

original

NO. 36008-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALAN DUNLAP,

Appellant.

07/11/09 2:09 PM
STATE OF WASHINGTON
BY: [Signature]

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

The Honorable Linda CJ Lee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Finding as to Disputed Fact No. 2 (CrR 3.6)¹ is not supported by substantial evidence.

2. The court erroneously concluded that the officer had a reasonable articulated suspicion that a traffic infraction occurred.

3. Evidence seized as a result of the unlawful detention should have been suppressed.

Issue pertaining to assignments of error

A police officer stopped appellant for driving without headlights. By statute, headlights are required until 30 minutes before sunrise or any time visibility on the highway is less than 1,000 feet. Although the stop occurred shortly after sunrise, the officer's report indicated that headlights were required due to the time of morning, because the sun had not yet come up. Where the state presented no evidence at the suppression hearing as to visibility conditions, did the state fail to prove that probable cause justified the warrantless seizure? Should evidence discovered as a result of the unlawful detention have been suppressed?

¹ A copy of the court's Findings and Conclusions on Admissibility of Evidence CrR 3.6 is attached as an appendix to this brief.

B. STATEMENT OF THE CASE

At 6:30 in the morning on April 16, 2006, a Milton police officer observed Michael Dunlap driving without illuminated headlights and conducted a traffic stop. CP 31. Dunlap identified himself to the officer and indicated he had outstanding warrants. CP 31. After confirming the warrants, the officer removed Dunlap from the vehicle and placed him under arrest. CP 31. Dunlap was charged with second degree identity theft and two counts of second degree possession of stolen property based on items the officer found in the car in a search incident to arrest. CP 1-2, 32; RCW 9.35.020; RCW 9A.56.160.

Dunlap moved to dismiss the charges, arguing there was no probable cause for the traffic stop and the evidence seized from the car should be suppressed. CP 12-33; 1RP 2. The motion was heard by the Honorable Linda CJ Lee. The state did not present testimony from the officer at the hearing but instead relied on his police report. In the report, the officer explained why he had conducted the stop: "Due to the time of morning, the sun had not yet come up and thus headlights were still required." CP 31.

It was undisputed that sunrise on the date in question occurred at 6:19 a.m., about 11 minutes before the traffic stop. 1RP² 6. Defense counsel pointed out that by statute, headlights are required only until one half hour before sunrise, and any other time when people and objects are not clearly discernible from 1,000 feet. RCW 46.37.020; 1RP 2-3. Since the officer stopped Dunlap solely based on the time of day, without reference to conditions affecting visibility, the state failed to prove the traffic stop was supported by probable cause to believe the infraction occurred. 1RP 4, 9.

The court denied the motion. It found that, although the officer did not specifically say that visibility was less than 1,000 feet, his statement that the sun had not yet come up and headlights were required indicated that it was dark. 1RP 11-12; CP 43³.

Dunlap was convicted on all counts after a stipulated facts trial before the Honorable Frederick W. Fleming. 2RP 16-17. Following the parties' agreed recommendation, the Honorable Lisa Worswick imposed a Drug Offender Sentencing Alternative. 3RP 10, 17; CP 61. Dunlap filed this timely appeal. CP 69.

² The Verbatim Report of Proceedings is contained in three volumes, designated as follows: 1RP—12/21/06; 2RP—1/18/07; 3RP—2/16/07.

³ “The officers [sic] statement, ‘...the sun had not yet come up and thus headlights were still required’, indicates it was dark.” CP 43.

C. ARGUMENT

THE STATE FAILED TO PROVE THE OFFICER HAD PROBABLE CAUSE TO STOP DUNLAP FOR A TRAFFIC INFRACTION, AND ALL EVIDENCE DISCOVERED AS A RESULT OF THE UNLAWFUL DETENTION SHOULD HAVE BEEN SUPPRESSED.

Both the federal and state constitutions prohibit unreasonable police seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const., amend. IV; Wash. Const., art. 1, § 7. Warrantless searches and seizures are unreasonable unless they fall within one of the “jealously and carefully drawn exceptions” to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). “The burden is always on the state to prove one of these narrow exceptions.” Ladson, 138 Wn.2d at 350.

A traffic stop, no matter how brief, is a “seizure” requiring either a warrant or circumstances which fall within one of the narrow exceptions to the warrant requirement. Ladson, 138 Wn.2d at 350. When not used as a pretext for other investigation, a traffic stop may be conducted if the officer has probable cause to believe a traffic infraction has been committed. Ladson, 138 Wn.2d at 358; Clement v. Dep’t of Licensing,

109 Wn. App. 371, 375, 35 P.3d 1171 (2001), review denied, 146 Wn.2d 1017 (2002).

Probable cause requires facts and circumstances “sufficient to warrant a person of reasonable caution to believe that an offense has been committed.” Clement, 109 Wn. App. at 375. Whether probable cause exists is a mixed question of law and fact. The trial court’s factual findings must be supported by substantial evidence, and those findings must support the court’s conclusions of law, which are reviewed *de novo*. State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001), affirmed, 148 Wn.2d 303, 59 P.3d 648 (2002).

In this case, the officer stopped Dunlap for driving without headlights. CP 31. Washington’s motor vehicle code sets forth when headlights must be used:

Every vehicle upon a highway within this state at any time from a half hour after sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of one thousand feet ahead shall display lighted headlights....

RCW 46.37.020.

It was undisputed that the traffic stop occurred 11 minutes after sunrise. 1RP 6. The lower court concluded, however, that the officer reasonably believed a traffic offense had been committed, based on its

finding that visibility was less than 1,000 feet because it was dark at the time of the stop. 1RP 11-12; CP 43. The court's finding as to visibility is not supported by substantial evidence in the record.

Substantial evidence exists when there is sufficient evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); Vasquez, 109 Wn. App. at 318-19 (substantial evidence to support finding that there was probable cause to stop for speeding, where officer testified that he paced defendant traveling 38 miles per hour in a 25 mile per hour zone.)

Here, unlike Vasquez, there was no testimony from the officer regarding the traffic stop. The only information before the court as to why the officer conducted the stop was the officer's report, which indicated he stopped Dunlap based on the time of day: "Due to the time of morning, the sun had not yet come up and thus headlights were still required." CP 31. The officer's report says nothing about visibility conditions, and the state presented no other evidence regarding that critical issue. The court's finding that it was dark is not supported by substantial evidence.

Since the traffic stop actually occurred after sunrise, the stop was justified by probable cause only if a reasonable person would believe that persons and vehicles on the highway were not clearly discernible at 1,000

feet. See RCW 46.37.020. Because it presented no evidence from which the court could find this necessary fact, the state failed to prove the warrantless seizure was lawful. See Ladson, 138 Wn.2d at 350 (state’s burden to prove exception to warrant requirement).

“It is elementary that ‘if the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible’” Ladson, 138 Wn.2d at 360 (quoting State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). This constitutionally mandated exclusionary rule “saves article 1, section 7 from becoming a meaningless promise.” Ladson, 138 Wn.2d at 359 (quoting Sanford E. Pitler, *The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 508 (1986)).

The state failed to prove that the traffic stop in this case was lawful, and all evidence discovered as a result of that stop should have been suppressed. The court’s ruling to the contrary must be reversed.

D. CONCLUSION

The state failed to prove the officer had probable cause to stop Dunlap for a traffic infraction, and all evidence discovered as a result of the unlawful detention should be suppressed. Because the state cannot

prove the charged offenses without the suppressed evidence, Dunlap's convictions should be reversed and the charges dismissed.

DATED this 1st day of August, 2007.

Respectfully submitted,

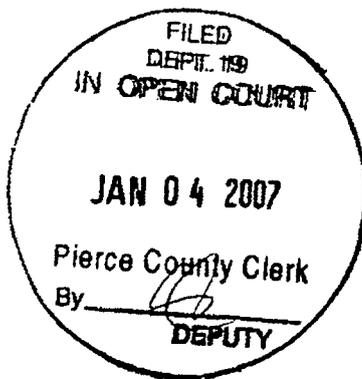
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Attorney for Appellant

APPENDIX



06-1-01690-6 26753558 FNFL 01-05-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-01690-6

vs.

MICHAEL ALAN DUNLAP,

FINDINGS AND CONCLUSIONS ON
ADMISSIBILITY OF EVIDENCE CrR
3.6

Defendant.

THIS MATTER having come on before the Honorable Linda CJ Lee on the 21st day of December, 2006, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

THE UNDISPUTED FACTS

- 1) On 4/16/06 at 6:30 am the defendant was traveling Southbound on Pacific Highway in Milton, Washington. Officer Downey, on routine patrol, observed that the defendant was driving without his headlights being turned on.
- 2) The officer noted that the sun had yet come up and headlights were still required. The officer performed a routine traffic stop on the defendant and his vehicle.
- 3) The officer contacted the defendant and informed him of the reason for the stop. The defendant stated that he knew he should have his lights on, but had forgotten to turn them on. The officer asked for his driver's license and proof of insurance. The defendant informed the officer that he did not have either document.

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«CAUSE_NUM»

- 4) The defendant identified himself verbally. The defendant then stated to the officer that he had warrants, "...you are going to want to run me in on".
- 5) The officer ran the defendant for warrants. The return indicated three felony warrants for the defendants arrest. The officer asked the defendant to step out of his vehicle. The officer arrested the defendant and informed him of his rights.
- 6) The officer secured the defendant in the back of his patrol vehicle. The officer then searched the ~~defendant's~~ ^{defendant's} vehicle incident to the arrest.
- 7) The officer found in the ~~defendant's~~ ^{defendant's} vehicle several credit cards, identifications, and a duffel bag of mail. All of the items belonged to persons other than the defendant.

THE DISPUTED FACTS

- 1) The defense claims that the stop was a pretext because lights are not required from one-half hour before sunrise(RCW 46.37.020) and sunrise was at 6:19 am. on 4/16/06.
- 2) The defense claims that the officer failed to note any factors that would adversely affect visibility. RCW 46.37.020 provides that lights are required if visibility is hindered at 1,000 feet.
- 3) The defense claims that the search was illegal because the defendant had been secured and no longer had control of the vehicle. The defense cited to State v. Porter, 102 Wn.App. 327, 6 P.2d 1245 (2000) for this proposition.

FINDINGS AS TO DISPUTED FACTS

- 1) The stop was not a pretext as the officer was on routine patrol and had no motive to make the stop other than a traffic stop.

«CAUSE_NUM»

- 2) The officers statement, "...the sun had not yet come up and thus headlights were still required", indicates that it was dark.
- 3) At the time of his arrest the defendant had just exited the vehicle at the officers request. The applicable case is State v. Stroud, 102 Wn.2d 144, 720 P.2d 436 (1986).

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

- 1) The officer had a reasonable articulated suspicion that a traffic infraction had occurred and performed a traffic stop.
- 2) After the stop, the officer developed probable cause to arrest when he confirmed the defendant's warrants.
- 3) The officer performed a valid search of the defendant's vehicle incident to the arrest.

DONE IN OPEN COURT this 4th day of January, 2007.

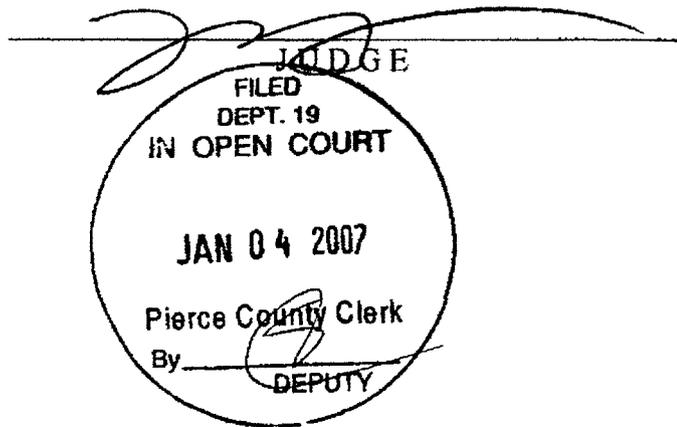
Presented by:

[Signature]
 Tom L. Moore
 Deputy Prosecuting Attorney
 WSB # 17542

Approved as to Form:

[Signature]
 Vera Jean
 Attorney for Defendant
 WSB # 28612

tlm



Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

State v. Michael Dunlap, Cause No. 36008-0-II, directed to:

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DIVISION II
07 AUG -2 PM 1:09
STATE OF WASHINGTON
BY XXXXXXXXXX
DEFIN

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



Catherine E. Glinski
Done in Port Orchard, WA
August 1, 2007