

NO. 35116-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

JAMES V. HESLEN,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY *lp* *SN*  
REPLY

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ON APPEAL FROM THE  
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael Sullivan, Judge

OPENING BRIEF OF APPELLANT

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Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

PM 1/29/07

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by admitting evidence found in James Heslen's pants because the State failed to prove that the State Patrol officer stopped Heslen for the sole purpose of enforcing the traffic code and not for the unconstitutional purpose of conducting a warrantless criminal investigation.

2. The trial court erred by admitting evidence found in Heslen's pants because the State failed to prove the officer stopped Heslen for the purpose of enforcing the traffic code and not for the unconstitutional purpose of conducting a warrantless criminal investigation.

3. The trial court erred in entering the following "Undisputed Findings of Fact" insofar as the Appellant challenges the constitutionality of the traffic stop:

A. That Trooper Madsen and defendant's car passed each other in opposite directions during dark hours and the Trooper observed the rear of the defendant's vehicle in his side mirror.

B. The Trooper turned around and followed defendant's vehicle.

C. The Trooper stopped defendant's vehicle. The defendant was the driver.

D. The Trooper asked for defendant's identification and driver's license check via dispatch. The trooper did not recognize the driver prior to the stop.

E. Driver's check verified defendant's license was suspended in the second degree.

F. Trooper Madsen placed defendant under arrest for driving with a suspended license in the second degree.

G. Trooper Madsen searched the defendant incident to arrest and located in defendant's right, front pants pocket folded cellophane.

H. Trooper Madsen unfolded the cellophane, found what looked like methamphetamine.

4. The trial court erred in entering the following "Decision":

The stop for failing to illuminate the license plate pursuant to RCW 46.37.050 was lawful. Therefore, the subsequent arrest and search of the defendant were also lawful. The items discovered on the defendant's person and seized as a result of the search incident to arrest are admissible in the State's case-in-chief.

5. The lower court erred in allowing an unwitting possession jury instruction that shifted the burden of proof to a criminal defendant.

6. Heslen received ineffective assistance of counsel based upon failure to object to an erroneous unwitting possession instruction.

## **B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. The State bears the burden of providing the constitutionality of warrantless seizures. In the absence of a finding of fact on a factual issue, a reviewing court must "indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Here, the trial court found the stop

pursuant to RCW 46.37.050 was lawful, but did not make a finding of the State Patrol officer's true motivation in stopping Heslen. Should this Court presume the State failed to meet its burden of proof and reverse the decision of the trial court? Assignments of Error No. 1, 2, 3, and 4.

2. Does the unwitting possession instruction, which shifts the burden of proof to a criminal defendant, require reversal of the conviction for possession of cocaine? Assignment of Error No. 5.

3. Did ineffective assistance of counsel deprive Heslen of constitutional right to a fair trial? Assignment of Error No. 6.

### **C. STATEMENT OF THE CASE**

#### **1. Procedural history:**

A jury convicted James Heslen of possession of methamphetamine and driving suspended/revoked in the second degree. Clerk's Papers [CP] at 26, 27. The State charged Heslen in an amended information filed by the State in Pacific County Superior Court on May 30, 2006, with possession of methamphetamine, in violation of RCW 69.50.4013, and driving while suspended/revoked in the second degree, contrary to RCW 46.20.342(1)(b). CP at 24-25.

#### **a. Motion to suppress methamphetamine.**

On April 28, 2006, Superior Court Judge Michael J. Sullivan heard a

motion pursuant to Criminal Rule 3.6 to suppress the methamphetamine. Washington State Patrol officer Shane Madsen testified that he stopped a 1978 Z-28 Camaro driven by James Heslen on September 11, 2005 at approximately 9:50 p.m. 1Report of Proceedings [RP] at 5, 7, 13, 47<sup>1</sup>. It was dark at the time of the traffic stop. RP at 26. He testified that he was traveling eastbound in Ocean Park, Washington, and saw the Camaro going westbound past him. 1RP at 7. The vehicle was traveling “somewhere near the speed limit.” 1RP at 12. He stated that he looked at the rear of Camaro in his driver’s side mirror in order to see the license plate. 1RP at 7,- 14. He testified that the Camaro did not have a license plate light and that “it was just totally pitch black on the back there.” 1RP at 7. He testified that he was between 10 and 20 feet away from the Camaro when he looked at the rear of the car. RP at 7. He testified that he stopped the Camaro for failing to have an illuminated rear license plate. RP at 8-9, 29. Heslen’s license was suspended in the second degree, and Madsen placed him under arrest. RP at 10-11. Madsen searched Heslen and found a folded piece of plastic containing a clear crystal substance in his right front pants pocket. RP at 11.

Madsen testified that his reason for pulling over the vehicle was that

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<sup>1</sup> 1RP, CrR 3.6 Suppression Hearing, on April 28, 2006.  
<sup>2</sup>RP Jury Trial, May 30, 2006.

the rear license plate was not lit. 1RP at 20. He denied using the license plate light as “an excuse to pull [the car] over to look for something else[.]” 1RP at 23. Heslen testified that Madsen told him that he was pulled over due to the license plate light. RP at 50.

Traci Vaughn, Heslen’s significant other, testified that she picked up the car after Heslen was arrested and drove it to their residence in Nahcotta. RP at 35. Madsen permitted her to drive the Camaro, despite his contention that the license plate was not illuminated. 1RP at 36. She stated that she checked the license plate lights and noting that it was working. 1RP at 35-36. The license plate light was still on when she got to her house. 1RP at 38.

Heslen testified that he probably checked his license plate light within a two-week period of being stopped by Madsen, and the light was working at that time. RP at 47. He testified that he after he was stopped, he told Madsen that the light was working shown he was sitting in the back of Madsen’s vehicle. RP at 48. He stated that Madsen said “it wasn’t working then.” RP at 48. Madsen denied that Heslen told him that the light was working and denied saying “well, it wasn’t working when I stopped you.” 1RP at 58, 59.

Heslen testified that the rear license plates on Camaros are mounted between the two taillights “so no matter what, if the license plate light is out,

the license plate is still lit.” 1RP at 54-55, 56, 57. Madsen testified that the taillights were working, but that he could not see the license plate when the car passed him. 1RP at 61.

He looked at the license plate light two days after his arrest and that it was working at that time. 1RP at 49.

Madsen did not issue a citation to Heslen for an alleged violation of RCW 46.37.050(3).<sup>2</sup> 1RP at 61.

The Judge issued a Memorandum Opinion Re: 3.6 Hearing on May 2, 2006. CP at 11-15. Appendix A-1 through A-5.

The Court entered the following Findings of Fact and Conclusions of Law on May 30, 2006:

### **I. UNDISPUTED FACTS**

1. That Trooper Madsen and defendant’s car passed each other in opposite directions during dark hours and the Trooper observed the rear of the defendant’s vehicle in his side mirror.
2. The Trooper turned around and followed defendant’s vehicle.

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<sup>2</sup>RCW 46.37.050(3) provides:

(3) Either a tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of fifty feet to the rear. Any tail lamp or tail lamps, together with any separate lamp or lamps for illuminating the rear registration plate, shall be so wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.

3. The Trooper stopped defendant's vehicle. The defendant was the driver.
4. The Trooper asked for defendant's identification and driver's license check via dispatch. The trooper did not recognize the driver prior to the stop.
5. Driver's check verified defendant's license was suspended in the second degree.
6. Trooper Madsen placed defendant under arrest for driving with a suspended license in the second degree.
7. Trooper Madsen searched the defendant incident to arrest and located in defendant's right, front pants pocket folded cellophane.
8. Trooper Madsen unfolded the cellophane, found what looked like methamphetamine.
9. Trooper Madsen released defendant's 1978 Camaro to the female passenger, Tracy Vaughn.
10. Tracy Vaughn checked the license plate light shortly after the traffic stop and it was working properly.
11. Tracy Vaughn drove the Camaro to their shared residence in the Nahcotta area.

## **II. DISPUTED FACTS**

2. Whether the defendant's license plate light was working at the time the Trooper observed it when defendant's vehicle passed by the trooper's vehicle.
3. Whether the Trooper's stop of the defendant's vehicle for an unlit license plate was actually a pretext stop for trying to discover some criminal activity.

### **III. DECISION**

The stop for failing to illuminate the license plate light pursuant to RCW 46.37.050 was lawful. Therefore, the subsequent arrest and search of the defendant were also lawful. The items discovered on the defendant's person and seized as a result of the search incident to arrest are admissible in the State's case-in-chief.

CP at 28-30. Appendix B-1 through B-3.

#### **b. Jury instructions.**

Neither counsel noted exceptions to requested instructions not given or objected to instructions given. RP at 89, 90-92. Supplemental CP at 1-20.

#### **c. Verdict.**

The jury found Heslen guilty of possession of methamphetamine and driving suspended/revoked in the second degree. CP at 26, 27.

#### **d. Sentencing.**

The matter came on for sentencing on July 7, 2006. Judge Sullivan imposed a standard range sentence of 45 days for Count I and 10 days for Count II, to be served concurrently. CP at 36. Heslen has no criminal history. CP at 32.

### **2. Substantive facts.**

#### **a. Methamphetamine found in Heslen's pocket in a search incident to arrest.**

James Heslen was stopped while driving a 1978 Camaro in Ocean Park the night of September 11, 2005. 2RP at 5. After the stop, State Patrol officer Madsen determined that his driver's license was revoked in the second degree. 2RP at 10, 11, 19. Exhibit 1. Madsen placed Heslen under arrest. 2RP at 11. He searched Heslen prior to putting him in his car. 2RP at 11. Madsen found wadded up plastic wrap in the right front pocket of Heslen's pants. RP at 12. The plastic wrap contained a white crystal substance. 2RP at 13-14. Heslen asked Madsen "what's that?" and he responded that "[i]t looks like meth." 2RP at 14, 15.

The substance obtained by Madsen tested positive for the presence of methamphetamine. 2RP at 26. Exhibits 2 and 3.

Heslen testified that he was searched twice. 2RP at 70. Madsen denied searching him twice. 2RP at 84, 85.

Heslen testified that he was not aware of having anything in his pants pocket prior to the search. 2RP at 72. He stated that he was surprised when Madsen "pulled it out of the pocket . . . ." 2RP at 72. He stated that he did not have methamphetamine in his pocket that he was "aware of" and did not know where it came from. 2RP at 73, 74, 83.

Timely notice of appeal was filed on July 7, 2006. CP at 47. This appeal follows.

**D. ARGUMENT**

**1. THE TRIAL COURT FAILED TO DETERMINE WHETHER THE TRAFFIC STOP WAS MADE SOLELY FOR A CONSTITUTIONALLY PERMISSIBLE PURPOSE.**

**a. Constitutional principles prohibit unreasonable seizures.**

The Fourth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .” U.S. Const. amend. IV; *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Under Article I, § 7 of the Washington Constitution, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. Washington courts have long recognized that Article I, § 7 provides greater protections to citizens’ privacy rights than those provided by the Fourth Amendment. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *Seattle v. Messiani*, 110 Wn.2d 454, 457-58, 755 P.2d 775 (1988).

A traffic stop is a seizure for purposes of the Fourth Amendment and Article I, § 7. *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769,

135 L. Ed. 2d 89 (1996); *State v. Barker*, 143 Wn.2d 915, 920-21, 25 P.3d 423 (2001). Under both the federal and state constitutions, warrantless searches and seizures are per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). “Nonetheless, there are a few ‘jealously and carefully drawn’ exceptions’ to the warrant requirement which ‘provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers [or] the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.’” *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)).

**b. The State must prove the legality of the warrantless seizure.**

The State always bears the burden of proving the applicability of one of the narrow exceptions to the warrant requirement. *Coolidge*, 403 U.S. at 455; *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999); *Hendrickson*, 129 Wn.2d at 71; *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

In order to meet this burden, the State must prove the traffic stop was

justified at its inception and reasonable. *Ladson*, 138 Wn.2d at 350 (citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). A police officer's decision to stop an automobile is generally reasonable if the officer has probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. at 810; *Ladson*, 138 Wn.2d at 349 (citing *State v. Mendez*, 137 Wn.2d 208-211-12, 219, 220, 970 P.2d 722 (1999)); *State v. Chelly*, 94 Wn. App. 254, 259, 970 P.2d 376 (1999). However, probable cause cannot justify a stop if the stop was pretextual and actually made in order to conduct a criminal investigation. *Ladson*, 138 Wn.2d at 351 (finding pretext stops to be "inherently unreasonable").

c. **The Court failed to find whether the traffic stop was based on the license plate light.**

The court merely found that the stop pursuant to RCW 46.37.050 "was lawful." CP at 30. On review, this Court must independently review the evidence, determine whether substantial evidence supported the trial court's finding of fact, and assess whether the findings in turn supported the trial court's denial of Heslen's suppression motion. *See e.g.*, *State v. Sandholm*, 96 Wn. App. 846, 848, 980 P.2d 1292 (1999); *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997).

The stop is unconstitutional if, as Heslen contends, the purpose of the

stop was to conduct a criminal investigation. *Ladson*, 138 Wn.2d at 349.

d. **Pretextual traffic stops violate Article I, § 7 of the Washington Constitution.**

A pretextual traffic stop occurs when the police stop a driver for the purpose of conducting a criminal investigation unrelated to driving and do so under the guise of making the stop to enforce the traffic code. *Ladson*, 138 Wn.2d at 349. Under Article I, § 7 of the Washington Constitution, pretext stops are forbidden. *Id.* at 345.

e. **The trial court employed precisely the type of reasoning rejected by the Supreme Court in *Ladson*.**

In the case at bar, Heslen was stopped purportedly for having an unlighted rear license plate. In concluding the stop was lawful, the trial court did not consider whether the light was actually the reason for the stop. Rather, the trial court found:

“The stop for failing to illuminate the license plate light pursuant to RCW 46.37.050 was lawful.”

CP at 30.

Judge Sullivan wrote in his Memorandum Opinion that “the initial stop for failing to property illuminate the rear license plate was not a pretext stop based on the evidence presented to this Court.” CP at 14. This

statement, however, was not made a finding in the Findings of Fact entered May 30, 2006.

- f. **Because the trial court did not make a finding of fact on the officer's motive to make the stop, this Court must presume the State failed to meet its burden of proving the legality of the stop.**

The court addressed the issue of pretext during the suppression hearing and in its Memorandum Opinion, RP 26-30. Yet the court never made a finding on the officers' purpose in making the stop. Even assuming, as the trial court did, that the light was defective, the police had no authority to stop Heslen if their purpose in doing so was to conduct a criminal investigation.

“In the absence of a finding on a factual issue [a court of review] must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *see also State v. Byrd*, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002) (reversing trial court's denial of suppression motion in part because no finding of fact supporting State's alternative basis for unlawful stop).

Because the trial court did not making a finding on the factual issue of

whether the officer's purpose in making the traffic stop was to enforce the traffic code or to conduct a criminal investigation, this Court must presume the State failed to sustain its burden of proof on this issue.

g. **Fruits of the illegal stop must be suppressed.**

Evidence uncovered as the result of an unconstitutional search or seizure must be suppressed. *Wong Sum v. United States*, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); *Ladson* 138 Wn.2d at 359.

2. **INSTRUCTION 8 PERTAINING TO UNWITTING POSSESSION SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT. THIS COURT SHOULD FOLLOW THE HOLDING OF DIVISION 3 IN STATE V. CARTER, WHICH FOUND THAT A SUBSTANTIALLY IDENTICAL INSTRUCTION REGARDING UNWITTING POSSESSION OF A FIREARM SHIFTED THE BURDEN OF PROOF AND REQUIRED REVERSAL.**

Heslen pursued an unwitting possession defense. 2RP at 105,106. Unwitting possession has been recognized as an affirmative defense since *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982).

The trial court submitted WPIC 52.01, the unwitting possession instruction. Defense counsel did not object to the proposed instruction.

The unwitting possession instruction was Instruction Number 8. It stated:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case that it is more probably true than not true.

SCP at 12.

In *State v. Carter*, 127 Wn. App. 713, 718, 112 P.3d 561 (2005), the court gave the following instruction:

A person is not guilty of unlawful possession of a firearm if the possession is unwitting. Possession of a firearm is unwitting if a person did not know that the firearm was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the firearm was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

*State v. Carter*, 127 Wn. App. at 718.

Unwitting possession instruction was declared by Division 3 of this Court to be inconsistent with the burden of proof instruction. In *Carter*, Division 3 held:

“When instructions are inconsistent, it is the duty of the reviewing court to determine whether ‘the jury was misled as to its function and responsibilities under the law’ by that inconsistency.” *Wanrow* [*State v. Wanrow*, 88 Wn.2d 221, 559 P.2d (1977)] at 239 (quoting *State v. Hayes*, 73 Wn.2d 568, 572, 439 P.2d 978 (1968)). If the inconsistency results from a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant. *Wanrow*, 88 Wn.2d 239.

Here, the jury was obviously misled to believe Mr. Carter had the burden of proving unwitting possession. The inconsistent instruction involving the burden of proof was a clear misstatement of the law. Mr. Carter is presumed to have been prejudiced. Therefore, Mr. Carter is entitled to a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

Heslen’s case is on all fours with *Carter*. The unwitting possession instruction shifted the burden of proof. This was improper. The Appellant contends that Division 3’s reasoning should be adopted by this Court and that Heslen’s conviction should be reversed and the case remanded for a new trial, with new counsel.

### 3. INEFFECTIVE ASSISTANCE OF COUNSEL.

Defense counsel did not object to the erroneous unwitting possession instruction.

The *Carter* case determined that the unwitting possession instruction was error. The *Carter* case also determined that it was ineffective assistance of counsel to submit the instruction. *Carter*, 127 Wn. App. at 718.

Heslen asserts that he received ineffective assistance of counsel in his case and that he was prejudiced thereby.

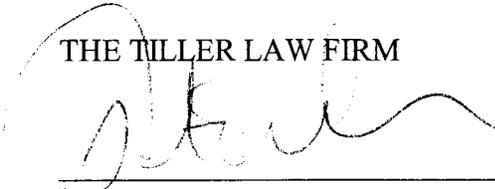
**E. CONCLUSION**

For the foregoing reasons, James Heslen respectfully requests that this Court reverse and dismiss with prejudice his convictions.

DATED: January 29, 2007.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over a horizontal line. The signature is fluid and cursive.

PETER B. TILLER-WSBA 20835  
Of Attorneys for James Heslen

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BY: *[Signature]*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PACIFIC

STATE OF WASHINGTON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JAMES HESLEN, )  
)  
Defendant. )  
\_\_\_\_\_ )

NO. 05-1-<sup>00218</sup>~~00042~~-1  
MEMORANDUM OPINION  
RE: 3.6 HEARING

This matter came before the court for a 3.6 hearing on April 28, 2006. The Court, after considering the testimony and the file and records therein, and after argument of counsel, the Court now upholds the traffic stop, the search of the defendant incident to arrest and the contraband found from said search.

Undisputed Facts

1. That trooper Madsen and defendant's car passed each other in opposite directions during dark hours and the trooper observed the rear of defendant's vehicle in his side mirror.
2. The trooper turned around and followed defendant's vehicle.
3. The trooper stopped defendant's vehicle. The defendant was the driver.

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4. The trooper asked for defendant's identification and ran driver's license check via dispatch. The trooper did not recognize the driver prior to the stop.
5. Driver's check verified defendant's license was suspended in second degree.
6. Trooper placed defendant under arrest for driving without a suspended license in the second degree.
7. Trooper searched the defendant incident to arrest and located in defendant's right, front, pants pocket folded cellophane.
8. Trooper unfolded the cellophane, found what looked like methamphetamine.
9. Trooper released defendant's 1978 Camaro to the female passenger, Tracy Vaughn.
10. Tracy Vaughn checked the license plate light shortly after traffic stop and it was working properly.
11. Tracy Vaughn drove the Camaro to their shared residence in the Nahcotta area.

#### **Disputed Facts**

1. Whether the defendant's license plate white light was working at the time the trooper observed it when defendant's vehicle passed by troopers vehicle.
2. Whether the trooper's stop of the defendant's vehicle for an unlit license plate was actually a pretext for trying to discover some criminal activity.

#### **Summary of Decision**

The burden of proving that the stop was pretextual is the moving party's burden, here the defendant. The trooper testified that no light was illuminating defendant's

license plate and that the trooper could not see the license plate through the trooper's side mirror. This was the reason the trooper turned around and followed the vehicle for a short ways before initiating his traffic stop. The trooper testified that he bent down to check the license plate light but there was no light coming from the license plate light holder. He asked the driver (Mr. Heslen) for I.D. and was provided a punched driver's license, which he ran and subsequently arrested Mr. Heslen for driving on a suspended license in the second degree.

The defendant testified that he is a long-time automotive mechanic and that he was rebuilding the 1978 Camaro and had also wired the vehicle. Tracy Vaughn, who was riding in the vehicle during the stop, testified that she checked the license plate light shortly after the trooper released the vehicle to her and she observed a properly working license plate light.

The trooper testified that he had made at least one hundred license plate light stops during his career, but did not stop every vehicle that he saw with a nonworking license plate light. He testified that he will not stop a vehicle for this violation if he is engaged in some other stop at the time or is on his way to some other call. There is no testimony from any person that the trooper was on any special emphasis patrol that night. There is also no testimony that the defendant's vehicle was operating in any suspicious or negligent manner prior to the stop. Therefore, the Court has no testimony of any motive that officer may have had to make a pretextual stop. The fact that a law enforcement officer elects to not stop every vehicle for some infraction is within the discretion of the

officer. There is no evidence before the court that the officer stopped the defendant's vehicle for the real reason of searching the defendant's vehicle or the defendant.

Further, the trooper testified that he observed the license plate light not working on three occasions: (1) initially in his side mirror as the defendant's vehicle passed him; (2) while following the defendant's vehicle after the trooper turned around; and (3) after the stop when the trooper bent down to check the license plate light. Neither the defendant nor the passenger were able to see the license plate light from their positions inside the Camaro. If accepted as true just for the sake of argument, that the license plate light was working when the passenger checked it just prior to driving the auto home, this does not negate the three, distinct times the trooper viewed the license plate without a functioning light.

RCW 46.37.050 (3) states that the light must be a white light. Again, for the sake of argument, if the tail lights (not white) displayed the license plate, the light had to be a white light.

Therefore, the initial stop for failing to properly illuminate the rear license plate was not a pretext stop based upon the evidence presented to the Court. The search of the defendant was lawful pursuant to a search incident to arrest and also for officer safety. The items taken from the defendant's person are admissible in the state's case-in-chief. The statements by the defendant during the search of his person were not before the court as this hearing was solely for 3.6 purposes.

Finally, the fact that the trooper released the Camaro to Ms. Vaughn does not prove that the traffic stop was pretextual. Evidently the tail lamps were functioning

properly so there was no safety issue to the public at large. Law enforcement officers are expected to make reasonable judgment calls at the scene. A challenge raised as to the wisdom of the trooper to allow a vehicle to be driven at night without a license plate light should be decided through administrative channels.

The state shall prepare findings of fact and conclusions of law for presentation at least one week prior to the trial date of May 18<sup>th</sup>. This memorandum is not intended to limit further findings as to both contested and uncontested facts and the Court will entertain such additions or editions to the findings listed above at the presentation hearing.

Decided this 2<sup>nd</sup> day of May, 2006.

  
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JUDGE MICHAEL J. SULLIVAN

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PACIFIC COUNTY

STATE OF WASHINGTON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
**JAMES V. HESLEN,** )  
Defendant. )  
\_\_\_\_\_ )

NO. **05-1-00218-1**  
FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

**I. UNDISPUTED FACTS**

1. That Trooper Madsen and defendant's car passed each other in opposite directions during dark hours and the Trooper observed the rear of the defendant's vehicle in his side mirror.
2. The Trooper turned around and followed defendant's vehicle.
3. The Trooper stopped defendant's vehicle. The defendant was the driver.
4. The Trooper asked for defendant's identification and ran driver's license check via dispatch. The Trooper did not recognize the driver prior to the stop.
5. Driver's check verified defendant's license was suspended in the second degree.

FINDINGS OF FACT &  
CONCLUSIONS OF LAW - 1

**Pacific County Prosecuting Attorney**  
**P.O. Box 45**  
**Courthouse**  
**South Bend, WA 98586**  
**Phone: (360) 875-9361**  
**Fax: (360) 875-9362**

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2 6. Trooper Madsen placed defendant under arrest for driving with a suspended  
3 license in the second degree.

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5 7. Trooper Madsen searched the defendant incident to arrest and located in  
6 defendant's right , front pants pocket folded cellophane.  
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9 8. Trooper Madsen unfolded the cellophane, found what looked like  
10 methamphetamine.  
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12 9. Trooper Madsen released defendant's 1978 Camaro to the female  
13 passenger, Tracy Vaughn.  
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16 10. Tracy Vaughn checked the license plate light shortly after the traffic stop  
17 and it was working properly.  
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19 11. Tracy Vaughn drove the Camaro to their shared residence in the Nahcotta  
20 area.  
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23 **II. DISPUTED FACTS**

24 1. Whether the defendant' license plate white light was working at the time  
25 the Trooper observed it when defendant's vehicle passed by the trooper's  
26 vehicle.  
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29 2. Whether the Trooper's stop of the defendant's vehicle for an unlit license  
30 plate was actually a pretext stop for trying to discover some criminal  
31 activity.  
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**III. DECISION**

The stop for failing to illuminate the license plate light pursuant to RCW 46.37.050 was lawful. Therefore, the subsequent arrest and search of the defendant were also lawful. The items discovered on the defendant's person and seized as a result of the search incident to arrest are admissible in the State's case-in-chief.

DATED this 30 day of May, 2006.

  
JUDGE

Presented by:



MICHAEL ANDERSON, WSB#34636  
Chief Deputy Prosecuting Attorney

Approved as to form:



HAROLD KARLSVIK, WSBA#  
Attorney for Defendant.

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DIVISION II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES V. HESLEN,

Appellant.

COURT OF APPEALS NO.  
35116-1-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to James V. Heslen, Appellant, and David John Burke, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on January 29, 2007, at the Centralia, Washington post office addressed as follows:

Mr. David J. Burke  
Deputy Prosecuting Attorney  
P.O. Box 45  
South Bend, WA 98586-0045

Mr. David Ponzoha  
Clerk of the Court  
WA State Court of Appeals  
950 Broadway, Ste. 300  
Tacoma, WA 98402-4454

CERTIFICATE OF  
MAILING

1

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE - P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828

Mr. James V. Heslen  
P.O. Box 286  
Ocean Park, WA 98640

Dated: January 29, 2007.

THE TILLER LAW FIRM



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PETER B. TILLER – WSBA #20835  
Of Attorneys for Appellant

CERTIFICATE OF  
MAILING

2

**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE – P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828