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SUPREME COURT NO. 96851-9

NO. 35704-0-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC OLSEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable M. Scott Wolfram, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Eric Olsen, the appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Olsen, ___ Wn. App. ___, ___ P.3d ___, 2019 WL 245388 (No. 35704-0-III, filed January 17, 2019).¹

B. ISSUE PRESENTED FOR REVIEW

Police stopped the car Olsen was driving purportedly to cite him for having an expired vehicle registration. Officers acknowledged however, that they were "looking for drugs" after having earlier seen the car parked in the driveway of a house suspected of drug activity. A second officer arrived within minutes of Olsen's car being stopped and immediately began questioning Olsen what he was doing at the house. Olsen eventually admitted to having a small amount of heroin in the car after being told that a drug detecting dog would search the car if he did not agree to a search. Olsen was never cited for having an expired vehicle registration, but rather, for displaying disfigured license plates. Olsen was also charged with possession of heroin and drug paraphernalia after police discovered the items in his car.

¹ A copy of the opinion is attached as an appendix.

Defense counsel's motion to suppress the evidence as an unlawful pretext stop was denied on the basis that officers conducted a lawful mixed motivation stop. The Court of Appeals concluded that the evidence supported the trial court's findings. Appendix at 3-5. The Court of Appeals also concluded that the possibility that an invalid basis for the stop existed did not invalidate the purported reason for the stop under this Court's opinion in State v. Arreola.² Appendix at 5.

Should review be granted under RAP 13.4(b)(1), (b)(3), and (b)(4) because the Court of Appeals decision relying on State v. Arreola conflicts with this Court's opinion in State v. Ladson,³ and involves significant questions of Constitutional law and substantial public interest, where officers were admittedly "looking for drugs", the seizure was objectively unreasonable in light of the expired vehicle registration justification for the stop, and absent the alleged registration violation, the presence of Olsen's car near a suspected drug house did not justify a warrantless seizure?

² 176 Wn.2d 284, 290 P.3d 983 (2012).

³ 138 Wn.2d 343, 979 P.2d 833 (1999).

C. STATEMENT OF THE CASE

Narcotics enforcement police officer, Gunner Fulmer, was conducting a patrol in Walla Walla "areas that are known for high volume narcotics use and trafficking[.]" RP⁴ 22. Fulmer saw an unoccupied car that he did not recognize parked in the driveway of a house that he routinely surveilled for suspected drug activity. RP 22, 35. Fulmer searched the license plate of the car and discovered the registration had expired. RP 23. Fulmer notified other Walla Walla police officers that the car's registration had expired. RP 3, 9, 14, 22.

At some point, Fulmer also notified police officers that the car had left the house.⁵ RP 3, 9, 14, 22. In response, Walla Walla police officer Paul Green headed toward where the car was traveling. RP 3, 14-15. Green observed that both the 2016 and 2017 tabs were displayed on the license plate, but that the month tab was absent. RP 3, 6. Green also explained that his computer showed the registration on the car had expired. RP 4-5.

⁴ The index to the citations to the record is found in the Brief of Appellant (BOA) at 3, n.2.

⁵ Fulmer's written report indicated that he saw the car leave the house. CP 15. Fulmer explained at the 3.6 hearing however, that his written report was incorrect, and he had not personally watched Olsen's car leave the house. RP 34-35. In contrast, officer Paul Green corroborated Fulmer's written report and testified that Fulmer said he saw the car leave the house. RP 14-15.

Green decided to stop the car, explaining that if he "had been on patrol" and saw a car displaying tabs in this manner he would have stopped it. RP 3-4, 18. Green denied that Fulmer ordered him to stop the car. RP 9, 14.

Olsen was driving the car. There is no evidence Olsen displayed any signs of drug or alcohol impairment. Olsen did not have a driver's license with him, but Green confirmed he had a valid driver's license. RP 4-5.

Green could not recall whether he told Olsen the car's registration had expired. Nor could Green recall whether Olsen had a copy of the car's registration with him. Instead, Green told Olsen he stopped him because he had improperly displayed tabs. RP 4-5. Green later discovered one of the tabs was for a different car registered in Olsen's parent's names. RP 6. Green returned to his car, where over the next 15 minutes he investigated and wrote Olsen a citation for the improperly displayed tabs. RP 5-6. He did not issue a citation for the expired registration. RP 11-13.

Within five minutes of Green stopping Olsen's car, officer Fulmer appeared at the scene with his drug detecting dog and another police officer. RP 7, 10, 18-19, 25-26, 38-39, 44. Fulmer began speaking with Olsen and immediately asked about him about drugs. RP 35. Fulmer explained his "intent" and "goal" in questioning Olsen was not to address "tabs or

anything about registration". RP 35, 39. As Fulmer acknowledged, "this was a stop about investigating drug activity[.]" RP 39.

Green returned to his car and could not hear what Fulmer and Olsen were discussing. RP 7-8. Green explained however, "I knew that he [Fulmer] was talking to Mr. Olsen about drugs because that's what Officer Fulmer usually does." RP 8, 10. Green also acknowledged that "we were looking for drugs." RP 12, 17.

In response to Fulmer's questioning, Olsen explained that he was coming from a friend's house where he smoked marijuana. RP 26, 36-37. Fulmer feigned surprise and responded that he believed Olsen's friend used heroin. RP 26-27. Olsen did not respond. Fulmer told Olsen that he was going to get his drug detecting dog and walk it around the car. RP 28, 56. If the dog indicated drugs were present, police would then impound and search the car. RP 27-28, 54. Olsen started reaching toward the center console compartment of the car. RP 26-28, 47. When Fulmer told him to stop reaching, Olsen explained that he had a syringe and a small amount of heroin in the car. RP 28, 51-55.

Fulmer ordered Olsen out of the car and advised him of his constitutional *Ferrier*⁶ warnings. Olsen consented to a search of his car.

⁶ State v. Ferrier, 136 Wash.2d 103960 P.2d 927 (1998).

Fulmer arrested Olsen after finding a syringe and heroin in the car. RP 29-30, 55. Based on this incident, Olsen was charged one count of possession of heroin and one count of use of drug paraphernalia third degree rape following a bench trial.

At the suppression hearing, Olsen confirmed that Fulmer never asked him about the car registration or license plate tabs. RP 45. As Olsen explained, the citation for improperly displayed tabs was later dismissed by the court. RP 48-49.

Olsen argued that his seizure was unlawful because police used the improper pretext of a license plate tab violation to conduct an investigation into drugs. Olsen noted that the officers' subjective intent was evidenced by Fulmer's nearly immediate arrival and questioning about drug use. Olsen argued that the search of his car was unlawful, thereby requiring suppression of the items discovered in his car. RP 58-61, 64; CP 7-27.

The State maintained that Olsen's seizure was not improperly pretextual under State v. Arreola. The State noted the officers indicated they would have stopped Olsen for the vehicle registration and improper license plate display regardless of their desire to also investigate drugs. RP 56-58, 62-63; CP 53-58.

The trial court denied Olsen's motion to suppress, explaining that the officers stated purpose of stopping the car for license tab infractions was

a "routine" and "legitimate basis". RP 64-65; CP 29-32. The trial court's written findings indicated that Officer Green had a lawful basis to stop the car due to the expired registration, Green would have conducted the stop regardless of Officer Fulmer's earlier observations, and Fulmer did not detain Olsen beyond the scope of Green's stop. The trial court noted however, that "had the two officers been reversed in the sense that had Fulmer pulled the vehicle over, I'm thinking at that point the defense has a pretty good argument. But it was Officer Green who pulled the vehicle over. It was Officer Fulmer who watched the vehicle leave." RP 64.

On appeal, Olsen argued that State v. Ladson was still good law, State v. Arreola was factually distinguishable, and Arreola was incorrect and harmful. Brief of Appellant (BOA) at 8-19.

The Court of Appeals rejected Olsen's argument, concluding "the trial court's findings are supported by the evidence and justify its conclusions of law." Appendix at 3. The Court of Appeals also concluded that the possibility an invalid basis for the stop existed did not invalidate the purported reason for the stop under this Court's opinion in State v. Arreola. Appendix at 5. In reaching this conclusion, the Court of Appeals failed to cite to, much less address, this Court's opinion in State v. Ladson.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1), (b)(3), and (b)(4) TO RESOLVE THE CONFLICT BETWEEN *STATE V. LADSON* AND *STATE V. ARREOLA* AND TO ADDRESS SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW AND SUBSTANTIAL PUBLIC IMPORTANCE.

Review is warranted because this case presents a significant question of constitutional law. RAP 14.3(b)(3). Under the Fourth Amendment and Article I, Section 7, a warrantless seizure is per se unreasonable unless it falls within one of the narrow, carefully delineated, and jealously guarded exceptions to the warrant requirement. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). “These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.” State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Pretextual traffic stops violate Article 1, Section 7 of the Washington State Constitution. State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999).

This case also presents an issue of substantial public importance under RAP 13.4(b)(4). Specifically, whether a mixed motive stop nonetheless violates Article 1, Section 7. Ladson, 138 Wn.2d at 358.

Finally, this case presents an opportunity for this Court to reconsider its opinion in Arreola and clarify the inherent conflict that exists between its opinion in that case and this Court's opinion in Ladson. For this reason, review is warranted under RAP 13.4(b)(1).

1. The Stop of Olsen's Car was Unconstitutionally Pretextual.

A "pretextual stop" describes a stop in which an alleged violation is "a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement." Ladson, 138 Wn.2d at 358. It is "a false reason used to disguise a real motive." State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). Moreover, it represents an abuse of a law enforcement officer's discretion to establish enforcement priorities:

Given the complicated nature of police work and the regulation of traffic in particular, police must exercise discretion in determining which traffic infractions require police attention and enforcement efforts. Yet in a pretextual traffic stop, a police officer has not properly determined that the stop is reasonably necessary in order to address any traffic infractions for which the officer has a reasonable articulable suspicion; instead, the traffic stop is desired because of some other (constitutionally infirm) reason -- such as a mere hunch regarding other criminal activity or another traffic infraction -- or due to bias against the suspect, whether explicit or implicit.

State v. Arreola, 176 Wn.2d 284, 295-96, 290 P.3d 983 (2012).

This Court's analysis in Ladson is instructive because it involved a traffic stop similar to the one here. Officers Mack and Ziesmer were on

gang patrol when they recognized Fogel, the driver of the car in which Ladson was riding, from a rumor that Fogel was involved with drugs. The officers followed Fogel's car for several blocks in the hopes of finding some reason to investigate for possible drug activity. When they determined the license plate tabs were expired, they pulled the car over for a traffic infraction in order to pursue a criminal investigation. Ladson, 138 Wn.2d at 346.

Following the pretextual stop, Ladson was ordered out of the car and patted down. Police found a handgun in Ladson's jacket. Police also found marijuana and \$600 in cash in Ladson's jacket during the search incident to his arrest. Ladson, 138 Wn.2d at 346-47.

Ladson moved to exclude the evidence on the grounds the search was based on a pretext and therefore illegal. The trial court granted Ladson's motion to suppress, but the Court of Appeals reversed. Ladson, 138 Wn.2d at 347 (citing Whren v. United States⁷).

This Court reversed the Court of Appeals, and held the initial traffic stop was illegal because it was used as a pretext to pursue a criminal investigation. Since the stop was unlawful, the subsequent search was unlawful. Ladson, 138 Wn.2d at 360 (citing State v. Kennedy, 107 Wn.2d

⁷ 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

1, 4, 726 P.2d 445 (1986)). Therefore, the Court suppressed the subsequently seized evidence and reversed Ladson's conviction. Ladson, 138 Wn.2d at 360.

The facts in Ladson are similar to the facts at issue here. Like the officers in Ladson, here Green and Fulmer were on proactive patrols in "areas that are known for high volume narcotics use and trafficking." RP 22. Fulmer saw Olsen's car parked in the driveway of a house he routinely surveilled for suspected drug activity. Fulmer did not recognize the car and no one was inside it at the time. RP 14, 35. Fulmer nonetheless ran the car's license plate and discovered the registration was expired. RP 21-22. Fulmer then informed other officers, including Green, that the car's registration was expired and that the car was leaving the area.

In response to Fulmer's information, Green immediately headed toward the location Olsen's car was traveling. Green then followed the car long enough to confirm that the registration was expired. RP 3-5. There is no evidence Green observed any driving that was consistent with drug or alcohol use.

Though Green claimed to be stopping Olsen for a registration violation, he explained to Olsen that the reason for the stop was that he had improperly displayed car tabs. RP 5. Green could not recall telling Olsen that his registration was expired and did not cite Olsen for expired

registration.⁸ RP 5, 11-13. Moreover, Green freely admitted that the purpose of stopping Olsen's car was to look for drugs. RP 12, 17-18.

Within five minutes of Olsen's car being pulled over, Fulmer also responded to the scene with his drug detecting dog. Green did not ask for Fulmer's assistance in processing the scene or issuing the improperly displayed car tabs citation. Rather, Fulmer appeared on his own initiative with the stated goal of "investigating drug activity." RP 35, 39. Fulmer asked Olsen no questions concerning the car's expired registration or improperly displayed license tabs.

The totality of the circumstances here shows that the officers' subjective intent for stopping Olsen's car was to conduct a drug investigation. But, although Fulmer may have suspected that Olsen was visiting the house with suspected drug activity, there is no evidence anyone actually saw Olsen enter or leave the house, or otherwise interact with any of the home's occupants. Fulmer had never even seen Olsen's car at the house before. RP 22. Numerous cases have repeatedly made clear that stopping someone to investigate suspected criminal drug activity requires reasonable individualized suspicion, not some general aura of suspiciousness radiating from a compromised location. See e.g. State v.

⁸ Failing to cite a driver for traffic infractions is a factor to consider when determining the officer's subjective intent for making the stop. State v. Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), rev. denied, 142 Wn.2d 1027 (2001).

Weyand, 188 Wn.2d 804, 816-17, 399 P.3d 530 (2017) (walking quickly and looking around, even after leaving a house with extensive drug history at 2:40 a.m., is not enough to create a reasonable, articulable suspicion of criminal activity justifying a *Terry*⁹ stop); State v. Fuentes, 183 Wn.2d 149, 164, 352 P.3d 152 (2015) (visiting an apartment of a woman known to have a conviction for possession with intent to distribute and observing Sandoz's pale, thin face, visible shaking, and "big" eyes did not give the officer reasonable suspicion that Sandoz was engaged in criminal activity); State v. Doughty, 170 Wn.2d 57, 60, 239 P.3d 573 (2010) (finding seizure illegal where police did not know what Doughty was doing at suspected drug house); State v. Gleason, 70 Wn. App. 13, 18, 851 P.2d 731 (1993) (where Gleason was seized leaving apartment complex with history of drug sales, finding seizure unwarranted where it was the first time Gleason was seen in the area, officers did not know what occurred at the apartments, and there was no evidence Gleason acted suspiciously).

The stop of Olsen's car ostensibly for a registration violation, but in reality, to investigate drugs for which there was no reasonable individualized suspicion, is precisely the type of pretext stop the Ladson court condemned. As Ladson warned, "The ultimate teaching of our case

⁹ Terry v. Ohio, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

law is that police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope the reason for the exception." 138 Wn.2d at 357. Just like the officers in Ladson, here Green and Fulmer used the expired vehicle registration as an excuse to make the stop because the suspected drug activity did not fit into one of the narrowly drawn exceptions to the warrant requirement under the Fourth Amendment and Article I, Section 7.

Ladson remains good law. Nonetheless, the Court of Appeals opinion fails to cite, much less address, it. Instead, in concluding that the trial court's findings were supported by the evidence and justified its conclusion, the Court of Appeals opinion relied solely on this Court's opinion in State v. Arreola. Arreola however, is distinguishable from what transpired in this case.

In Arreola, an officer responding to a tip concerning a suspected DUI followed the car for half a mile and did not observe any signs of DUI, but stopped the car for having an illegally altered exhaust. 176 Wn.2d at 288-89. After approaching the car, the officer observed detected an "odor of alcohol," and noticed the driver's "eyes were red and watery." The officer also saw "two passengers and several open containers of alcohol in plain view inside the vehicle." Arreola, 176 Wn.2d at 290. Under the facts of

Arreola, the officer's independent rationale for conducting the stop was held to justify the stop under Article 1, Section 7, even though the officer admitted he was primarily motivated to look for evidence of DUI. Id. at 289-90.

In reaching this conclusion, the Arreola court created a new type of traffic stop called a "mixed-motive" stop. 176 Wn.2d at 297. The Court defined a mixed-motive traffic stop as a stop based on both legitimate and illegitimate grounds. Id. The Court held the officer's stop of the accused was a mixed-motive stop because the trial court found the driver's exhaust system infraction was an actual reason for the stop. In so holding, the Court observed the trial court found the officer would have stopped the accused for the exhaust infraction even without a previous DUI report. Id. at 298.

The Court held:

[A] traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.

Arreola, 176 Wn.2d at 297-98. The stop is, therefore, justified even when the officer's primary motivation is a hunch or some other legally insufficient reason and the legitimate reason is secondary. Id. "In such a case, an officer's motivation to remain observant and potentially advance a related

investigation does not taint the legitimate basis for the stop, *so long as discretion is appropriately exercised and the scope of the stop remains reasonably limited based on its lawful justification.*" Id. at 299 (emphasis added).

Contrary to the Court of Appeals opinion, Arreola is distinguishable from Olsen's case for several important reasons. Appendix at 4-5. In Arreola, the officer testified that he would often stop a vehicle for an altered muffler "because, as a member of the community, he appreciates concerns about the excessive noise that such mufflers emit." 176 Wn.2d at 289. He also testified "he made a conscious decision to make the traffic stop because of the altered muffler." Id. This testimony therefore supported the trial court's findings. Here, in contrast there was no testimony that reacting to the expired registration or improperly displayed tab was "reasonably necessary in furtherance of traffic safety and the general welfare." For unlike an altered muffler, which emits "excessive noise" regardless of the time or traffic conditions, an expired registration or improperly displayed license plate poses no danger or nuisance to the public.

Moreover, although Green testified that he often stops cars with expired tabs that he encounters while on routine patrol, Green did not see Olsen's car while out on a routine patrol. Rather, Green actively sought out Olsen's car after being told of its location by Fulmer. RP 3-4, 9, 14. As

Arreola recognized, this is an important consideration in determining whether the stop is mixed-motive or pretextual. 176 Wn.2d at 298-99 ("The officer in *Ladson* would not have conducted the stop had there been no street rumor, and the officer abused his discretion by conducting the stop without deeming it reasonably necessary to enforce license plate tab regulations.").

Finally, unlike in Arreola, here, the stopping of Olsen's car was not treated just like any other ordinary traffic stop. Fulmer's nearly immediate presence at the scene in order to investigate entirely unrelated suspicions of drug activity was not reasonably related to the initial stop for an expired registration and improper license plate display and was not, therefore, "reasonably limited based on its lawful justification." Arreola, 176 Wn.2d at 299. Unlike in Arreola, here there is no evidence that either officer observed any signs of intoxication or drug use in Olsen that justified extending the investigation beyond its initial lawful justification for an expired car registration. Even if Green and Fulmer had not acknowledged that their intent in stopping Olsen's car was to investigate drug activity, Fulmer's action of appearing at the scene nearly immediately with a drug-detection dog, without being summoned, is objectively unreasonable in light of the initial justification for the stop. Thus, Arreola's stated exception to taint when there exists a legitimate basis for the stop does not apply.

Under the totality of the circumstances, the stop was a pretext to search for drugs and the trial court erred in denying Olsen's motion to dismiss on those grounds. Whether Olsen's seizure was a mixed motive stop or not, it was still pretextual in violation of Article I, Section 7. Suppression of evidence found as a result of the unlawful search is required. Ladson, 138 Wn.2d at 360. Absent the illegal seizure, insufficient evidence exists to sustain the convictions. This Court should grant review under RAP 13.4(b)(1), (b)(3) and (b)(4).

2. This Case Presents an Opportunity to Reconsider *Arreola* and Clarify the Inherent Conflict that Exists Between *Ladson* and *Arreola*.

Justice Chambers' dissent in Arreola warned that the Court's majority opinion would destroy the "spirit of *Ladson*[" 178 Wn.2d at 301 (Chambers, J. dissenting). As Justice Chambers foreshadowed, "Going forward, police officers in Washington will be free to stop citizens primarily to conduct an unconstitutional speculative investigation as long as they can claim there was an independent secondary reason for the seizure." Id. at 302.

Olsen's case highlights the dangers of extending Arreola's mixed-motive reasoning. Similar to this case, in State v. Tait, 191 Wn. App. 1035, 2015 WL 7777223, rev. denied, 85 Wn.2d 102, 377 P.3d 719 (2016), a seizure of Tait's car to investigate a suspended license also quickly became

an investigation into Tait's suspected drug possession.¹⁰ Officer Fulmer and his drug detecting dog appeared at the scene, and several drugs were subsequently found in Tait's possession. Tait, 2015 WL 7777223, *1-2. Like Olsen, Tait was subsequently charged and convicted of unlawful possession stemming from an ostensibly mixed-motive stop. 2015 WL 7777223, *2, 5. Based on an erroneous interpretation of Arreola's holding, police officers are now free to engage in a pattern of mixed-motive stops that do not comport with the holding in Ladson or with article I, section 7's command that "[n]o person shall be disturbed in his private affairs...without authority of law." 178 Wn.2d at 302 (Chambers, J. dissenting).

¹⁰ Under GR 14.1(a), Olsen asks this court to take judicial notice of the similar facts, and involvement of some of the same Walla Walla Police Department officers, in this unpublished, non-binding opinion. "Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963).

E. CONCLUSION

Because Olsen satisfies the criteria under RAP 13.4(b)(1), (b)(3), and (b)(4), he respectfully asks that this Court grant review, reverse the court of Appeals, and dismiss his convictions for possession of heroin and use of drug paraphernalia.

DATED this 15th day of February, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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APPENDIX

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

STATE OF WASHINGTON,)	
)	No. 35704-0-III
Respondent,)	
)	
v.)	
)	
ERIC LEON OLSEN,)	UNPUBLISHED OPINION
)	
Appellant.)	

KORSMO, J. — Eric Olsen appeals from his conviction for possession of heroin, arguing that the heroin was improperly seized as part of a pretext traffic stop. We affirm the conviction, but direct that the trial court strike the criminal filing fee.

FACTS

Officer Gunner Fulmer of the Walla Walla Police Department was on patrol October 29, 2016 along with a drug detection dog. One of Fulmer’s duties was to patrol areas known for drug activities. He routinely conducted surveillance of the house of Donnie Demaray. On the 29th, he saw an unknown, and unoccupied, Subaru Outback outside of Demaray’s residence.

Upon running the license plate number, Fulmer learned that the license tabs were expired. He later drove past Demaray’s house and observed that the Subaru had

departed. Through his computer, Fulmer asked other officers if they were familiar with the car and also advised them that the car's tabs were expired. He did not request a traffic stop of the vehicle.

About 1:30 p.m. that day, Walla Walla Officer Paul Green saw the Subaru driving and realized that it had both 2016 and 2017 tabs on its plates, but had no month tab displaying. He ran a records check and discovered that the vehicle's registration had expired. He then effected a stop of the vehicle, which was driven by Eric Olsen. Olsen did not have his driver's license with him.

Upon hearing of the traffic stop, Officer Fulmer went to the scene and talked to Olsen while Green was writing traffic tickets. He engaged Olsen in conversation concerning his visit to Demaray's house. Fulmer expressed disbelief at Olsen's story that he had smoked marijuana with Demaray, a known heroin user. Fulmer asked Olsen for consent to search the car, indicating that he would deploy his drug detection dog if there was no consent. Olsen told the officer that he had heroin and a syringe in the car. He consented to a search of the car after first being told that he did not need to consent and could limit or revoke his consent.

The officer recovered heroin and two syringes; the dog was never employed in the search. Charges of possession of heroin and use of drug paraphernalia were filed. Mr. Olsen's counsel moved to suppress, arguing that Green's traffic stop was a pretext in order to allow Fulmer to search for drugs. The trial court heard the motion and denied it,

entering findings that Green would have conducted the traffic stop even without knowing where the car earlier had been seen and that Fulmer's contact with Olsen did not extend the time Green took to conduct his investigation and issue the traffic tickets.

Mr. Olsen then consented to a stipulated trial. The court found him guilty as charged and timely entered all required findings. Mr. Olsen then timely appealed to this court, arguing that the suppression motion should have been granted. By supplemental brief, he was allowed to challenge the court's imposition of a \$200 filing fee.

ANALYSIS

Mr. Olsen first argues that the suppression ruling was erroneous. He both attempts to distinguish this case from *State v. Arreola*, 176 Wn.2d 284, 290 P.3d 983 (2012), and, alternatively, argues that we should not follow that decision. He also argues that the filing fee should be struck due to his indigency. Finding *Arreola* indistinguishable, we affirm the conviction, but grant the request to strike the filing fee.

Suppression Ruling

The trial court's findings are supported by the evidence and justify its conclusions of law. Accordingly, we affirm.

Appellate courts review de novo the trial court's conclusions of law pertaining to a motion to suppress. *Arreola*, 176 Wn.2d at 291. We review the factual findings for "substantial evidence." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

“Substantial evidence” is evidence sufficient to convince a fair-minded person of the truth of the finding. *Id.* at 644.

Pretextual stops are prohibited by art. I, § 7, of the Washington Constitution. *Arreola*, 176 Wn.2d at 294. Pretextual stops occur when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to enforcement of the traffic code. *State v. DeSantiago*, 97 Wn. App. 446, 451, 983 P.2d 1173 (1999). ““ When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.”” *Id.* at 452.

In *Arreola*, an officer had received a tip about a suspected impaired driver. Finding the suspect vehicle, the officer did not see any signs of impairment, but did see a violation related to the vehicle’s exhaust system and stopped the car. 176 Wn.2d at 288-289. The trial court determined that the primary reason for the stop was to investigate the tip, but that was not the officer’s sole reason for the stop, noting the muffler violation. *Id.* at 289. The Washington Supreme Court affirmed the trial court, holding that “a mixed-motive traffic stop is not pretextual so long as the desire to address a suspected traffic infraction (or criminal activity) for which the officer has a reasonable articulable suspicion is an actual, conscious, and independent cause of the traffic stop.” *Id.* at 288.

Here, Mr. Olsen challenges findings of fact 1, 2, and 4. Those findings indicate that Officer Green had a lawful basis to stop the car due to the expired registration, Green

would have conducted the stop regardless of Officer Fulmer's earlier observations, and Fulmer did not detain Olsen beyond the scope of Green's stop. The evidence supports those findings. Upon seeing the Subaru, Green observed different licensing violations than that reported by Fulmer. Green then investigated the vehicle registration before making the traffic stop. Fulmer did not ask any officer to stop the Subaru. Fulmer then responded to the scene and questioned Olsen about Demaray before lawfully obtaining consent to search. Green's investigation was still ongoing; it was not extended by Fulmer's questioning of Olsen.

In short, the evidence allowed the trial court to make the findings that it did. Those findings support the trial court's conclusions of law. Unlike *Arreola*, the trial court here did not determine that Green had a second motive for stopping Olsen. On that basis, alone, the motion to suppress necessarily failed. But, even if the fact that Mr. Olsen can postulate an additional motive were sufficient to make this a mixed case, *Arreola* disposes of that contention. The trial court found that a valid basis for the stop existed. The possibility that an invalid basis existed does not invalidate the valid reason for the stop.

Recognizing his problem, Mr. Olsen also argues that *Arreola* was wrongly decided and should not be followed. However, this court is required to follow that case. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (lower courts are bound by ruling of

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Washington Supreme Court). He must address his claim to the Washington Supreme Court.

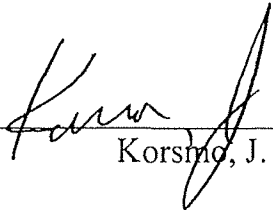
The trial court did not err in denying the motion to suppress.

Criminal Filing Fee


Mr. Olsen argues that the trial court lacked authority to impose the criminal filing fee due to his indigency. Due to an intervening change in the law, we agree. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). On the basis of *Ramirez*, we direct the trial court to strike the criminal filing fee.

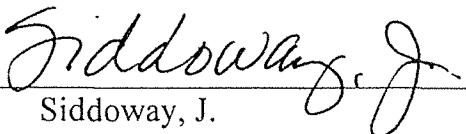
Affirmed and remanded to strike the filing fee.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Korsmo, J.

WE CONCUR:


Pennell, A.C.J.


Siddoway, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

February 15, 2019 - 9:50 AM

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