

62147-5

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No. 62147-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NICKO ZOURKOS,

Appellant.

2009 JUL -9 PM 4:00

COURT OF APPEALS  
STATE OF WASHINGTON

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

REPLY BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR<sup>1</sup>

1. The trial court erred entering CrR 3.6 Finding of Fact 3.
2. 1. The trial court erred entering CrR 3.6 Finding of Fact

10..

3. The trial court failed to file Findings of Fact and

Conclusions of Law as required by CrR 6.1(d).

B. ARGUMENT

1. MR. ZOURKOS'S CONVICTION MUST BE REVERSED BECAUSE HE DID NOT WAIVE HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL BEFORE HE WAS CONVICTED BY THE COURT

The right to a jury trial is guaranteed by the federal and state constitutions. U.S. Const. Amend. VI; Const. Art. I §§ 21, 22.

A defendant may waive his constitutional right to a jury trial as long as the waiver is voluntary, knowing, and intelligent.

Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984);

Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.

1461 (1938); State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979

(1994). The State must carry the burden of demonstrating the

validity of a waiver. State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d

452 (1979) (citing Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct.

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<sup>1</sup> Because the trial court filed the Findings of Fact and Conclusions of Law after Mr. Zourkos filed his initial brief he was unable to comply with the requirements of RAP 10.3(g).

2041, 23 L.Ed.2d 854 (1973)). “[A] court must entertain every presumption against waiver” of the right to a jury trial. Acrey, 103 Wn.2d at 207 (citing Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942)). Indeed, the requirement of written waiver found in CrR 6.1(a)<sup>2</sup> exists “to guard against silent waivers.” Wicke, 91 Wn.2d at 642.

Here, there is neither a written nor oral waiver by Mr. Zourkos. What the State points to instead is Mr. Zourkos failure to object the denial of jury trial. Brief of Respondent at 5 (Neither Zourkos or his attorney contradicted or raised any concerns in response to the court’s comments”); 7 (Mr. Zourkos did not “express confusion or raise questions or concerns . . . and instead acquiesced in the process.”) The Supreme Court has held waiver cannot be presumed from a silent record; instead the record must show “the express and intelligent consent of the defendant.” Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930). Because it cannot point to anything in the record that demonstrates Mr. Zourkos knowingly waived his right to a jury, the State instead points to silence. The State has not carried its burden of showing a

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<sup>2</sup> CrR 6.1(a) reads: “Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.”

valid waiver by Mr. Zourkos of his right to a jury trial. Mr. Zourkos is entitled to a new trial.

2. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE FRUITS OF THE OFFICER'S UNLAWFUL, PRETEXTUAL SEIZURE OF MR. ZOURKOS

It is clear from the record that Mr. Zourkos was seized. It is equally clear the police officer's stated basis for doing so was pretextual and thus violated the Washington Constitution.

a. The record establishes Mr. Zourkos was seized when the officer stood outside the driver's door and demanded Mr. Zourkos's license and proof of insurance. The State contends the seizure here was merely a consensual encounter. Brief of Respondent at 11-12. But in making its argument the State completely does not address the question of why if this was merely a consensual encounter as opposed to an investigatory stop, did the officer ask Mr. Zourkos for proof of insurance? Even if a consensual encounter might involve a request for identification, it does not include a request for a proof of insurance. The facts do not support the trial court's finding that this was merely a consensual encounter unaffected by a request for identification.

Beyond the request for insurance, where a “request” for identification is made to a driver on public roadway, the person must comply. RCW 46.61.020(1). Mr. Zourkos was free to refuse and leave only at the risk of criminal prosecution. RCW 46.61.020(2). Thus, Mr. Zourkos was seized when the officer requested he provide identification and proof of insurance.

The State dismisses the threat of criminal prosecution and contends that because Mr. Zourkos had parked by the time the officer approached the ensuing request for identification did not constitute seizure. Brief of Respondent at 11-12 (citing State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003)) Mr. Zourkos submits that practical concerns dictate that every request by an officer to a driver for identification occurs after the driver has stopped his vehicle, as it is unlikely an officer could run alongside a moving vehicle while requesting the driver produce his license. Beyond that practical reality, even a person who has parked their car must comply with a request for identification and insurance. RCW 46.61.020 does not limit itself to drivers but applies to “any person while operating **or in charge of any vehicle** to refuse when requested by a police officer to give his or her name and address.” Further, “Any person requested to identify himself or herself to a

law enforcement officer pursuant to an investigation of a traffic infraction has a duty to identify himself or herself and give his or her current address.” RCW 46.61.021(3). Infractions are not limited to those committed by drivers while in moving car. See RCW 46.61.240 (pertaining to pedestrians crossing other than at crosswalk); RCW 46.61.570 (pertaining to parking). Plainly the distinction the State imagines, whether the car is moving or not at the time police request identification, is not relevant to the analysis.

Nonetheless, the State urges this Court to myopically read O’Neill to hold that any time a driver has come to a stop an officer’s request for identification and proof of insurance does not amount. By the state’s logic, if a police officer observes a driver commit an infraction, but waits until the driver has come to a stop at a stop light, the officers request for identification would not constitute a seizure. But the converse must be true, if the driver is not seized he is free to leave and could refuse the officers request and drive away. RCW 46.61.020 and RCW 46.61.021 make clear that is not the case.

While O’Neill concluded a person, presumably the car’s driver, was not seized when police requested he provide identification, that case did not involve application of the statutory

provisions regarding a drivers duty to comply with an officers request. In O'Neill the car in question was parked in a parking lot. 148 Wn.2d at 570 (“Defendant Matthew Glynn O’Neill was parked in the parking lot.”) Pursuant to RCW 46.61.005, the “rules of the road” apply “exclusively to the operation of vehicles upon highways” except where another place is indicated or where statutes pertaining to reporting accidents, reckless driving, and driving under the influence are involved. RCW 46.20.005, RCW 46.20.015, RCW 46.20.017, and RCW 46.61.020 do not fall within those exceptions, and thus were not applicable to the driver in O’Neill. These statutes were, however, applicable to Mr. Zourkos, and thus he was not free to refuse the officer’s request for identification and proof of insurance and drive away. Mr. Zourkos was seized.

b. Mr. Zourkos’s seizure was unlawful.

Because it was merely a pretext to investigate potential drug activity, Officer Chissus’s seizure of Mr. Zourkos lacked the authority of law in violation of Article I, section 7 of the Washington Constitution, because the seizure was pretextual. See State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (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 358-59.

The trial court's belated findings provide "Officer Chissus was assigned to emphasize illegal overnight parking and drug activity on Cornwall Avenue." (Finding of Fact 3). In fact, Officer Chissus testified that because of "suspected drug trafficking coming out of the parked cars" along Cornwall Avenue, police officers were "doing . . . emphasis" patrols in the area. 1RP 6. Thus rather than separate emphases on parking and drug activity, any emphasis on parking was occurring only to the extent it was related to the drug activity. The court's finding is not supported by the record.

Instead, the record plainly establishes Officer Chissus conducted the seizure to investigate potential drug activity and not because of any potential traffic or parking violation by Mr. Zourkos. Officer Chissus testified that was why he was riding a bicycle along Cornwall Avenue. 1RP 7. The officer denied he was contacting Mr. Zourkos to investigate potential drug activity. 1RP 18. Yet, everything the officer did was consistent with such an intent and with his initial description of the drug emphasis patrols in response

to drug activity from parked cars along Cornwall Avenue. Without any indication that Mr. Zourkos had done anything illegal and for no reason other than it was on Cornwall Avenue, the officer turned to follow Mr. Zourkos's truck when it passed him going the other direction. 1RP 7. The officer observed Mr. Zourkos stop and park along the curb, "so I went down there." Id. Only after making the decision to turn and investigate, and only upon approaching the car did the officer notice the claimed parking violation: that Mr. Zourkos had momentarily stopped in front of an unused driveway. Id. The officer then demanded the driver produce identification and proof of insurance. The officer's claim that he contacted the driver to investigate the parking violation was plainly pretextual, as the decision to investigate was made before he observed any illegal activity.

Because he lacked adequate justification to stop Mr. Zourkos when he made the decision to turn and follow him, the officer found a rationale to seize him – the alleged violation of the parking ordinance – that was "at once [arguably] lawfully sufficient, but not the real reason." Ladson, 138 Wn.2d at 351.

Nonetheless the State argue the officer was in fact taking time off from his drug emphasis activity to investigate an alleged

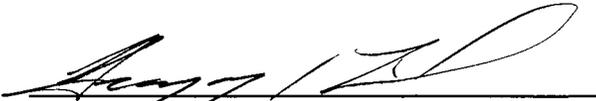
parking violation. Even ignoring the record to the contrary, the officer still lacked the authority to investigate that infraction. RCW 46.61.570(1)(b) provides in relevant part it is unlawful to “Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge a passenger or passengers . . . In front of a public or private driveway or within five feet of the end of the curb radius leading thereto.” The court found that the car was only stopped for 20 to 30 seconds before the officer contacted Mr. Zourkos and that during that brief period a passenger got out and entered a nearby motor home. (Findings 7 and 8). It would be patently absurd to suggest that a 20 to 30 second stop to discharge a passenger is not momentary. But, in an effort to save a plainly pretextual seizure, that is precisely the argument the State makes. Brief of Respondent at 14. The officer did not observe Mr. Zourkos commit an infraction and thus had no basis to contact him.

Because it was pretextual, the officer’s contact with Mr. Zourkos was unlawful from its inception. The fruits of that illegality must be suppressed. The trial court erred in refusing to suppress the fruits of the unlawful seizure and subsequent search of Mr. Zourkos.

C. CONCLUSION

Because the record does not establish Mr. Zourkos waived his right to a jury trial and because the trial court erred in failing to suppress the fruits of the unlawful seizure of Mr. Zourkos, this Court must reverse his convictions.

Respectfully submitted this 9th day of July, 2009.



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