

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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NO. 36559-6-II

STATE OF WASHINGTON,

Respondent.

vs.

CHRISTOPHER LEE ARMENDARIZ

Appellant.

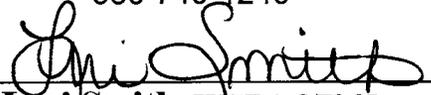
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STATE OF WASHINGTON  
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BY: 

**STATE'S RESPONSE BRIEF**

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*P. M. 4-2-08*

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## STATEMENT OF THE CASE

The Appellant's statement of the case is adequate for purposes of responding to this appeal.

## ARGUMENT

### **I. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO SUPPRESS EVIDENCE IN THIS CASE BECAUSE THE INITIAL STOP OF THE VEHICLE FOR A TRAFFIC INFRACTION WAS LAWFUL AND BECAUSE THIS WAS NOT A "PRETEXT" STOP.**

Armendariz claims that the stop of the vehicle he was riding in was a "pretext stop" and therefore all evidence flowing from that stop should have been suppressed. This claim is without merit.

A pretextual traffic stop violates article I, section 7, of the Washington Constitution because it is a warrantless seizure. State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999). "The essence of a pretextual traffic stop is that the police stop a citizen, not to enforce the traffic code, but to investigate suspicions unrelated to driving. State v. DeSantiago, 97 Wn.App. 446, 451, 983 P.2d 1173 (1999) (emphasis added)( citing Ladson, 138 Wn.2d at 351);State v. Nichols, 161 Wn.2d 1, 8-9, 162 P.3d 1122 (2007)("a pretextual stop occurs when an officer stops a vehicle in order to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code.") In other words, an

officer engages in a pretextual traffic stop when he decides to stop a citizen--not to enforce the traffic code--but to circumvent the warrant requirement and to investigate some other matter. Id. Conversely, where enforcement of the traffic code is the reason for the traffic stop, the stop is *not* pretextual. State v. Hoang, 101 Wn.App. 732, 742, 6 P.3d 602 (2000). "When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." Ladson, 138 Wn.2d at 358-59. It is important to remember that "[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." Hoang, 101 Wn.App. at 742.

The present case can be distinguished from all of the cases relied upon by Armendariz. In the present case the officer performed a traffic stop on the vehicle in which Armendariz was a back-seat passenger. 6/26/07 RP 17, 20. The infraction witnessed by the officer was failure to signal a lane change. Id.; RCW 46.61.305. This traffic infraction is what first drew the officer's attention to the vehicle in which Armendariz was riding--not some

other non-traffic situation. Id. As the officer explained at the 3.6 hearing:

I made a stop on a vehicle for changing lanes without use of a signal, as well as the registered owner had come back suspended 3rd. Upon stopping the vehicle I walked up to the vehicle and made contact with the driver and saw Mr. Armendariz in the back seat not wearing a seat belt.

6/13/07 RP 4. Upon seeing that Mr. Armendariz did not have his seat belt on, the officer asked Armendariz for his identification.

6/26/07 RP 20. Then, upon checking the status of both the driver and Armendariz, the officer found that Armendariz had an outstanding felony warrant and that the driver of the vehicle had a suspended license. 6/13/07 RP 8; 6/21/07 RP 21. Armendariz's status also showed that he had an "officer safety tag"--that he was a "career criminal" and possibly armed. 6/13/07 RP 8. All of these actions by the officer here were lawful methods of enforcing the traffic code. State v. Hoang, 101 Wn.App. 732, 6 P.3d 602 (2000).

As the trial court noted in the present case:

[[The officer] doesn't realize until he walks up to the car that the person driving the car is not in fact female. He's got a basis for a legitimate traffic stop given the fact that the car made the improper lane change without signaling. The fact that he's got a basis for the traffic infraction, as far as I'm concerned, gives him the justification for asking the driver his name. . . . [H]e shined his flashlight in. . . the car and

discovered that Mr. Armendariz was not wearing his seat belt. Again, that's a traffic infraction. . . . And again, the inquiry that was made is, "What is your name?" et cetera, that you would expect for somebody who's going to get nothing more than a traffic infraction.

6/13/07 RP 21,22 (emphasis added).

Here, Officer Lowrey could not see inside the vehicle in which Armendariz was a passenger, so he could not see who was driving until he got up to the driver's window and noticed the driver was obviously not the registered owner of the vehicle. 6/26/07 RP 19. However, because of the infraction for failure to signal a lane change, the officer still had the right to request identification from the driver of the vehicle, which he did do. RCW 46.61.305; 6/13/07 RP 4. Also, when Officer Lowrey got up to the driver's side window, he shined his flashlight across the laps of the passengers to see if they were wearing their seatbelts. Id. Armendariz was not wearing his seatbelt. Id. This is a traffic infraction. RCW 46.61.688. The Officer was therefore within his rights to ask Armendariz his name once the officer saw that Armendariz had committed the seatbelt infraction. Id. Officer Lowrey then ran Armendariz's name to see if there were any warrants out for his arrest. 6/13/07 RP 8. This, too, is a lawful exercise of police

authority while enforcing the traffic code. RCW 46.61.021(2).

Indeed, the scope of an investigatory stop may be enlarged or prolonged if the stop confirms or arouses further suspicions. State v. Smith, 115 Wn.2d 775, 801 P.2d 975 (1990). And again, as the Hoang 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.

State v. Hoang, 101 Wn.App. at 742 (emphasis added).

All of the facts in the present case show that Officer Lowrey was enforcing the traffic code and that his initial stop of the vehicle was lawful. Hoang, supra. These facts also completely distinguish this case from the facts of Ladsen--a case relied upon by Armendariz to claim the stop here was a pretext stop.

In Ladsen, the police officer saw the defendant riding with a person suspected of gang activity. Then, in order to speak with the defendant about his suspicions, the officer found a reason to perform a traffic stop on the vehicle and he stopped the vehicle for having expired license tabs. State v. Ladson, 138 Wn.2d 343. Thus, in Ladsen the officer was, in reality, stopping the vehicle

solely so that he could investigate possible gang activity-- something completely unrelated to enforcing the traffic code. Ladsen, supra. These facts are very different than those of the instant case where the officer initially stopped the vehicle solely because of a violation of the traffic code. 6/13/07 RP 4; 6/26/07 RP 17, 20. There is absolutely nothing in the facts or record of the present case which infer that the officer here had some other ulterior motive or pretextual, subjective intent when he first noticed the traffic infraction committed by the driver of the vehicle in which Armendariz was a passenger. Id. Thus, Armendariz's reliance upon Ladsen is simply incorrect.

Likewise, Armendariz's reliance upon State v. Penfield, 106 Wn.App. 157, 22 P.3d 293 (2001), is also incorrect--as the trial court noted. 6/13/07 RP 21. Penfield is far different from what occurred in the present case. In Penfield, the officer could see as he approached the vehicle that the defendant driver was a male and was thus *not* the registered owner of the vehicle. Nonetheless, the officer in Penfield still asked the driver for his license. That is not what happened in the present case.

Here, unlike in Penfield, Officer Lowrey had a separate, independent basis for stopping the vehicle and requesting

identification from the driver: the traffic infraction of failure to signal a lane change. 6/13/07 RP 4. This fact was not present in Penfield. Also, in the present case the officer could not see inside the vehicle to see who was driving until he got right up next to the driver's side door. Finding of Fact 1.3. Once Officer Lowery got up to the driver's side door he could see that the driver was not the registered owner; however, because Officer Lowrey's initial reason for stopping the vehicle here was the driver's failure to signal a lane change, Officer Lowrey had this independent basis to ask the driver for his license and identification. Conclusion of Law 2.1; 2.2; 2.3. And, unlike in Penfield, when Officer Lowrey got up to the driver's side window he could see inside the vehicle and he noted that Mr. Armendariz--a passenger in the back set--was not wearing his seatbelt. Finding of Fact 1.7. So, here--unlike in Penfield--Armendariz was himself caught breaking the law by not wearing a seatbelt, which gave Officer Lowrey the right to request identification from Mr Armendariz. Finding of Fact 1.8.

The differences between Penfield and the instant case can be seen in this passage from the Penfield case:

Here, Officer Vaughn's only articulable suspicion of criminal activity was information that the driver's license of the vehicle's owner was suspended. He

had no other reason to ask Mr. Penfield for his driver's license after he realized Mr. Penfield was not the registered owner.

Penfield at 162-163 (emphasis added). This is in stark contrast with the facts of the present case where the officer did have another reason to ask the driver for his license, and that was the officer's belief that the driver had violated the traffic code by failing to signal a lane change. 6/13/07 RP 4; Conclusion of Law 2.1; 2.2. Furthermore, once Officer Lowrey got up to the driver's side window and looked inside the vehicle, he saw the defendant Mr. Armendariz committing a violation of the traffic code by not wearing a seatbelt. Finding of Fact 1.7. These facts completely distinguish Penfield from the instant case. In sum, there are simply no facts in the present case which indicate this was anything other than a lawful traffic stop. Accordingly, the ruling of Penfield does not apply to the facts of this case, and Armendariz's reliance upon it is incorrect.

**II. THE STATE DID NOT ELICIT IRRELEVANT OR PREJUDICIAL EVIDENCE WHEN IT ASKED THE OFFICER WHY HE ARRESTED THE DEFENDANT.**

Armendariz argues that the State elicited "irrelevant and prejudicial evidence" when it asked the officer why he arrested the defendant and the officer responded because there was a warrant

out for the defendant's arrest. Brief of Appellant 18. Armendariz tries to analogize cases in which specific crimes were elicited or mentioned. But this is not what happened here, and his argument to the contrary is without merit.

All of the cases cited by Armendariz in his brief in regards to the State's eliciting testimony about the existence of the warrant for Armendariz's arrest have deal with a prosecutor's eliciting information about specific crimes--not just the bare existence of a warrant with no naming of the underlying crime. Armendariz cites State v. Pogue, 108 Wn.2d 981, 17 p.3d 1272 (2001) (defendant charged with possession of cocaine, and the prosecutor elicited information regarding prior possession of cocaine conviction), and State v. Acosta, 123 Wn.App. 424, 98 P.3d 503 (2004). But these cases are distinguishable. For example, in Acosta--unlike in the present case--the court allowed the State to recite the defendant's entire criminal history to the jury. That did not happen here-- where there was just a general reference to an outstanding arrest warrant--and thus Acosta is distinguishable. Likewise, another case relied upon by Armendariz can be distinguished. In State v. Escalona, 49 Wn.App. 251, 742 P.2d 190(1987) the defendant was charged with second degree assault with a knife. The defendant in Escalona

also had a prior conviction for the same exact crime (assault with a knife). Id. During cross examination a witness blurted out that the defendant already had a record and had stabbed someone. Id. Thus, a prior for the very same crime the defendant was on trial for was elicited from the witness. This was correctly found to be highly prejudicial by the Escalona court. However, nothing like that happened in the present case, and Appellant's reliance on the Escalona analysis is misplaced because here there was no eliciting of the name of an underlying, specific crime. Quite the contrary, for here the only information elicited from the witness was the reason for the officer's arrest of Armendariz: the existence of a warrant-- which was something Armendariz himself told Melissa Grab while they were in the vehicle together. 6/26/07 RP 58.

**III. THE PROSECUTOR DID NOT COMMENT ON THE CREDIBILITY OF A WITNESS WHEN HE ASKED THE WITNESS ABOUT A PROVISION OF HER AGREEMENT TO TESTIFY.**

Armendariz also claims that the prosecutor commented on the credibility of a witness when he asked State's witness Marissa Grab about her plea agreement and whether as part of that agreement she agreed to testify truthfully. Brief of Appellant 28. But this argument is misplaced because asking a witness about

whether she agreed to testify truthfully as part of an agreement disposing of her case is not the same as either the prosecutor's giving a personal opinion on the credibility of a witness, or asking a witness to comment on the credibility of another witness. See e.g., State v. Clapp, 67 Wn.App. 263, 274, 834 P.2d 1101 (1992) (prosecutor could tell jury that witness "escaped prosecution in exchange for his truthful testimony.")

Furthermore, what the State was doing in the present case when it asked Melissa Grab about her agreement to testify was the legitimate trial tactic of anticipating the "attack" that the State knew would come from defense counsel when he brought up the topic of the plea agreement-for-testimony issue on cross examination. 6/26/07 RP 66. In other words, the State should be able to anticipate the defendant's cross examination tactic on direct, thereby diffusing the damage from anticipated cross examination as much as properly possible. See e.g., State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997) (it was reasonable for the State to anticipate the attack and "pull the sting" of the defense cross-examination), *citing* United States v. LeFevour, 798 F.2d 977, 983 (7th Cir. 1986)(noting prosecution in a criminal case may "pull the sting of cross-examination" by asking damning questions of its

witness on direct examination). Because the credibility of Melissa Grabs' testimony was a central issue in this case, it was reasonable for the prosecutor to "pull the sting" of the inevitable cross examination by bringing out the corroborative evidence of the agreement to testify during its direct examination. Bourgeois, supra.

Appellant Armendariz seems to be claiming that when the prosecutor asked Marissa Grab about whether she agreed to testify truthfully in exchange for her plea agreement, that this amounted to the prosecutor's "vouching" for the witness's credibility. While Armendariz did object to this line of questioning, the basis for his objection was that it was "a misstatement of the plea agreement." 6/26/07 RP 66,67. Nonetheless, the State does not believe that the prosecutor's actions in this case amounted to improper vouching. The State's actions here certainly did not amount to the prosecutor's giving his *personal opinion* as to the veracity of a witness. See e.g., Clapp, Bourgeois, supra.

On the other hand, even if the line of questioning which elicited one term of the plea agreement was improper, Armendariz cannot show that he was prejudiced, and any impropriety should be deemed harmless.

#### IV. TRIAL COUNSEL WAS NOT INEFFECTIVE.

Armendariz claims that his trial counsel was ineffective because he did not "waive" an essential element of the crime of unlawful possession of a firearm, arguing that failure to waive the element prejudiced him because the jury learned that Armendariz had previously been convicted of a serious offense via the stipulation. Brief of Appellant, 33. But Armendariz's argument relies on a misunderstanding of the law as to the effect of such stipulations.

In fact, Armendariz *did* waive this element via his stipulation that he had previously been convicted of a serious offense. 6/26/07 RP 3. One court explains this situation where a defendant has stipulated to an element of the crime in order to avoid mentioning the *specific* and more prejudicial crime thusly:

At trial, [the defendant] stipulated that he had been convicted of a serious offense, which is an element of unlawful possession of a firearm. . . . The prosecutor read the following stipulation in the record: "It is hereby stipulated by and between the state and the defendant that the defendant has in the past been convicted of a serious offense causing him to be ineligible to own or possess a firearm." . . . This stipulation had been requested by [the defendant] pursuant to Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). An Old Chief stipulation prevents the jury from learning the nature of the prior conviction.

State v. Stevens, 137 Wn.App. 460, 464, 153 P.3d 903 (2007).

More important to the analysis in the present case, however, is the fact that such a stipulation has also been referred to as a "waiver":

A recent case from Division One of this court takes a different approach to this issue. In State v. Wolf, 134 Wn.App. 196, 139 P.3d 414 (2006), Division One applied the waiver doctrine. Under the waiver doctrine, once a defendant enters into a stipulation, he or she waives the right to require the government to prove its case on the stipulated element.

State v. Stevens, 137 Wn.App. at 466. Indeed, as referenced above, Armendariz's counsel *did waive* the requirement that the State prove the element of a prior serious offense by entering into the stipulation as to that element: "[t]he premise of the waiver theory is that, upon entering into a stipulation on an element, a defendant waives his right to put the government to its proof of that element." State v. Wolf, supra (holding that the defendant waived the right to put the State to its burden of proof on the element of having previously been convicted of a serious offense by his written stipulation) (citations omitted). Indeed, Armendariz's trial counsel did what he could to mitigate any prejudicial effect of this particular element of the crime when he had Armendariz stipulate to the

element instead of making the State prove the precise prior crime involved:

We will stipulate that my client has been convicted of a serious offense. Obviously the reason we're doing that is we don't necessarily want the jury to know what the serious offense was. So the State has agreed to not mention the serious offense. We'll just agree that it is a serious offense.

6/26/07 RP 3. Again, this so-called "Old Chief stipulation prevents the jury from learning the nature of the prior conviction." Stevens, 137 Wn.App. at 464. The bottom line is that whether this is seen as an *Old Chief* stipulation or a waiver, it accomplishes the same desired goal for a defendant: it prevents the jury from hearing about and thus being prejudiced by, the exact nature or specific name of the underlying offense. Id. This was not ineffective assistance of counsel but was instead the work of a very experienced trial attorney who was doing his best to mitigate any prejudicial effect that would occur if the State were simply left to its proof and actually named the prior offense-- which is certainly far more prejudicial than simply referring to the offense as "a serious offense" pursuant to a stipulation.

In order to prove ineffective assistance of counsel an appellant must show deficient performance resulting in prejudice.

Strickland v. Washington, 466 U.S. 668, 687-289, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995). Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). It is the defendant's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d at 335. The defendant must show that there were no legitimate strategic or tactical rationales for his trial counsel's conduct. State v. Hakimi, 124 Wn. App. 15, 22, 98 P.2d 809 (2004) citing McFarland, 127 Wn.2d at 336. Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Decisions by trial counsel concerning methods of

examining witnesses are trial tactics. Hendrickson, 129 Wn.2d at 77, 78. Likewise, decisions by trial counsel as to when or whether to object are trial tactics. State v. Madison, 53 Wn.App. at 763; State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) (failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy).

As previously stated, Armendariz claims his trial counsel was ineffective because he did not "waive the requirement that the jury find beyond a reasonable doubt that the defendant had a prior conviction for a serious offense." Brief of Appellant 33. There is no case law supporting this argument. This was not ineffective assistance of counsel but instead shows experienced trial counsel mitigating the effect of a prior conviction as best as he could hope for under the circumstances. This was a tactical decision by trial counsel and as such cannot be the target of an ineffective assistance of counsel claim. Armendariz's argument to the contrary should be disregarded.

### **CONCLUSION**

Because the initial stop of the vehicle in this case was lawful because it was based solely upon a traffic violation, the trial court did not err when it refused to suppress evidence emanating from

this lawful stop. Nor was this a pretext stop. Moreover, the prosecutor did not improperly elicit information about the existence of an arrest warrant for Mr. Armendariz as this information was necessarily elicited to show the jury why the officer arrested Mr. Armendariz. Neither did the prosecutor commit misconduct when he asked a witness about her plea agreement with the State in exchange for her "truthful" testimony--this was done in anticipation of possibly damaging cross examination and was not a personal comment on the veracity of a witness. But even if such questioning was improper, any error should be deemed harmless. Accordingly, Armendariz's judgment and sentence should be affirmed in all respects.

DATED THIS 1 day of April, 2008.

L. MICHAEL GOLDEN  
PROSECUTOR

by:

  
LORI SMITH, WSBA 27961  
Deputy Prosecutor

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

08 APR -3 PM 1:17

STATE OF WASHINGTON

BY LSM  
DEPUTY

STATE OF WASHINGTON,	)	NO. 36559-6-II
Respondent,	)	
vs.	)	
CHRISTOPHER ARMENDARIZ,	)	DECLARATION OF
Appellant.	)	MAILING
	)	
_____	)	

LORI SMITH, Deputy Prosecutor for Lewis County, Washington,  
 declare under penalty of perjury of the laws of the State of Washington that  
 the following is true and correct: On the 2<sup>nd</sup> day April, '08, I served  
 appellant with a copy of the **Respondent's Brief** by depositing same in the  
 United States Mail, postage pre-paid, to attorney for Appellant at the name  
 and address indicated below:

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DATED this 2nd day of April, 2008, at Chehalis, Washington.

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Declaration of  
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