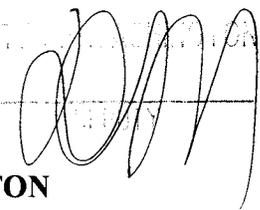


FILED
COURT OF APPEALS

10 JUN -1 PM 12:15

STATE OF WASHINGTON

BY 

NO. 40162-2-II

IN THE COURT OF APPEALS IN THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

Appellant

v.

EDUARDO QUEZADAS-GOMEZ

Respondent

**THE HONORABLE JUDGE BARBARA JOHNSON
JUDGE OF THE SUPERIOR COURT
OF CLARK COUNTY, STATE OF WASHINGTON**

RESPONDENT'S BRIEF

**JAMES J. SOWDER
WSBA# 9072
Attorney for Respondent
1600 Daniels Street
P. O. Box 27
Vancouver, WA 98666-0027
(360) 695-4792**

P.M. 6-30-2010

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

RESPONSE TO ISSUES PRESENTED 1

CONCLUSION 6

AUTHORITIES

TABLE OF CASES

State v. Ladson, 138 Wn.2d 343 (1999) 2, 3

State v. Myers, 117 Wn. App. 93 (2003) 3

State v. Mekelson, 133 Wn. App. 431 (2006). 3

State v. Eisfeldt, 163 Wn.2d 628 (2008) 4

Terry v. Ohio, 392 U.S. 1 (1967) 4

State v. Setterstrom, 163 Wn.2d 621 (2008) 4

State v. Gatewood, 163 Wn.2d 534 (2008) 4

State v. Markham, 149 Wn. App. 894 (2009) 5

State v. Kennedy, 107 Wn.2d 1 (1986) 6

TABLE OF STATUTES

Article 1, § 1 of the Constitution of the State of Washington 2

Article 1, § 7 of the Constitution of the State of Washington. 2, 3, 6

Fourth Amendment of the United States Constitution 3, 6

STATEMENT OF THE CASE

The statement of the facts of the case is contained in the trial court's findings of fact and conclusions of law (CP __), attached as Exhibit A.

The essence of the facts is contained in Paragraph C of the court's findings of fact and conclusions of law. On August 4, 2009, Officer Demmon was in uniform and on regular patrol when he observed the defendant driving the same vehicle as he observed in a controlled buy. Officer Demmon conducted a traffic stop. Officer Demmon told the defendant the stop was for a traffic violation. Officer Demmon indicates that the true purpose of the traffic stop was to obtain defendant's identification for purpose of further drug investigation. Officer Demmon learned defendant's true name from his Washington identification. Officer Demmon also learned the defendant's address.

RESPONSE TO ISSUES PRESENTED

The essence of the State's argument is that since the officer had probable cause to arrest the respondent none of the protections of the United State's Constitution, the Washington State Constitution, the Court Rules and the Revised Code of Washington applied to him. The trial court concluded there was probable cause to arrest but ruled it did not negate Washington case
RESPONDENT'S BRIEF - |

law barring pre-text searches. In every pre-text stop there is probable cause or at least well founded suspicion (for a traffic infraction) to stop the vehicle. Yet the court in State v. Ladson, 138 Wn.2d 343 (1999) and subsequent cases ruled that Article 1, § 1 of the Constitution of the State of Washington is a higher standard. Simply because there is a legal reason for a stop does not allow the police in the State of Washington to evade the purpose of Article 1, § 7 to protect the private affairs of citizens of the State of Washington.

It is undisputed that Officer Demmon was stopping the vehicle not to arrest the defendant but to find out additional information. This is important because the probable cause standard in the act of arrest brings in a variety of statutory court rules and constitutional protection once a suspect is actually arrested. Once probable cause as a standard is established the officers have a duty to arrest and not harass a defendant free of any statutory, court rule or constitutional restraints.

Under the state's theory once probable cause is established to arrest the police may continually contact, detain and harass a suspect under authority of probable cause. The police may continue to threaten the suspect with arrest and manipulate the suspect to do whatever the police want out of the suspect's fear of arrest. When does probable cause create an obligation to arrest so that constitutional, statutory and courtroom rights can be initiated?

RESPONDENT'S BRIEF - 2

State v. Ladson 138 Wn.2d 343 (1999) held a pre-text stop was not allowed under Article 1, § 7. In Ladson narcotics officers who do not make routine traffic stops followed suspect gang members seeking justification to stop their car. When they observe an infraction they pull the suspect car over and take their driver's license and when they find out the driver's license is suspended they arrest the defendant and in a search incident to arrest drugs are found. In determining whether a stop is pretextual the court should consider the totality of circumstances including subjective intent of the officer and objective reasonableness of the officer's behavior.

In respondent's case there is no dispute the objective and subjective intent of the officer in stopping the vehicle was to obtain the identification of the respondent and his home address. This information, the true name and address of the defendant, began surveillance of the home and ultimately led to a search warrant. It also led to a search of the public utility records to confirm his residence.

Subsequent cases have held officers on routine patrol cannot do a pretext stop for a traffic infraction; State v. Myers, 117 Wn. App. 93 (2003); State v. Mekelson, 133 Wn. App. 431 (2006).

Article 1, § 7 of the Washington State Constitution provides greater protection than the Fourth Amendment of the United States Constitution. It is
RESPONDENT'S BRIEF - 3

unconcerned with the reasonableness of the search but instead requires a warrant before any search reasonable or not; State v. Eisfeldt, 163 Wn.2d 628 (2008). In Eisfeldt the issue was a private search by a repairman who lets the police in to search a house. The court ruled the private search doctrine was not applicable under the Washington Constitution.

The state attempts to justify the stop as a stop admitted under Terry v. Ohio, 392 U.S 1 (1967). The use of the Terry stop as used as power by the police was reviewed in State v. Setterstrom, 163 Wn.2d 621 (2008). This case involved a search of two men in the lobby of a Department of Social and Health Services building. Note that the roots of Terry v. Ohio is a stop and frisk exception not a stop to identify someone who is doing nothing unlawful to find his or her home address. In State v. Gatewood, 163 Wn.2d 534 (2008), the police observe Mr. Gatewood leaving a bus shelter and wanted to talk to him. They had previously observed him looking surprised when they drove by the bus stop. The officers pulled the car in front of him and demanded he stop so they could talk to him. He turns, walks away and refuses to stop. He was ultimately arrested for having in his possession a firearm. The court noted generally warrantless searches and seizures are unconstitutional with some exceptions. An investigative stop under Terry v. Ohio is such an exception;

there must be a reasonable articulable suspicion based on specific objective facts that a person sees, has committed, or is about to commit a crime.

Respondent's activities at the time of the stop did not justify a Terry stop. The officers need to know the respondent's name has nothing to do with his having just committed a crime or being about to commit a crime. The trial court specifically ruled having probable cause is cause to arrest. If there was probable cause to arrest and he was arrested, and there was a search incident to arrest, identification discovered at that point would raise different questions. However, there was not a custodial arrest. Therefore, a search incident to arrest does not apply as a means to obtain the defendant's identification and address.

Washington courts have recognized the Terry stop principles can be used to stop a vehicle; State v. Markham, 149 Wn. App. 894 (2009). In Mr. Markham's case his vehicle was stopped based on an informant's tip that marijuana could be discovered in his vehicle. The vehicle was pulled over and Mr. Markham was told he was speeding. The court notes that Mr. Markham in fact had been driving under the speed limit and he told the officer that. Nevertheless, the officer continued to request his driver's license and vehicle registration and perform a check. After doing routine checks the officer came back to the car and detected an odor of marijuana. Mr. Markham was required

RESPONDENT'S BRIEF - 5

to exit the car, a drug sniffing dog was used and Defendant ultimately admitted to having drugs and was arrested. The court noted a stop, although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment of the United States Constitution and Article 1, § 7 of the Constitution of the State of Washington.

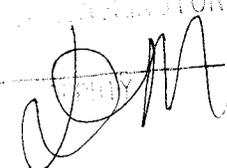
In State v. Kennedy, 107 Wn.2d 1 (1986), the court held reasonable suspicion necessary for a Terry investigatory stop is a substantial possibility criminal contact has occurred or is about to occur. There is nothing indicated at the time of the respondent's stop he was about to commit a crime. Assuming there was probable cause to arrest him for the earlier drug dealing activity the existence of probable cause in the past is not a continued license to detain without custodial arrest as a pretext for further investigation.

CONCLUSION

The Court should affirm the trial court for suppression of evidence and dismissal of Respondent's case.

DATED this 29 day of June, 2010.


JAMES J. SOWDER WSBA #9072
Attorney for Respondent

FILED
COURT OF APPEALS
10 JUL -1 PM 12:15
STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,)
Appellant,) NO. 40162-2-II
v.) DECLARATION OF
EDUARDO QUEZADAS-GOMEZ,) SERVICE
Respondent.)
_____)

I, Reba D. Graham, certify and declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

On the 29th day of June, 2010, I mailed a copy of the enclosed Respondent's Brief and a copy of this Declaration to the following:

David Ponzoha (original for filing and one copy) Philip A. Meyers
Clerk of the Court, Division II Clark County Prosecuting Attorney's Office
Court of Appeals for Washington Senior Deputy Prosecuting Attorney
950 Broadway, Suite 300 P O Box 5000
Tacoma, WA 98402 Vancouver, WA 98666-5000

Eduardo Quezadas-Gomez
3412 NE 66th Ave. C-29
Vancouver, WA 98661

DATED this 29th day of June, 2010.


REBA D. GRAHAM, Assistant to
JAMES J. SOWDER