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COURT OF APPEALS
DIVISION II

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No. 36833-1-II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Thomas Owen,

Appellant.

Grays Harbor Superior Court

Cause No. 07-1-00215-7

The Honorable Judges McCauley and Foscue

Appellant's Reply Brief

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ARGUMENT

DEPUTY SCHRADER LACKED A REASONABLE ARTICULABLE SUSPICION THAT THE CAR WAS “IN SUCH UNSAFE CONDITION AS TO ENDANGER ANY PERSON,” AND THE STATE FAILED TO PROVE THE ABSENCE OF A PRETEXT STOP.

A. The cracked windshield did not block the driver’s view.

The stop in this case was valid only if Deputy Schrader had a reasonable articulable suspicion that the car was “in such unsafe condition as to endanger any person.” RCW 46.37.010(1)(a)(b). The trial judge listened to the testimony, viewed the exhibits, and determined that the cracked windshield did *not* obstruct the driver’s view—contrary to Schrader’s testimony. RP (7/30/07) 38-39.

The judge did not find that the crack made the car so unsafe as to endanger any person. RP (7/30/07) 38-39. Nor did the judge specifically find that the officer had a reasonable articulable suspicion that the crack made the car unsafe.¹ RP (7/30/07) 38-39; Findings and Conclusions, CP 19-24.

¹ This is consistent with the testimony: the windshield had been cracked for four years yet had never drawn the attention of law enforcement, and neither Deputy Schrader (nor any other officer) stopped the car during the months after the arrest, even though the windshield was not repaired. RP (7/30/07) 19, 25-26.

Instead, the judge concluded that the car was stopped “in order to investigate a traffic infraction *for having a cracked windshield.*” Conclusion of Law No. 1, CP 19, *emphasis added*. But driving with a cracked windshield is not itself a traffic infraction. *See* RCW Title 46. The judge’s findings and conclusions (and the evidence upon which they were based) are insufficient to legitimize the traffic stop.² Because of this, the arrest was invalid and the search unlawful. *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996). The conviction must be reversed and the evidence suppressed. *State v. Glossbrener*, 146 Wn.2d 670, 685, 49 P.3d 128 (2002).

B. Once pretext is raised, the state bears the burden of proving the absence of a pretext stop.

Although Schrader denied stopping the car to hassle Pratt, the judge did not find that the traffic stop was not pretextual. RP (7/30/07) 33; Findings and Conclusions, CP 19-24. This is consistent with the testimony. First, the car had not been stopped for the cracked windshield during the four years preceding this incident. RP (7/30/07) 25-26.

² Contrary to Respondent’s assertion, Mr. Owen does not suggest the state was required to prove that the infraction was actually committed. *See* Brief of Respondent, p. 8-9. The state failed to meet its burden of showing a reasonable articulable suspicion that the infraction had occurred, because a cracked windshield that does not block the driver’s view does not necessarily make a car unsafe.

Second, Schrader saw the car but did not stop it for the cracked windshield during the months after this incident. RP (7/30/07) 19. Third, the cracked windshield did not obstruct the driver's view. RP (7/30/07) 38-39. Fourth, Schrader did not issue a citation for the cracked windshield. RP (7/30/07) 19. Fifth, there was some evidence that Schrader bore Pratt some animus. RP (7/30/07) 27-28. Contrary to Respondent's assertion, the record is replete with evidence suggesting the stop was pretextual. *See* Brief of Respondent, p. 11.

Without citation to authority or the record, Respondent relies on "the tenor of the trial court's oral decision," claiming that the judge's tone "provides 'ample evidence' that Judge McCauley rejected" Mr. Owen's pretext argument. Brief of Respondent, p. 15. This Court should not substitute the "tenor" of a trial judge's oral ruling for the findings of fact required under CrR 3.6. It is impossible to determine from the judge's tone what he concluded from the evidence, much less the standard he applied and how he allocated the burden of proof.

Mr. Owen raised the pretext issue in the trial court. He presented evidence to support his position, and he argued that the stop was a pretext. RP (7/30/07) 17-32, 36-37. He gave the trial court ample opportunity to rule. Respondent's suggestion that the issue is waived is inexplicable. Brief of Respondent, p. 15-16.

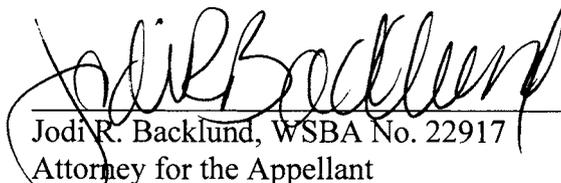
The state failed to prove the absence of a pretext stop. Because of this, the conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *State v. Ladson*, 138 Wn.2d 343, 979 p.2d 833 (1999).

CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Owen's conviction, suppress the evidence, and dismiss the case with prejudice.

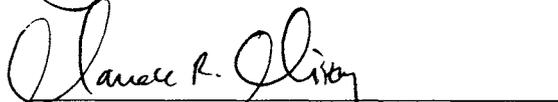
Respectfully submitted on June 30, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

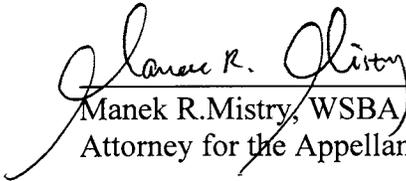
Thomas Owen
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and to the Grays Harbor Prosecuting Attorney, at their address of record,
and that I sent the original and one copy to the Court of Appeals, Division
II, for filing;

All postage prepaid, on June 30, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on June 30, 2008.



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