the Defendant has a chemical dependency that contributed to the offense and ordered him to participate in outpatient drug

treatment at his own expense. CP 66, 75. The Defendant challenges this finding on appeal.

V. ARGUMENT

A. THE COURT DID NOT ERR IN DENYING THE MOTION TO SUPPRESS.

The Defendant challenges the lower court's denial of the defense motion to suppress. Appellant's Brief at 5. Because the court found that the officer would have conducted a traffic stop regardless of any suspicion of drug activity, the court did not err in finding the stop was not pretextual. Because the court found the canine sniff did not exceed the amount of time it took to write the citation, the court properly found that the detention was reasonable and did not exceed the scope of the lawful investigative stop.

A trial court's decision on a suppression motion is reviewed de novo. *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).

In *State v. Arreola*, the Washington Supreme Court held that a mixed-motive traffic stop is not pretextual so long as the officer's desire to address the traffic offense is an actual, conscious, and independent cause of the traffic stop. *State v. Arreola*, 176 Wn.2d at 290, 297.

In that case, the officer received a report of a possible DUI (driving

under the influence) in progress. *State v. Arreola*, 176 Wn.2d at 288. He observed Arreola's car which matched the description from the report, but the officer did not observe any impaired driving. *State v. Arreola*, 176 Wn.2d at 288-89. The officer stopped Arreola's car to cite the driver for an altered exhaust, which is the officer's practice, but primarily to investigate the DUI. *State v. Arreola*, 176 Wn.2d at 289. The court of appeals found the stop to be pretextual, because the officer's desire to cite for the altered exhaust was admittedly subordinate to his desire to investigate the DUI. *State v. Arreola*, 176 Wn.2d at 290. The supreme court reversed the court of appeals, holding that as long as any motive is legitimate and the legitimate motive is an actual, conscious, and independent reason for the stop, article I, section 7 will not be violated if the officer exercises discretion appropriately and the scope of the stop remains reasonably limited based on its lawful justification. *State v. Arreola*, 176 Wn.2d at 298-99.

The Defendant argues that the officer exceeded his discretion and the scope of the stop by summoning the canine officer. Appellant's Brief at 7-8. This is an incorrect analysis of both this case and *Arreola*.

First, as the trial court explained, challenges related to the canine sniff are for another case. RP 55. Officer Pellicer repeatedly explained

that he intended to arrest the Defendant from the outset, regardless of the outcome of the canine sniff. RP 5, 7-8, 15, 26-27. And he did arrest the Defendant for DWLS. **The evidence of conviction (for possessing methamphetamine) was not the fruit of the sniff of the car, but was discovered on the Defendant's person incident to his arrest.** Therefore, the canine sniff is irrelevant to the arrest and the conviction on count two.

Second, the *Arreola* opinion finds that discretion is properly exercised in a mixed-motive stop, when the officer truly does follow through with an investigation of the violation which legitimized the stop. Thus in *Ladson*, "the officer abused his discretion by conducting the stop without deeming it reasonably necessary to enforce license plate tab regulations." *State v. Arreola*, 176 Wn. 2d at 298. But in *Arreola*, the officer's appropriate use of discretion was apparent because he cited for the exhaust violation.

> A mixed-motive stop does not violate article I, section 7 so long as the police officer making the stop exercises discretion appropriately. Thus, ***if a police officer makes an independent and conscious determination that a traffic stop to address a suspected traffic infraction is reasonably necessary in furtherance of traffic safety and the general welfare, the stop is not pretextual.*** That remains true even if the legitimate reason for the stop is secondary and the officer is motivated primarily by a hunch or some other reason that is insufficient to justify a stop. In such a case, the legitimate ground is an independent cause of the stop,

> and privacy is justifiably disturbed due to the need to enforce traffic regulations, as determined by an appropriate exercise of police discretion. Any additional reason or motivation of the officer does not affect privacy in such a case, ***nor does it interfere with the underlying exercise of police discretion, because the officer would have stopped the vehicle regardless***.

State v. Arreola, 176 Wn. 2d at 298-99 (emphasis added). The *Arreola* opinion directs that:

> The trial court's inquiry should be ***limited*** to whether investigation of criminal activity or a traffic infraction (or multiple infractions), for which the officer had a reasonable articulable suspicion, was an actual, conscious, and independent cause of the traffic stop.

State v. Arreola, 176 Wn. 2d at 299-300 (emphasis added).

Here the officer cited the Defendant with DWLS; and the prosecutor charged the Defendant with DWLS. It is plain from the officer's behavior and from the testimony which the trial court credited that the DWLS was an actual, conscious, and independent cause of the stop. That is the limit of the inquiry created under *Arreola.*

The canine sniff did not expand the intrusion into the Defendant's privacy. The trial court found that the canine sniff did not delay the Defendant, because it was completed before Officer Pellicer had finished writing the citation for use in the arrest. Nor is it a search within the meanings of either the state or federal constitution for a trained canine to

sniff an object in a public location. *State v. Hartzell*, 156 Wn. App. 918, 929-30, 237 P.3d 928 (2012) (citing *State v. Boyce*, 44 Wn. App, 724, 729, 723 P.2d 28 (1986) (not a search within the meaning of the Washington constitution when a canine sniffs an object from an area where the defendant does not have a reasonable expectation of privacy); *United State v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (exposure of luggage, which was in a public place, to a canine sniff is not a search for Fourth Amendment purposes). Therefore, the scope of the stop was reasonably limited to its lawful justification.

The lower court appropriately applied *Arreola* in deciding to deny the suppression motion. There was no error.

B. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION IN MAKING A FINDING THAT THE OFFENSE WAS RELATED TO THE DEFENDANT'S CHEMICAL DEPENDENCY.

The Defendant challenges the sentencing court's finding that chemical dependency contributed to the offense. Appellant's Brief at 8. The Defendant acknowledges that such a finding authorizes the treatment condition imposed. Appellant's Brief at 9. The record supports the court's finding.

From numerous contacts, police knew the Defendant to have been

in possession of illegal drugs and the paraphernalia to personally consume them. RP 6. Police had information a few days before the offense that the Defendant was involved with methamphetamine. RP 21. In this offense, police found a glass pipe with methamphetamine residue in the Defendant's coat pocket and a defaced bottle with 36 pills of hydrocodone in his car. CP 2, 4-5. The pipe with methamphetamine residue indicates the Defendant's personal and recent use.

The Defendant asserts that it is impermissible to make such a finding absent a medical diagnosis. Appellant's Brief at 9-10. No authority supports this argument. The imposition of sentencing conditions is reviewed for abuse of discretion, reversing only if a sentence is manifestly unreasonable such that no reasonable person would take the view adopted by the court. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

The Defendant relies on *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993). This opinion does not indicate that before a court can make a finding of chemical dependency that it must have a medical diagnosis. This case reverses an exceptional sentence down predicated on the defendant's cocaine addiction. The opinion holds that in pleading guilty, the defendant acknowledged the mental state necessary for the offense,

therefore, the sentencing court could not find otherwise in justifying a departure from the standard range. *State v. Hutsell*, 120 Wn.2d at 923-24.

A few cases have addressed challenges to the substance abuse treatment.

In *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013), the court reversed the requirement of a chemical dependency evaluation and treatment, ***not*** because there was no medical diagnosis, but because there was "no evidence and no finding [ ] that any substance except alcohol contributed to the sentenced offense." The defendant conceded that an *alcohol* evaluation and recommended treatment was properly ordered "[g]iven the evidence of alcohol consumption." *State v. Warnock*, 174 Wn. App. at 613.

Similarly, in *State v. Kinzle*, 181 Wn. App. 774, 786, 326 P.3d 870 (2014), the court of appeals did not require a medical diagnosis, but struck the evaluation and treatment requirement because there was no evidence to suggest that a substance *other than alcohol* contributed to the offense.

In *State v. Powell*, 139 Wn. App. 808, 819, 162 P.3d 1180 (2007), the defendant argued that his drug use was not related to the offense. The court found that there was a sufficient record to support imposition of the condition based on the defendant's consumption of methamphetamine

prior to committing the offense and the request of both attorneys for imposition of the condition. *State v. Powell*, 139 Wn. App. at 820.

Here the court's finding is well supported in the record. There is no authority which prevents a finding of chemical dependency absent a medical diagnosis. The finding and condition must be affirmed.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: December 8, 2014.

Respectfully submitted:

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Andrea Burkhart <Andrea@BurkhartandBurkhart.com> Jason Michael Tait 701 N. 7th Ave. Walla Walla, WA 99362	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 8, 2014, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**