

COURT OF APPEALS
DIVISION TWO
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STATE OF WASHINGTON
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No. 39040-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID M. RANDOLPH,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Trial Court Judge
Motion to Suppress Hearing
Cause No. 08-1-00224-1

BRIEF OF RESPONDENT

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60-62-71 MID

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- (b) RANDOLPH'S SPEECH WAS SLURRED, HE SWAYED WHILE HE WALKED AND DROPPED SEVERAL PAPERS ON THE FLOOR OF HIS CAR;
- (c) RANDOLPH DID NOT PERFORM WELL ON THE WALK AND TURN AND HORIZONTAL GAZE NYSTAGMUS (HGN) TESTS;
- (d) RANDOLPH ADMITTED THAT HE HAD CONSUMED TWO BEERS AND TWO SHOTS PRIOR TO DRIVING; AND
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A. ASSIGNMENTS OF ERROR

1. Did the Trial Court err at CONCLUSIONS OF LAW NO. 1 at the CrR 3.6 hearing by holding Trooper Merritt had reasonable articulable suspicion sufficient to stop Randolph's vehicle?
2. Did the Trial Court err at CONCLUSION OF LAW NO. 1 at the CrR 3.6 hearing by holding that no other evidence is required to stop a vehicle other than an inadmissible Speed Measuring Device result?
3. Did the Trial Court err at CONCLUSION OF LAW NO. 2 at the CrR 3.6 hearing by failure to suppress all evidence obtained after the stop of Randolph's vehicle?
4. Did the Trial Court err at CONCLUSION OF LAW No. 3 at the CrR 3.6 hearing by finding that Trooper Merritt had probable cause for an arrest for Driving While Under the Influence?

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did error occur during the CrR 3.6 hearing when the trial court found that Trooper Merritt had reasonable, articulable suspicion to stop Randolph after:
 - (a) the trooper's radar, which he was trained and certified to use and had checked that day showed Randolph driving 54 mph in a posted 40 mph zone; and
 - (b) the trooper also saw Randolph, while rounding a turn, cross the road into the path of oncoming traffic?
2. At the CrR 3.6 hearing, should the trial court have suppressed any evidence that Trooper Merritt obtained after stopping Randolph when testimony was given that:
 - (a) the radar in Trooper Merritt's patrol car, which he was trained and certified to use and had checked that day, showed Randolph driving 54 mph in a posted 40 mph zone; and
 - (b) the trooper also saw Randolph, while rounding a turn, cross the road into the path of oncoming traffic?

3. Should the trial court have found that Trooper Merritt did not have probable cause to arrest Randolph for DUI at the CrR 3.6 hearing when testimony was given that:
 - (a) Trooper Merritt could smell the odor of intoxicants coming from Randolph's car;
 - (b) Randolph's speech was slurred, he swayed while he walked, and dropped several papers on the floor of his car;
 - (c) Randolph did not perform well on the walk and turn and horizontal gaze nystagmus (HGN) tests; and
 - (d) Randolph admitted that he had consumed two beers and two shots prior to driving; and Randolph
 - (e) was driving 54 mph in a posted 40 mph zone and while rounding a turn, crossed the road into the path of oncoming traffic?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP." The Appellant's Brief shall be referred to as "AB."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Randolph's recitation of the procedural history and facts and adds the following:

On April 30, 2008, Trooper Joshua J. Merritt of the Washington State Patrol (WSP) was on patrol inside Mason County, WA, on State Route 106, "just east of Trails End Drive, where Trails End Drive intersects with 106." RP 3: 12-16. Trooper Merritt first noticed David M.

Randolph, the appellant, driving towards him while he (Merritt) “was scanning traffic for any violations that may occur.” RP 3: 20-22. As Randolph’s car approached, Trooper Merritt noticed that his patrol car radar “had locked on or obtained a speed for the defendant’s vehicle.” RP 3: 20-24. This radar was “a trooper radar, number R-555,” that could “activate on vehicles coming towards it and going away from it.” RP 4: 5-6; 14-16.

Trooper Merritt’s attention was first drawn to Randolph’s car by “a combination” of the radar and his “visual seeing the vehicle as it came into view.” RP 5: 5-9. The radar unit installed in Trooper Merritt’s patrol car was “something that [he] was trained and certified to operate.” RP 7: 16-19. The trooper’s certification to operate this radar was both “valid and current” on the date of Randolph’s arrest. RP 8: 15-17. Trooper Merritt performed a series of quality control checks on this radar that same day and determined that it was operating properly. RP 8: 18-25; 9: 1-11.

When Randolph drove past Trooper Merritt, the “target indicator” of the trooper’s radar showed “54.” RP 12: 6-10. The posted speed limit on this section of roadway was “40 mile-per hour.” RP 12: 13. After following Randolph for a brief time but before he activated his lights and sirens, Trooper Merritt noticed that Randolph made a “short” turn on

Trails End Drive. RP 12: 22-25. As Trooper Merritt testified, Randolph made the turn “short,” in that:

There was ample room to make a qualified right-angle turn on that road if the speed is slowed enough. The defendant’s vehicle basically cut across the corner into the oncoming lane of travel. And as he did so, he merged his way or made his way into the appropriate lane from there. RP 12: 25; 13: 1-5.

After observing Randolph driving in this manner, Trooper Merritt then activated his emergency lights “to indicate to the vehicle to pull to the right side of the road,” which occurred. RP 13: 12-15.

When the trooper contacted Randolph, he (Merritt) “could smell the order of consumed intoxicants.” RP 14: 23-25. Trooper Merritt also noticed that Randolph “slurred his speech” to “some amount,” and that his eyes were “bloodshot and watery.” RP 17: 3-5. Randolph admitted to the trooper that he had “had several drinks,” and testified on direct examination that, specifically, he had ingested “two beers and two shots.” RP 18: 24; 98: 6. Randolph also “dropped several papers on the floor of his vehicle” and then “swayed as he walked” to the front of his car. RP 19: 23-25. Although Randolph performed but did not do well on the standard field sobriety tests consisting of horizontal gaze nystagmus (HGN) and the walk and turn, the one-legged stand was not offered due to

traffic conditions. RP 21-28. After Randolph took a voluntary portable breath test (PBT), Trooper Merritt placed him under arrest. RP 30: 1-2.

3. Summary of Argument

The trial court did not err during the CrR 3.6 hearing because under Terry¹, Trooper Merritt had reasonable, articulable suspicion to stop Randolph after: (a) the trooper's radar, which he was both trained and certified to use and had checked that day showed Randolph driving 54 mph in a posted 40 mph zone; and (b) the trooper saw Randolph, while rounding a turn, cross the road into the path of oncoming traffic.

Although Randolph argues that the radar reading should have been ruled inadmissible because it was allegedly not authenticated during the CrR 3.6 hearing, he is in error; all the Trooper needed to stop Randolph was reasonable, articulable suspicion, and he had two valid reasons to do so. While Randolph argues on page 8 of his brief that Trooper Merritt "lacked...articulable facts to stop Defendant for speeding; and or DUI for crossing the centerline only one time," this argument is without merit, for the trooper would have been remiss in his duties to not effect a stop given the nature of Randolph's driving. Put another way, the trooper should not have had to wait until an accident occurred to contact Randolph given this specific set of facts.

That the trooper smelled an odor of intoxicants, noticed that Randolph's speech was slurred and heard him admit that he had had several drinks after the stop gave him a basis to investigate and eventually arrest Randolph for DUI. The trial court did not err at Randolph's CrR 3.6 hearing, and the State respectfully requests the Court to affirm.

E. ARGUMENT

1. ERROR DID NOT OCCUR DURING THE CrR 3.6 HEARING WHEN THE TRIAL COURT FOUND THAT TROOPER MERRITT HAD REASONABLE, ARTICULABLE SUSPICION TO STOP RANDOLPH BECAUSE:
 - (a) THE TROOPER'S RADAR, WHICH HE WAS TRAINED AND CERTIFIED TO USE AND HAD CHECKED THAT DAY SHOWED RANDOLPH DRIVING 54 MPH IN A POSTED 40 MPH ZONE; AND
 - (b) THE TROOPER ALSO SAW RANDOLPH, WHILE ROUNDING A TURN, CROSS THE ROAD INTO THE PATH OF ONCOMING TRAFFIC.

Washington courts have applied the Terry stop exception under the Fourth Amendment and under article 1, section 7, of the Washington State Constitution to stops incident to traffic infractions. State v. Duncan, 146 Wash.2d 166, 174-175, 43 P.3d 513 (2002). To be lawful, a traffic stop is a seizure and must be justified at its inception. State v. Tijerina², 61

¹ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968).

² IRLJ 6.6 Speed Measuring Device: Design and Construction Certification: (a) In General: This rule applies only to contested hearings in traffic infraction cases (emphasis added). Subsection (b) Speed Measuring Device Certificate; Form, addresses when, in an

Wash.App. 626, 628-629, 811 P.2d 241 (1991). Police may conduct a warrantless traffic stop if the officer has a reasonable and articulable suspicion that a traffic violation has occurred or is occurring. State v. Ladson, 138 Wash.2d 343, 349, 979 P.2d 833 (1999).

In Randolph's case, Trooper Merritt had two separate facts that gave him reasonable and articulable suspicion to effect a stop: (a) Randolph was driving 54 mph in a posted 40 mph zone, and (b) the trooper saw Randolph, while rounding a turn, cross the road into the path of oncoming traffic. That Randolph argues that he only crossed the centerline "once" is without merit, for a law enforcement officer, in this particular situation, should not have had to wait until an accident occurred before making contact with Randolph. See: Appellant's Brief, page 8. Because Trooper Merritt had the requisite reasonable, articulable suspicion under Terry to stop Randolph, the trial court did not err.

2. AT THE CrR 3.6 HEARING THE TRIAL COURT CORRECTLY RULED THAT NONE OF THE EVIDENCE SHOULD BE SUPPRESSED BECAUSE TROOPER MERRITT HAD A REASONABLE, ARTICULABLE SUSPICION TO STOP RANDOLPH.

Under Terry, Trooper Merritt had the requisite reasonable, articulable suspicion to stop Randolph. The trooper could in fact choose between

infraction case, either expert testimony or a certificate regarding an "electronic or laser speed measuring device (SMD) is at issue.

two separate infractions; Randolph's excessive speed or his crossing the centerline while rounding a turn. Hypothetically, the combination of Randolph's speed and crossing the centerline on a roadway with a sharp turn could have also given the trooper probable cause to stop Randolph for reckless endangerment, a gross misdemeanor. The trial court made the correct decision at the CrR 3.6 hearing to allow the fruits of Trooper Merritt's investigation to come into evidence.

3. THE TRIAL COURT CORRECTLY FOUND THAT TROOPER MERRITT HAD PROBABLE CAUSE TO ARREST RANDOLPH FOR DUI AT THE CrR 3.6 HEARING BECAUSE TESTIMONY WAS GIVEN THAT:
 - (a) TROOPER MERRITT COULD SMELL THE ODOR OF INTOXICANTS COMING FROM RANDOLPH'S CAR;
 - (b) RANDOLPH'S SPEECH WAS SLURRED, HE SWAYED WHILE HE WALKED AND DROPPED SEVERAL PAPERS ON THE FLOOR OF HIS CAR;
 - (c) RANDOLPH DID NOT PERFORM WELL ON THE WALK AND TURN AND HORIZONTAL GAZE NYSTAGMUS (HGN) TESTS;
 - (d) RANDOLPH ADMITTED THAT HE HAD CONSUMED TWO BEERS AND TWO SHOTS PRIOR TO DRIVING; AND
 - (e) WAS DRIVING 54 MPH IN A POSTED 40 MPH ZONE AND WHILE ROUNDING A TURN, CROSSED THE ROAD INTO THE PATH OF ONCOMING TRAFFIC.

The basic definition for probable cause in Washington State is:

Probable cause for arrest as it is normally understood is defined in terms of circumstances sufficient to warrant a prudent person in believing that the suspect had committed or was committing a crime. State v. Parks, 136 Wash.App. 232, 237, 148 P.3d 1089 (2006).

In count one, the State charged Randolph with driving under the influence:

In the County of Mason, State of Washington, on or about the 30th day of April 2008, the above-named defendant, DAVID M. RANDOLPH, did commit DRIVING UNDER THE INFLUENCE, a Gross Misdemeanor, in that said defendant did drive a vehicle (a) and had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; contrary to RCW 46.61.502(1) and against the peace and dignity of the State of Washington. CP: 6.

When Trooper Merritt stopped Randolph, he had the following facts before him: (a) he smelled the odor of intoxicants coming from Randolph's car; (b) noticed that Randolph's speech was slurred, that he swayed when he walked, and dropped several papers on the floor of his car; (c) observed that Randolph did not perform well on either the walk and turn or the HGN tests; (d) Randolph admitted that he had consumed two beers and two shots prior to driving; (e) the trooper saw that Randolph's car gave a reading of 54 mph in a posted 40 mph zone, and (f) the trooper saw Randolph make a turn and cross into the lane of oncoming traffic. Given totality of this situation, Trooper Merritt had probable cause to arrest Randolph for DUI and no error occurred at the CrR 3.6 hearing.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 29TH day of December, 2009

Respectfully submitted by:


Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)	
)	No. 39040-0-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
DAVID M. RANDOLPH,)	
)	
Appellant,)	
_____)	

I, EDWARD P. LOMBARDO, declare and state as follows:

On TUESDAY, DECEMBER 29, 2009, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Robert A. Wolle
Houle & Goodell
Attorneys at Law PLLC
P.O. Box 1845
Belfair, WA 98528

BY: [Signature] 12/29/09 10:50 AM
COURT CLERK

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 29th day of December, 2009, at Shelton, Washington.

[Signature of Edward P. Lombardo] #39591
Edward P. Lombardo, WSBA #39591