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DIVISION II

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NO. 34668-1-II  
Cowlitz Co. Cause NO. 06-1-00114-9

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Respondent,

v.

**LEIF ERIC COLE,**

Appellant.

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**BRIEF OF RESPONDENT**

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CIRCUMSTANCES SUPPORTED THE STOP'S BASIS. ADDITIONALLY, OFFICER MURRAY HAD INDEPENDENT GROUNDS TO LAWFULLY STOP THE VEHICLE.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. WHETHER THERE IS A SUFFICIENT QUANTITY OF EVIDENCE IN THE RECORD OF FINDING OF FACT NUMBER 3, THAT SADDANNE JACKOWIAK HAS A RECORD FOR BURGLARIES AND CAR THEFTS. IF NOT, WHETHER THIS FINDING WAS MATERIAL AS TO OFFICER MURRAY'S REASONABLE ARTICULABLE SUSPICION THAT CRIMINAL ACTIVITY WAS OCCURRING OR HAD OCCURRED AT THE CHURCH.
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7. **WHETHER OFFICER MURRAY USED HIS AUTHORITY TO ENFORCE THE TRAFFIC CODE AS A PRETEXT TO AVOID THE WARRANT REQUIREMENT FOR AN UNRELATED CRIMINAL INVESTIGATION.**

### III. STATEMENT OF THE CASE

The information, filed on January 20, 2006, charged the defendant with violation of no contact, protection or restraining order – third or subsequent violation – domestic violence. CP 1-2. On March 3, 2006, the defendant filed a motion to suppress alleging the defendant's arrest and subsequent search were illegal. CP 3-5. The State filed its response to this motion on March 13, 2006. CP 6-11.

On March 14, 2006, the trial court held a hearing on the defendant's motion to suppress. RP<sup>1</sup> 4-94. Officer Brent Murray of the Woodland Police Department testified he was on patrol duty on Tuesday, January 17, 2006. RP 9, 51.<sup>2</sup> While on patrol, Officer Murray saw the

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<sup>1</sup> There is one volume of verbatim transcript of proceedings, referred to herein as "RP." This single volume includes transcripts from three separate proceedings: first, the March 14, 2006 suppression hearing, pages 4-94; second, the ruling on the suppression motion, held on March 28, 2006; pages 95-98, and third, the stipulated facts trial and sentencing, held on April 4, 2006, pages 99-108.

<sup>2</sup> Page 9 of the verbatim transcript of proceedings incorrectly states the date as January 7, 2006. The day in question is actually January 17, 2006. RP 10-11.

defendant and a female walking from a back parking lot of the Woodland Christian Church at approximately 6:41 a.m. RP 10, 12, 16. Officer Murray testified the defendant and the female came out from behind trees and a hedgerow near the back parking lot. RP 45. The church was not open at this time of day. RP 50. Officer Murray thought he recognized the female as Saddanne Jackowiak, an individual he was familiar with, and testified “frequently has felony warrants and I have also arrested her for burglaries and so forth.” RP 12-13. Officer Murray attempted to obtain a warrant check on Saddanne Jackowiak, but was unsuccessful. RP 13. He then observed the defendant and female get into a vehicle, a dark colored Ranger, parked in the front parking lot of the Woodland Christian Church. RP 13-14. Officer Murray stated this vehicle could not belong to Saddanne Jackowiak, because “[i]t was a little bit too nice for her.” RP 14.

Officer Murray pulled in behind the vehicle as it left the church parking lot. RP 14-15. He tried to run the vehicle’s license plate, but the center digit of the plate was obstructed by the trailer hitch. RP 15-16. At this point Officer Murray decided to stop the vehicle because he was concerned with the pair’s presence behind the church. RP 17. Officer Murray testified his concern came from knowing three Woodland churches and one Ridgefield church were burglarized over the Christmas

holidays and one of those burglaries occurred after midnight. RP 17, 39. Officer Murray knew that two of the Woodland churches were approximately a mile from the current church. RP 38. It was with this in mind that Officer Murray stopped the defendant. RP 19. Additionally, Officer Murray testified he thought the female was Saddanne Jackowiak, and this raised specific questions why she and the male would be at the church at all, let alone behind it, and also why they were using a vehicle Officer Murray did not associate with Saddanne. RP 20.

The State did ask Officer Murray whether he considered his inability to read the license plate as a basis for the stop. RP 20-21. Murray stated he was thinking of the obstructed license when he pulled them over, because he was trying to determine who owned the vehicle. RP 20-21. Given his earlier conclusion the female was Saddanne and the condition of the vehicle, Officer Murray suspected the vehicle was stolen. RP 20-21. He testified that even were he able to read the plate, he would have stopped the vehicle. RP 21.

As such, Officer Murray stopped the vehicle and contacted the driver. RP 21. Upon contact, Murray realized the driver was not Saddanne Jacokowiak. RP 21. The driver of the vehicle was Stacy Welker. RP 21. He asked Ms. Welker, “[w]hy are you guys coming out from behind the church?”, and told her he pulled her over because he

thought she was someone else and because of the obstructed license plate. RP 21, 70. Ms. Welker responded they were coming from a friend's house, named Pat Dunham. RP 21. Officer Murray was familiar with Mr. Dunham's residence, located down the block from the church. RP 21-22. Officer Murray testified that given the location of the residence, it did not make sense to walk behind the church and come around through the parking lot to the front to get to the vehicle. RP 24. He stated that walking through the parking lot to get to the vehicle, as opposed to walking along the sidewalk, was at least an extra 214 feet. RP 32. Officer Murray was also familiar with Mr. Dunham and his residence, and in response to the State's question, "[t]o your knowledge did [Mr. Dunham] have any criminal dealings?", he testified he knew the house was a drug house and "Pat Dunham [was] always up to his eyebrows with criminal activity." RP 22-23.

Officer Murray asked Ms. Welker for her driver's license, vehicle registration, and proof of insurance. RP 25. A check of her driver's license revealed she was a protected person, and the person restricted from contacting her was an individual named Eric Leif Cole.<sup>3</sup> RP 28. Officer Murray cited Ms. Welker for the obstructed license plate. RP 50.

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<sup>3</sup> The person restricted from contacting Ms. Welker was the defendant, Leif Eric Cole. Officer Murray mistakenly testified that his name was Eric Leif Cole.

After contacting Ms. Welker, Officer Murray asked the defendant his name. RP 25. The defendant responded his name was David Cole. RP 26. Officer Murray requested a records check for a David Cole, but no records were found. RP 28. Because the physical description of Leif Eric Cole was close to the defendant, Officer Murray asked the defendant for identification. RP 28-29. The defendant stated he did not have any identification. RP 29. Officer Murray then asked the defendant if his name was Leif Cole. RP 29. The defendant said it was not and again stated it was Michael David Cole. RP 29. During this conversation dispatch notified Officer Murray of a warrant return for a Department of Corrections felony warrant for Leif Cole, including a list of tattoos. RP 30. Officer Murray noticed tattoos on the defendant's hands. RP 30. After speaking to the defendant regarding the tattoos, Officer Murray seized the defendant, and gave him an abridged version of his rights. RP 30. The defendant then told Officer Murray his name was Leif Eric Cole. RP 31. Because Leif Eric Cole was prohibited from contacting Ms. Welker, the contact on January 17, 2006 was a violation of no contact, protection or restraining order – third or subsequent violation – domestic violence. CP 1-2.

After Officer Murray testified, the defendant testified, and the court heard arguments from the defendant and the State. RP 57-90. The

court took the suppression issue under advisement. RP 90-94. On March 28, 2006, the court denied the defendant's motion to suppress. RP 95-98. On April 4, 2006, the court issued written findings of fact and conclusions of law on the defendant's motion. CP 12-15; App. A. The written findings of fact are as follows:

1. On January 17, 2006, at approximately 6:40 AM, Officer Brent Murray observed a dark truck parked in the empty parking lot of a closed church.
2. At the time of the observation, Officer Murray was aware of two recent church burglaries in the area.
3. Officer Murray observed a man and woman walking in the back parking lot behind the church. He thought he recognized the woman as Saddeeanne<sup>4</sup> Jackowiak, someone with a record for burglaries and car thefts.
4. The man and woman walked from the back parking lot to the front parking lot of the church and entered the truck.
5. Officer Murray knew Ms. Jackowiak typically did not drive a truck, and he did not recognize the truck as belonging to her.
6. Officer Murray was suspicious of the man and woman's presence at the church and thinking the woman was Ms. Jackowiak, was suspicious of her being in possession of the truck.
7. Officer Murray pulled in behind the truck as it was driving out of the parking lot. He attempted to run the license plate of the truck to see if it was stolen. Officer Murray was unable to read the license plate because the vehicle trailer hitch obstructed the plate.

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<sup>4</sup> There is a discrepancy in the spelling of Ms. Jackowiak's first name. Throughout the verbatim transcript of proceedings, Ms. Jackowiak's first name is spelled "Saddanne", not "Saddeeanne". Therefore, her name will be spelled "Saddanne" herein.

8. Officer Murray stopped the vehicle because of the obstructed license plate and the above concerns.
9. When Officer Murray approached the female driver, he immediately realized she was not Ms. Jackowiak.
10. Officer Murray asked the driver what she was doing at the church. The driver explained that she was coming from Pat Dunham's residence to her vehicle.
11. Officer Murray was familiar with Pat Dunham and the residence referenced by the driver. Murray knew Dunham was associated with criminal activity and his residence was located several houses down the street from the church.
12. The driver explained that the two cut through the back yard of Dunham's house to get to the church.
13. Officer Murray found the driver's explanation illogical and nonsensical because the path she described was not the most direct route from Dunham's and actually increased the distance to the truck.
14. Given the illogical path explanation and Dunham's reputation, Officer Murray was suspicious of the man and woman's presence near the church.
15. Officer Murray asked the driver for her identification, proof of insurance, and registration. He then asked the male passenger his name. Officer Murray had not spoken to the male passenger until that point. The passenger identified himself as "David Cole" although, he was later identified to be Leif Eric Cole, the defendant.
16. After learning both identities, Officer Murray ran a record's check of the driver. He learned she was a protected party in a no contact order, prohibiting Leif Eric Cole from contacting her.
17. Officer Murray asked for a records check of a David Cole born in the early 1970's. Dispatch replied they did not have any

identifying information on such a person, but Leif Cole did have a warrant for his arrest.

CP 12-14.

The written conclusions of law are as follows:

1. When Officer Murray asked the defendant his name, the defendant was seized. The defendant was not seized up to this point.
2. Officer Murray's suspicions were reasonable and sufficient to believe that criminal activity occurred or was occurring in relation to the man's presence at the church.
3. Officer Murray had reasonable articulable suspicion that criminal activity was occurring or had occurred in regards to the church. Officer Murray was not required to rule out any valid possible explanations for the presence of the passenger at the church. As such, Officer Murray had sufficient facts to conduct a Terry investigation of the passenger, and ask him his name.

CP 15.

Also on April 4, 2006, the court held a stipulated facts trial, and the defendant was found guilty of violation of no contact order – third or subsequent violation – domestic violence. RP 104-106; CP 20-28. The defendant was sentenced to 15 months. RP 106; CP 24. The defendant filed a timely notice of appeal on April 6, 2006. CP 29.

#### **IV. STANDARD OF REVIEW**

An appellate court will review only those findings of fact entered on a motion to suppress to which error is assigned. *See State v. Hill*, 123 Wash.2d. 641, 647, 870 P.2d 313, 316 (1994). Furthermore, findings of

fact are considered binding on appeal “[w]here there is substantial evidence in the record supporting the challenged facts.” *Id.* “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *Id.* at 644, 870 P.2d at 315 *citing State v. Halstien*, 122 Wash.2d 109, 129, 857 P.2d 270 (1993). An appellate court reviews conclusions of law entered on a motion to suppress de novo. *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722, 725 (1999) *citing State v. Johnson*, 128 Wash.2d 431, 443, 909 P.2d 293 (1996).

## **V. ARGUMENT**

### **I. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT FINDING OF FACT NUMBER 3, THAT SADDANNE JACKOWIAK HAD A RECORD FOR BURGLARIES AND CAR THEFTS. SHOULD THE COURT DISAGREE, THE ERROR IS IMMATERIAL AS TO WHETHER OFFICER MURRAY HAD A REASONABLE ARTICULABLE SUSPICION THAT CRIMINAL ACTIVITY WAS OCCURRING OR HAD OCCURRED AT THE CHURCH.**

The defendant assigns error to the second sentence of finding of fact 3, that Saddanne Jackowiak has a record for burglaries and car thefts. The defendant argues that nothing in the record confirmed Ms. Jackowiak had any convictions for burglaries or other crimes.

Officer Murray testified he was familiar with Ms. Jackowiak, and that she “frequently has felony warrants and I have also arrested her for

burglaries and so forth.” RP 12-13. The State agrees there is nothing in the record confirming Ms. Jackowiak had any convictions for burglaries or other crimes. However, Officer Murray’s testimony is sufficient to persuade a fair-minded, rational person of the truth of the finding that Ms. Jackowiak has a record for burglaries and car thefts. Furthermore, Officer Murray testified as if he knew her well enough to know the kind of car she drove. Corroboration of his testimony is unnecessary, because credibility determinations are left up to the trial court. Accordingly, the State requests the court find sufficient evidence supports finding of fact 3, rendering it binding on appeal.

Should the Court disagree, whether Ms. Jackowiak had a record for burglaries and car thefts is immaterial as to whether Officer Murray had a reasonable articulable suspicion that criminal activity was occurring or had occurred at the church. Officer Murray testified his concerns surrounding the presence of the female in the church parking lot, in part, were based on dealing with Ms. Jackowiak in the past, past felony warrants and arrests for burglaries and “so forth”, and the vehicle in the church parking lot, which was “too nice for her.” RP 12-13. Whether or not Ms. Jackowiak had actually been convicted of any crimes was irrelevant to Officer Murray’s suspicions of her presence at the church. Therefore, should the Court find there was insufficient evidence

supporting finding of fact 3, the State requests the Court find the error is immaterial as to whether Officer Murray had a reasonable articulable suspicion criminal activity was occurring or had occurred at the church.

**II. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT FINDING OF FACT 8, THAT OFFICER MURRAY STOPPED THE VEHICLE BECAUSE OF BOTH THE OBSTRUCTED LICENSE PLATE AND THE CONCERNS STATED IN FINDINGS OF FACT 1-7.**

The defendant assigns error to the first portion of finding of fact 8, that Officer Murray stopped the vehicle because of the obstructed license plate. However, finding of fact 8, in its entirety, refers to the complete reasons why Officer Murray stopped the vehicle: “Officer Murray stopped the vehicle because of the obstructed license plate and the above concerns.” CP 13. The “above concerns” refer to findings of fact 1-7, which include Officer Murray’s knowledge of the recent church burglaries in the area, his observation of a man and woman walking through the church parking lot and entering a truck, and his observation that Ms. Jackowiak typically did not drive a truck. CP 12-13.

Officer Murray testified he was thinking about the obstructed license plate when he pulled the vehicle over:

The State: Were you thinking at all that you couldn’t see the license plate when you pulled them over?

Officer Murray: That was part of it. I mean I was trying to run the plate to find out who this vehicle belonged to.

RP 20.

Additionally, Officer Murray cited Ms. Welker, the driver of the vehicle, for the obstructed license plate. RP 50. Furthermore, Officer Murray testified to his other interests in stopping the vehicle, including why the man and woman were in the church parking lot, why they were in the vehicle, and why they were coming out from behind the church. RP 20. Corroboration of his testimony is unnecessary, because credibility determinations are left up to the trial court.

Accordingly, Officer Murray's testimony is sufficient to persuade a fair-minded, rational person of the truth of the finding that he stopped the vehicle because of both the obstructed license plate and the concerns stated in findings of fact 1-7. Therefore, the State requests the Court find sufficient evidence supports finding of fact 8, rendering it binding on appeal.

**III. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT FINDING OF FACT 11, THAT OFFICER MURRAY KNEW PAT DUNHAM WAS ASSOCIATED WITH CRIMINAL ACTIVITY.**

The defendant assigns error to the second sentence of finding of fact 11, that Officer Murray knew Pat Dunham was associated with

criminal activity. The defendant argues Officer Murray suspected, but did not know, that Mr. Dunham was associated with criminal activity.

In response to the State's question, "[t]o your knowledge did [Mr. Dunham] have any criminal dealings?", Officer Murray testified "Pat Dunham is always up to his eyebrows with criminal activity." RP 22-23. Officer Murray did not respond that he merely suspected Mr. Dunham was associated with criminal activity. In contrast, his answer demonstrates that Officer Murray actually had knowledge of Mr. Dunham's association of criminal activity. Furthermore, there is no evidence in the record contradicting Officer Murray's knowledge that Mr. Dunham was associated with criminal activity.

Accordingly, Officer Murray's testimony, coupled with the lack of contradictory evidence, is sufficient to persuade a fair-minded, rational person of the truth of the finding that he knew Pat Dunham was associated with criminal activity. Furthermore, corroboration of his testimony is unnecessary, because credibility determinations are left up to the trial court. Therefore, the State requests the Court find sufficient evidence supports finding of fact 11, rendering it binding on appeal.

**IV. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT FINDING OF FACT 14, THAT OFFICER MURRAY WAS SUSPICIOUS OF THE PRESENCE OF THE MAN AND WOMAN NEAR THE CHURCH.**

The defendant assigns error to the second portion of finding of fact 14, that Officer Murray was suspicious of the presence of the man and woman near the church.

Officer Murray testified three church burglaries in Woodland and one church burglary in Ridgefield took place over the Christmas holidays. RP 17. Officer Murray further testified he was thinking of these burglaries when he saw the man and woman, specifically, the defendant and Stacy Welker, in the parking lot of the church. RP 19. Officer Murray stated his concern was why these two people were in the church parking lot. RP 19. Upon contacting the driver of the vehicle, Officer Murray, directly addressing this concern, asked, “[w]hy are you guys coming out from behind the church?” RP 21.

This line of testimony demonstrates Officer Murray knew of recent church burglaries in the area, expressed concern why these two individuals were in the parking lot, in light of these burglaries, and immediately addressed this concern upon contacting the driver of the vehicle. Therefore, this line of testimony is sufficient to persuade a fair-minded, rational person of the truth of the finding that he was suspicious of the presence of the man and woman near the church. Therefore, the State requests the Court find sufficient evidence supports finding of fact 14, rendering it binding on appeal.

**V. THE TRIAL COURT PROPERLY FOUND THE DEFENDANT WAS NOT SEIZED UNTIL OFFICER MURRAY ASKED THE DEFENDANT HIS NAME IN ACCORDANCE WITH *STATE V. MENDEZ* AND *STATE V. RANKIN*.**

The trial court found the defendant was seized when Officer Murray asked the defendant his name, but not before. CP 15. The defendant argues he was seized when Officer Murray stopped the vehicle in which he was a passenger. However, the defendant cites no case law to support this argument.

“Not every encounter between a citizen and a police officer rises to the stature of a seizure.” *State v. Mennegar*, 114 Wash.2d 304, 310, 787 P.2d 1347, 1350 (1990). A seizure occurs “[w]hen a police officer accosts an individual and restrains his freedom to walk away.” *State v. Mendez*, 137 Wash.2d 208, 222, 970 P.2d 722 (1999) quoting *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Furthermore, “[t]here is a ‘seizure’ when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Id.* quoting *State v. Young*, 135 Wash.2d 498, 510, 957 P.2d 681 (1998).

In *State v. Mendez*, two police officers stopped a vehicle after the driver failed to stop at a stop sign. *See Mendez*, 137 Wash.2d at 212, 970 P.2d at 724. Efrain Mendez was a passenger in the stopped vehicle. *See*

*id.* Mendez and the driver exited the vehicle after it came to a stop, and Mendez walked away from the vehicle. *See id.* An officer requested Mendez return to the vehicle, but instead, Mendez continued walking. *See id.* at 212-13, 970 P.2d at 724. Mendez then began to run away, and an officer followed on foot. *See id.* Mendez was caught, arrested, and searched. *See id.* The search revealed a pipe allegedly used to smoke marijuana. *See id.* Mendez moved to suppress the marijuana pipe. *See id.* The trial court denied the motion, and the Court of Appeals affirmed. *See id.* at 213-14, 970 P.2d at 724-25. On review by the Supreme Court of Washington, the court held “[s]topping the car in which Mendez was a passenger did not effect a seizure of Mendez.” *Id.* at 222, 970 P.2d at 729. The court stated “[w]hile the operator of a vehicle is seized when a police authority signals the operator to stop after a traffic infraction, the privacy rights of passengers in that stopped vehicle are not diminished by the stop.” *Id.* The court found Mendez was seized, but the seizure occurred when the officer requested Mendez return to the vehicle, not when the vehicle was stopped. *See id.* at 222-23, 970 P.2d at 729. The court reversed the lower courts, finding the officers did not have an objective rationale for ordering Mendez to back into the vehicle, as required by Article I, Section 7 of the Washington Constitution. *Id.* at 224, 970 P.2d at 730.

In *State v. Rankin*, the Supreme Court of Washington consolidated two cases for review, *State v. Rankin* and *State v. Staab*. *State v. Rankin*, 151 Wash.2d 689, 691-93, 92 P.3d 202, 203-04 (2004). In both cases, the defendants were passengers in vehicles stopped for traffic offenses. *See id.* Upon stopping the vehicles, each officer requested identification from each defendant. *See id.* In determining whether a seizure of the defendants occurred, the court stated “[a]n automobile passenger is not seized when a police officer merely stops the vehicle in which the passenger is riding.” *Id.* at 95, 92 P.3d at 205 *citing State v. Mendez*, 137 Wash.2d 208, 222, 970 P.2d 722 (1999). However, the court found “both individuals were seized as a matter of law when the officers made the request or demand for identification.” *Id.* at 699, 92 P.3d at 207. The court held “the freedom from disturbance in ‘private affairs’ afforded to passengers in Washington by Article I, Section 7 prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent reason that justifies the request.” *Id.* The court found neither officer had such an independent reason to request identification from the defendants. *See id.*

Here, in accordance with *State v. Mendez* and *State v. Rankin*, the defendant was not seized when Officer Murray stopped the vehicle in which he was a passenger. Rather, under *State v. Rankin*, the defendant

was seized when Officer Murray asked him his name. Therefore, the State requests the Court find the trial court properly found the defendant was not seized until the point Officer Murray asked the defendant his name.

**VI. THE TRIAL COURT PROPERLY FOUND OFFICER MURRAY'S SUSPICIONS WERE REASONABLE AND SUFFICIENT TO BELIEVE CRIMINAL ACTIVITY OCCURRED OR WAS OCCURRING IN RELATION TO THE DEFENDANT'S PRESENCE AT THE CHURCH, WHICH JUSTIFIED HIM ASKING THE DEFENDANT HIS NAME.**

The trial court found Officer Murray's suspicions were reasonable and sufficient to believe criminal activity occurred or was occurring in relation to the defendant's presence at the church. CP 15. Here, the defendant argues the seizure of the defendant was unjustified at its inception.

“As a general rule, warrantless searches and seizures are per se unreasonable.” *State v. Hendrickson*, 129 Wash.2d 61, 70, 917 P.2d 563, 568 (1996) quoting *State v. Houser*, 95 Wash.2d 143, 149, 622 P.2d 1218 (1980). However, there are several exceptions to this general rule. *See id.* Specifically, “[t]he exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops.” *Id.* at 71, 917 P.2d at 568. “To justify a *Terry* stop under the Fourth Amendment and Art. I, § 7, a police officer must be able

to ‘point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’” *State v. Mendez*, 137 Wash.2d 208, 223, 970 P.2d 722, 729 (1999) quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Armenta*, 134 Wash.2d 1, 20, 948 P.2d 1280 (1997). “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.’” *Id.* quoting *State v. Kennedy*, 107 Wash.2d 1, 6, 726 P.2d 445 (1986).

Here, the defendant was seized when Officer Murray asked him his name. *See State v. Rankin*, 151 Wash.2d 689, 699, 92 P.3d 202, 207 (2004) (stating “both individuals [passengers in vehicles] were seized as a matter of law when the officers made the request or demand for identification.”). Accordingly, for the seizure to qualify as a *Terry* investigative stop, Officer Murray needed reasonable and sufficient suspicions to believe that criminal activity occurred or was occurring in relation to the defendant’s presence at the church.

Officer Murray’s testimony at the suppression hearing clearly established he had reasonable and sufficient suspicions that criminal activity occurred or was occurring in relation to the defendant’s presence at the church. First, Officer Murray testified he was aware of several

church burglaries that took place over the Christmas holidays, three in Woodland and one in Ridgefield. RP 17. One of the burglaries occurred after midnight, and it was 6:41 a.m. when he saw the defendant and Ms. Welker in the church parking lot. RP 16; 39. Moreover, the church was closed at this hour. RP 50. Officer Murray testified he was thinking of these recent burglaries when he saw the defendant and Ms. Welker in the church parking lot. RP 19. Additionally, after Officer Murray stopped the vehicle, he learned from Ms. Welker that she and the defendant had walked to their vehicle from Pat Dunham's house. RP 21. Officer Murray was familiar with this residence, and he testified that given the location of the residence, it would not make sense to walk through the church parking lot in order to get to the vehicle. RP 21-22; 24. Officer Murray's knowledge of the recent church burglaries, the time of day, the fact the church was closed, and the indirect path taken by the defendant and Ms. Welker to get to the vehicle raised reasonable and sufficient suspicions that criminal activity, specifically, a burglary, occurred or was occurring at the church. Accordingly, Officer Murray was justified in asking the defendant his name.

The defendant argues *Brown v. Texas* is similar to the case here. See *Brown v. Texas*, 443 U.S. 47 (1979). In *Brown*, two police officers saw the defendant and another man walking away from each other in an

alley. *See id.* at 48. One of the officers, Officer Venegas, stopped the defendant, asked him his name, and what he was doing at this location. *See id.* at 48-49. The defendant refused to give Officer Venegas his name, and was arrested for violating a Texas statute requiring a person to give his name and address to an officer “who has lawfully stopped him and requested the information.” *Id.* at 49. With respect to why he stopped the defendant, Officer Venegas testified the scene “looked suspicious and we had never seen that subject in that area before.” *Id.* The area where the defendant was stopped had a high incidence of drug traffic. *Id.* Additionally, “[t]he officers did not claim to suspect [the defendant] of any specific misconduct, nor did they have any reason to believe he was armed.” *Id.*

The court found the defendant could not be punished for refusing to identify himself, “because the officers lacked any reasonable suspicion to believe [the defendant] was engaged or had engaged in criminal conduct.” *Id.* at 53. The court stated:

The flaw in the State’s case is that none of the circumstances preceding the officers’ detention of [the defendant] justified a reasonable suspicion that he was involved in criminal conduct. Officer Venegas testified at [the defendant’s] trial that the situation in the alley “looked suspicious,” but he was unable to point to any facts supporting that conclusion. There is no indication in the record that it was unusual for people to be in the alley. The fact that [the defendant] was in a neighborhood frequented

by drug users, standing alone, is not a basis for concluding that [the defendant] himself was engaged in criminal conduct. In short, [the defendant's] activity was no different from the activity of other pedestrians in that neighborhood. When pressed, Officer Venegas acknowledged that the only reason he stopped appellant was to ascertain his identity.

*Id.* at 52.

Unlike *Brown v. Texas*, there are facts here to support Officer Murray's suspicions related to the defendant's presence at the church. These facts include the recent burglaries of churches in the area, the fact that the church was closed, and the fact there was a more direct route between Pat Durham's residence and the vehicle than traveling behind the church's parking lot. Officer Murray testified he specifically had these burglaries in mind when he saw the defendant and Ms. Welker in the church parking lot. RP 19. Therefore, *Brown v. Texas* is distinguishable from the case here.

Accordingly, based on Officer Murray's testimony at the suppression hearing, the State requests this Court uphold the trial court finding that Officer Murray's suspicions were reasonable and sufficient to believe criminal activity occurred or was occurring in relation to the defendant's presence at the church, which justified him asking the defendant his name.

**VII. OFFICER MURRAY’S STOP OF THE VEHICLE WAS NOT A PRETEXT FOR A CRIMINAL INVESTIGATION, BECAUSE THE STOP WAS OBJECTIVELY REASONABLE AND THE TOTALITY OF THE CIRCUMSTANCES SUPPORTED THE STOP’S BASIS. ADDITIONALLY, OFFICER MURRAY HAD INDEPENDENT GROUNDS TO LAWFULLY STOP THE VEHICLE.**

The defendant argues Officer Murray’s stop of the vehicle for the obstructed license plate was a pretext to conduct a criminal investigation, citing *State v. Ladson*. See *State v. Ladson*, 138 Wash.2d 343, 979 P.2d 833 (1999).

In *State v. Ladson*, two law enforcement officers were on proactive gang patrol. See *Ladson*, 138 Wash.2d at 345-46, 979 P.2d at 836. While on proactive gang patrol, the officers did not make routine traffic stops, however, “they [u]sed traffic infractions as a means to pull over people in order to initiate contact and questioning.” *Id.* at 346, 979 P.2d at 836. The officers noticed a vehicle driven by Richard Fogle, with Thomas Ladson as a passenger. See *id.* The officers recognized Mr. Fogle, based on a rumor that he was involved with drugs. See *id.*

Subsequently, “[t]he officers tailed the Fogle vehicle looking for a legal justification to stop the car.” *Id.* The officers waited while the vehicle refueled at a gas station, then several blocks later, pulled the vehicle over for expired license plate tabs. See *id.* Mr. Fogle was arrested

based on a suspended driver's license. *See id.* The officers then ordered Mr. Ladson to exit the vehicle, and he was arrested after a small handgun was found in his jacket, located in the passenger's seat. *See id.* at 346-47, 979 P.2d at 836. After searching Mr. Ladson incident to arrest, the officers found cash and marijuana on his person and in the jacket. *See id.* Mr. Ladson was charged with unlawful possession of a controlled substance with intent to deliver while armed with a deadly weapon, and possession of a stolen firearm. *See id.* He filed a motion to suppress, arguing the evidence was obtained as a result of a pretextual traffic stop. *See id.*

The Supreme Court of Washington agreed with the trial court's ruling granting the motion to suppress. *See id.* at 360, 979 P.2d at 843. The court held "pretextual traffic stops violate Article I, Section 7" of the Washington Constitution. *Id.* at 358, 979 P.2d at 842. The court stated:

The essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.

*Id.* at 349, 979 P.2d at 837-38.

Accordingly, the court found “the initial stop, which [was] a seizure for constitutional purposes, was without authority of law because the reason for the stop (investigation) was not exempt from the warrant requirement.” *Id.* at 360, 979 P.2d at 843. The *Ladson* court also stated the test for determining whether a traffic 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 359, 979 P.2d at 843.

Following *Ladson*, the Court of Appeals of Washington, Division 1, found that a stop of a vehicle by an officer on routine patrol duty was not a pretextual stop. *See State v. Hoang*, 101 Wash.App. 732, 6 P.3d 602 (2000). In *State v. Hoang*, an officer on routine patrol duty observed a vehicle pulled to a stop by a group of individuals. *See Hoang*, 101 Wash.App. at 734-35, 6 P.3d at 603. The driver of the vehicle appeared to talk with the individuals. *See id.* at 735, 6 P.3d at 603. The vehicle then moved toward a second group of individuals, and the driver again talked with the individuals. *See id.* Although he did not see an exchange take place, based on these two incidents, the officer suspected a drug deal may have occurred. *See id.* The vehicle moved forward, stopped at a stop sign, and made a left-hand turn without signaling. *See id.* The officer then

activated his lights, pulled behind the vehicle, and stopped the vehicle within approximately one block. *See id.*

After requesting the driver's license, registration, and insurance, the officer arrested the driver for driving while his license was suspended. *See id.* at 736, 6 P.3d at 603. During a search of the passenger compartment of the vehicle, the officer found a rock of cocaine in plain view. *See id.* at 735, 6 P.3d at 603-04. The driver was charged with possession of cocaine, and subsequently filed a motion for suppress. *See id.* at 735, 6 P.3d at 604. The trial court denied this motion, and the driver was convicted of the charge. *See id.* at 738, 6 P.3d at 604.

On appeal, the court affirmed the driver's conviction, upholding the trial court's ruling that the stop was not unconstitutionally pretextual. *See id.* at 743, 6 P.3d at 607. The court stated:

Under *Ladson*, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation.

*Id.* at 742, 6 P.3d at 606-07 *citing Ladson*, 138 Wash.2d at 357-58, 979 P.2d 833. The court found in determining whether the stop was pretextual, the trial court followed the totality of the circumstances test set forth in *State v. Ladson*. *See id.* at 741, 6 P.3d at 606. The officer only

asked the questions typically asked on a routine traffic stop, and he did not ask what the driver was doing at the scene. *See id.* Additionally, the officer immediately pulled the driver over after he failed to signal, as opposed to in *Ladson*, where the officer followed the driver looking for a reason to stop the vehicle. *See id.* at 741-42, 6 P.3d at 606. The court found the officer's failure to cite the driver for failing to signal was not dispositive in determining the constitutionality of the stop. *See id.* at 742, 6 P.3d at 607.

Here, an examination of the objective reasonableness of Officer Murray's behavior and his subjective intent show that his stop of the vehicle was not a pretext for a criminal investigation. With respect to the objective reasonableness of Officer Murray's behavior, like the officer in *State v. Hoang*, Officer Murray did not follow Ms. Welker looking for a legal reason to stop the vehicle. To the contrary, Officer Murray pulled the vehicle over after it left the church parking lot, as soon as he realized he could not run the license plate. RP 14-15; 20-21. Furthermore, unlike the officers in *State v. Ladson*, Officer Murray was on routine patrol at the time of this contact. RP 9. One of his duties was to make routine traffic stops. Furthermore, it is unlawful to have an obstructed license plate. *See* RCW 46.16.240. Accordingly, Officer Murray cited Ms. Welker for the

obstructed license plate. RP 50. Officer Murray was enforcing the traffic code when he stopped and subsequently cited Ms. Welker.

With respect to the Officer Murray's subjective intent, it is true that Officer Murray testified he would have pulled the vehicle over, even if he was able to read the license plate. RP 20-21. Nonetheless, the Court is required to look at the totality of the circumstances, not just Officer Murray's subjective intent at the time of the stop. The State requests the Court find, in evaluating both the objective reasonableness of Officer Murray's behavior and his subjective intent, that his stop of the vehicle was not a pretext for a criminal investigation.

Additionally, Officer Murray had independent grounds to stop the vehicle. Officer Murray was not using his authority "to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation." *Hoang*, 101 Wash.App. at 742, 6 P.3d at 607 citing *Ladson*, 138 Wash.2d at 357-58, 979 P.2d 833. Officer Murray had a ground to avoid the warrant requirement for an unrelated criminal investigation – a *Terry* stop of the driver of the vehicle based on her presence in the church parking lot. As with the defendant, Officer Murray had reasonable and sufficient suspicions to believe that criminal activity occurred or was occurring in relation to Ms. Welker's presence at the church. This includes his knowledge of the recent church burglaries in the

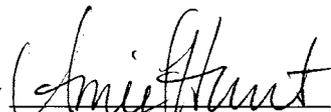
area, the time of day he saw Ms. Welker in the church parking lot, and the fact the church was closed. RP 16-17; 19; 50. This gave Officer Murray the authority to question Ms. Welker upon stopping the vehicle regarding her presence at the church. The State requests the Court find Officer Murray had grounds, independent of the traffic violation, to lawfully stop the vehicle.

#### **VI. CONCLUSION**

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectfully submitted this 14<sup>th</sup> day of December, 2006

SUSAN I. BAUR  
Prosecuting Attorney

By   
AMIE HUNT/SWBA 31375  
Deputy Prosecuting Attorney  
Representing Respondent

# **APPENDIX A**



- 1 5. Officer Murray knew Ms. Jackowiak typically did not drive a truck, and he did not  
2 recognize the truck as belonging to her.
- 3 6. Officer Murray was suspicious of the man and woman's presence at the church and  
4 thinking the woman was Ms. Jackowiak, was suspicious of her being in possession of the  
5 truck.
- 6 7. Officer Murray pulled in behind the truck as it was driving out of the parking lot. He  
7 attempted to run the license plate of the truck to see if it was stolen. Officer Murray was  
8 unable to read the license plate because the vehicle trailer hitch obstructed the plate.
- 9 8. Officer Murray stopped the vehicle because of the obstructed license plate and the above  
10 concerns.
- 11 9. When Officer Murray approached the female driver, he immediately realized she was not  
12 Ms. Jackowiak.
- 13 10. Officer Murray asked the driver what she was doing at the church. The driver explained  
14 that she was coming from Pat Dunham's residence to her vehicle.
- 15 11. Officer Murray was familiar with Pat Dunham and the residence referenced by the driver.  
16 Murray knew Dunham was associated with criminal activity and his residence was  
17 located several houses down the street from the church.
- 18 12. The driver explained that the two cut through the back yard of Dunham's house to get to  
19 the church.
- 20 13. Officer Murray found the driver's explanation illogical and nonsensical because the path  
21 she described was not the most direct route from Dunham's and actually increased the  
22 distance to the truck.
- 23 14. Given the illogical path explanation and Dunham's reputation, Officer Murray was  
24 suspicious of the man and woman's presence near the church.  
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15. Officer Murray asked the driver for her identification, proof of insurance, and registration. He then asked the male passenger his name. Officer Murray had not spoken to the male passenger until that point. The passenger identified himself as "David Cole" although, he was later identified to be Leif Eric Cole, the defendant.

16. After learning both identities, Officer Murray ran a record's check of the driver. He learned she was a protected party in a no contact order, prohibiting Leif Eric Cole from contacting her.

17. Officer Murray asked for a records check of a David Cole born in the early 1970's. Dispatch replied they did not have any identifying information on such a person, but Leif Cole did have a warrant for his arrest.

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Conclusions of Law

1. When Officer Murray asked the defendant his name, the defendant was seized. The defendant was not seized up to this point.
2. Officer Murray's suspicions were reasonable and sufficient to believe that criminal activity occurred or was occurring in relation to the man's presence at the church.
3. Officer Murray had reasonable articulable suspicion that criminal activity was occurring or had occurred in regards to the church. Officer Murray was not required to rule out any valid possible explanations for the presence of the passenger at the church. As such, Officer Murray had sufficient facts to conduct a Terry investigation of the passenger, and ask him his name.

DATED this \_\_\_\_\_ day of 4/4/ 2006.

  
J U D G E

Presented by:

  
AMIE HUNT, WSB # 31375  
Attorney for the State

Approved as to form:

  
SAM WARDLE, WSBA # *with exceptions noted on record*  
Attorney for Defendant  
*notice waived of presentation*  
*waved*

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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON

BY CM  
DEPUTY

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 LEIF ERIC COLE, )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

NO. 34668-135209-5-II  
Cowlitz County No.  
06-1-00114-9

CERTIFICATE OF  
MAILING

I, Audrey J. Gilliam, certify and declare:

That on the 14 day of December, 2006, I deposited in the mails  
of the United States Postal Service, first class mail, a properly stamped  
and address envelope, containing Brief of Respondent addressed to the  
following parties:

Court of Appeals  
950 Broadway, Suite 300  
Tacoma, WA 98402

Lisa E. Tabbut  
Attorney at Law  
1402 Broadway  
Longview, WA 98632

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

Dated this 14 day of December, 2006.

Audrey J. Gilliam  
Audrey J. Gilliam