

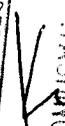
No. 40564-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

SHALAM DAS

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY 
DEPUTY

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The trial court erred by finding that the traffic stop for failing to signal a turn 100 feet before the stop was lawful.
2. The trial court erred by finding that the traffic stop for having an improper muffler was lawful.
3. The trial court's finding of fact that Mr. Das had an improper muffler is not supported by substantial evidence.
4. The trial court erred by concluding that the traffic stop was not a pretext stop.

Issues Pertaining to Assignments of Error

1. Mr. Das signaled a left turn and then, forty feet before the turn, changed to signal a right turn. Did the trial court err by finding that the traffic stop was reasonable and lawful?
2. Did the trial court err by finding that the traffic stop for having an "improper" muffler was reasonable and lawful?
3. Is the trial court's finding of fact that Mr. Das had an "improper muffler" supported by substantial evidence when the officer could not recall any details about the status of the muffler?
4. Assuming *arguendo* that the traffic stop was objectively reasonable and lawful, did the trial court err by concluding that the traffic

stop was not pretextual given the officer's subjective intent to pull over the vehicle at midnight, coupled with the de minimus nature of the infractions?

B. Statement of Facts

Shalam Das was charged and convicted by a jury of possession of methamphetamine. CP, 87, 110. Prior to trial he filed a motion to suppress evidence pursuant to CrR 3.6. CP, 18. The motion was denied and the court entered findings of fact and conclusions of law. CP, 51. He appeals.

Mr. Das was driving a car on October 22, 2009 that was pulled over by Bremerton Police Sergeant Billy Renfro. RP, 11.¹ Sergeant Renfro had just turned from the Bremerton Police Department parking lot onto Burwell Street. RP, 31. It was approximately midnight, a time of the night when it is "unsafe to some degree" for people to be driving. RP, 11-12. At the time of Mr. Das' alleged traffic infractions, Sergeant Renfro was thinking that the conduct may be indicative of someone driving under the influence of alcohol or drugs. RP, 12.

¹ All references to the report of proceedings refer to the suppression motion argued on December 24, 2009.

According to Sergeant Renfro's testimony, he pulled over the vehicle for "some signal violations in addition to an unmuffled exhaust on his vehicle." RP, 11. The trial court's findings on this point state: "That on October 22, 2009, Officer Renfro with the Bremerton Police Department, stopped the Defendant's vehicle for improper signaling and an improper muffler." CP, 47.

When asked to clarify the signal violations, Sergeant Renfro testified he observed Ms. Das' vehicle driving west on Burwell Street in Bremerton approaching the intersection of Burwell and State Street. RP, 32. There are no traffic signals or stop signs on Burwell at this intersection. RP, 32. Mr. Das turned on his turn signal indicating his intent to make a left turn onto State Street. RP, 32. Approximately 40 feet before the turn, Mr. Das changed his turn signal to indicate an intent to make a right turn. RP, 33. According to Sergeant Renfro, this constituted a law violation because it was less than 100 feet before the turn. RP, 12.

Regarding the muffler violation, Sergeant Renfro was asked on direct examination to explain his concerns with the muffler. RP, 12. He responded, "Other than it's just – it's simply a defective equipment violation. That's the only concern I had with that." RP, 12. Questioned on cross-examination, he was unable to recall whether he noticed the

exhaust before or after he activated his emergency lights, although he believed it was beforehand. RP, 33-34.

The driver was identified as Shalam Das. RP, 11. Also present was a passenger, identified in the record as Mr. Clark. RP, 18. Mr. Das did not have his license with him but said it was in the trunk. RP, 13. Mr. Das was permitted to get out of the car and open the trunk. RP, 16. By this time a second officer, Officer Thuring, had arrived as a back-up officer. Officer Thuring stood with Mr. Das while Sergeant Renfro searched for the identification in the trunk. RP, 41-42. Inside the trunk, Sergeant Renfro observed a chrome handle that he believed might be a gun. RP, 16. He immediately detained Mr. Das by placing him in handcuffs. RP, 16, 46. Sergeant Renfro determined, however, that what he had observed was a starter pistol, not an actual firearm. RP, 17. After two to three minutes, he released Mr. Das. RP, 17, 47.

Sergeant Renfro made observations of Mr. Das that his eyes were dilated and his taste buds raised and swollen. RP, 18. To Sergeant Renfro, this indicated recent use of a central nervous system stimulant such as methamphetamine or cocaine. RP, 18. Mr. Das was instructed to sit in the car. RP, 19. Sergeant Renfro noted that the passenger was not making eye contact with him, so he decided to contact him. RP, 19. Upon contact he recognized him as someone who may have a warrant from the Department

of Corrections. RP, 20. A warrant check was completed and a felony warrant was discovered for Mr. Clark. RP, 20.

Mr. Clark had a backpack at his feet, but he denied that it was his. RP, 20-21. Sergeant Renfro believed the backpack belonged to Mr. Clark because of its location. RP, 20. Mr. Das said he gives rides to various people and that the backpack was not his. RP, 21. Sergeant Renfro asked Mr. Das for consent to search the backpack and Mr. Das said, "Go ahead. You can rip the shit out of it." RP, 22. Inside the backpack he found methamphetamine inside a metal lockbox. RP, 22.

Sergeant Renfro asked Mr. Das for "voluntary consent" to search the vehicle, which Mr. Das gave. RP, 24-25. He did not read Miranda rights to him because he did not consider him to be in custody. RP, 65. According to Mr. Das' testimony, Sergeant Renfro told him that he was free to leave and he felt that he was free to leave. RP, 69. Near the driver's side door Sergeant Renfro found a black eyeglass case with methamphetamine and drug paraphernalia. RP, 25. At that point, Sergeant Renfro arrested Mr. Das and arranged to have him transported to the jail. RP, 26. The stop lasted about 30 to 45 minutes. RP, 27. The trial court denied the motion to suppress. CP, 51.

C. Argument

In his motion to suppress, Mr. Das argued that the traffic stop was a warrantless detention that was not justified at its inception and pretextual. CP, 22-23, 32, citing State v. Avila-Avila, 99 Wn.App. 9, 991 P.2d 720 (2000); State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999). The motion should have been granted.

1. A traffic stop for changing a turn signal from a left turn to a right turn 40 feet before the turn is unreasonable.

Although the officer mentioned, and the trial court found, two reasons for the traffic stop, almost all the testimony was about the alleged turn signal violation. The trial court found that Mr. Das signaled a left turn and, approximately 40 feet before the turn, he changed it to a right turn signal. This was as he approached an intersection with no stop sign or traffic light. As defense counsel argued in the trial level, this was a de minimum violation at best. The violation was for not signaling within 100 feet of the turn. Although neither party cited the relevant statute in the trial court, the statute that applies is RCW 46.61.305, which reads, “A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.”

Warrantless searches and seizures are, as a general rule, unreasonable. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

In Washington, there is a growing body of law that de minimus traffic violations that are promptly corrected by the driver may not be used as grounds to pull over the vehicle. In State v. Montes-Malinas, 144 Wn. App. 254, 182 P.3d 999 (2008) the officer observed a vehicle leave a parking lot without its headlights on. The vehicle traveled for approximately 100 yards and then the driver turned on the headlights. The officer effectuated a traffic stop soon thereafter. The Court of Appeals held that this stop was unlawful, reasoning in part, “And it is not reasonable to stop a car only after its lights have been turned on.” Montes-Malinas at 262.

In State v. Prado, 145 Wn. App. 646, 186 P.3d 1186 (2008), the Court of Appeals held that a brief “incursion” over the exit lane was insufficient to establish grounds to make a traffic stop. In doing so, the Court agreed with the Arizona Court of Appeals that the legislature did not intend to penalize “brief, momentary, and minor deviations of lane lines.” Prado at 648, citing State v. Livingston, 206 Ariz. 145, 75 P.3d 1103 (Ct. App. 2003).

In State v. DeArman, 54 Wn. App. 621, 774 P.2d 1247 (1989), the officer initially believed that the vehicle was disabled because it sat motionless for 45 to 60 seconds before proceeding through a stop sign. But the Court of Appeals held that the officer’s concerns were assuaged

once the driver proceeded through the intersection and that the traffic stop was unreasonable.

An earlier case, State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962), addressed a stop and arrest for the criminal charge of failing to signal a left turn. Because Michaels predates the decriminalization of minor traffic violations, the appellant's primary argument was that the arrest was a pretext arrestual. But the court spoke disapprovingly of the stop and arrest for failure to use a turn signal. Michaels was cited extensively in the Ladson opinion.

In urging this conclusion, Mr. Das concurs with the words of the Supreme Court in Ladson when it noted that the Washington traffic code is sufficiently extensive and complex and that it would be virtually impossible to drive forever infraction free.

We note if we were to depart from our holdings and allow pretextual traffic stops, Washington citizens would lose their privacy every time they enter their automobiles. The traffic code is sufficiently extensive in its regulation that "whether it be for failing to signal while changing lanes, driving with a headlight out, or not giving 'full time and attention' to the operation of the vehicle, virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter." Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 An.J.Crim.L 627, 633 (1997) (footnote omitted). Thus, nearly every citizen would be subject to a Terry stop simply because he or she is in his or her car. But we have repeatedly affirmed that Washingtonians

retain their privacy while in the automobile and we will do so today.

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999) (footnote 10).

In a case with very similar facts to Mr. Das' case, the Delaware Superior Court cited this footnote with approval when they found a traffic stop unreasonable when the driver signaled his turn 20 to 30 feet before the turn. State v. Heath, 929 A.2d 390 (Dela. Super. 2006). Accord State v. Mendoza, 75 S.W.3d 842 (Mo.App. 2002) (footnote 10 cited with approval in finding traffic stop unreasonable after officer stopped driver for driving in the passing lane when no vehicle was in the right lane).

The sentiments expressed in footnote 10 of Ladson were also expressed very well by Judge Richard Posner of the Third Circuit when he said:

Gilding the lily, the officer testified that he was additionally suspicious because he noticed that Broomfield was "star[ing] straight ahead." Had Broomfield instead glanced around him, the officer would doubtless have testified that Broomfield seemed nervous or, the preferred term; because of its vagueness, "furtive." Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.

United States v. Broomfield, 417 F.3d 654 (3rd Cir. 2005).

The Court in Prado noted that the statute requires drivers to remain in their lane “as nearly as practicable.” This Court interpreted the phrase as recognition by the legislature that “brief incursions over the lane lines will happen.” Prado at 649. The turn signal statute requires drivers to signal their intention to turn “when required.” This phrase indicates recognition by the legislature that it will not always be practicable to indicate an intent to turn 100 feet before the turn. A simple hypothetical illustrates the point. Suppose a person intends to turn right at an intersection and then immediately turn right again into a parking lot that is 50 feet from the corner. While it may be practicable to signal the first turn 100 feet before the turn, it will be impossible to lawfully signal the second turn because only 50 feet exists. The legislature did not intend such absurd results.

This Court should not countenance the traffic stop in Mr. Das’ case. The officer observed a driver with his turn signal activated to the left. Apparently, he changed his mind about his intended direction of travel, because he changed the signal to a right turn. What was the driver to do at that point? Having signaled his intention to go left, was he thereafter *required* to turn left? Would it have been lawful for him to turn off the signal entirely and proceed straight? The traffic stop in this case was not reasonable and the trial court erred in finding otherwise.

2. A traffic stop for an unspecified muffler violation is unreasonable.

Findings of Fact are treated as verities unless not supported by substantial evidence. State v. Cheatam, 112 Wn. App. 778, 51 P.3d 138 (2002). Mr. Das objects to Finding of Fact #1 insofar as it finds that Mr. Das' muffler was "improper" because it is not supported by substantial evidence.

Pursuant to RCW 46.37.390, "Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise, and no person shall use a muffler cut-out, bypass, or similar device upon a motor vehicle on a highway." Sergeant Renfro's testimony on the state of the muffler is conclusory and vague. Sergeant Renfro was unable to provide any details about the muffler except to say that it was a "defective equipment violation." It is unclear if he had a muffler at all or if he was alleging that the muffler was defective. He does not provide any details about the amount of noise being emitted or what the muffler looked like.

A traffic stop must be justified from its inception. State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991). A traffic stop is justified if the State can point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in illegal

activity. State v. Villarreal, 97 Wn.App. 636, 984 P.2d 1064 (1999). It is not sufficient to simply say that the muffler was defective; the officer must provide a specific and articulable basis for this conclusion. There is not substantial evidence to support the finding that the muffler was “improper” and the traffic stop on that basis was unreasonable.

There is also a question of when the officer noted that alleged defective muffler. Although he believed he noted it before the stop, on cross-examination he conceded that he may have noted it after initiating the stop. There is not substantial evidence supporting the conclusion that the traffic stop was justified at its inception. Sergeant Renfro’s stop of Mr. Das was unlawful.

3. The traffic stop of Mr. Das’ vehicle was a pretext stop.

Pretextual traffic stops are illegal in this state. State v. Ladson, 138 Wn.2d 343, 351, 979 P.2d 833 (1999). It does not make any difference that the announced reason for the stop may be legal; the question is whether the announced reason (here a traffic stop) was the real reason for the stop. Ladson requires that the trial court consider the “totality of the circumstances.” The Ladson court specifically held that courts passing on whether a stop was pretextual should consider both “the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.” Ladson at 358-59. The inquiry is not limited to objective

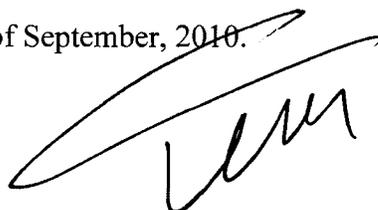
factors alone. “Whether a vehicle stop is pretextual is a factually nuanced question.” State v. Meckelson, 133 Wn.App. 431, 436, 135 P.3d 991 (2006), review denied, 159 Wn.2d 1013 (2007). Subjective motivations are important but not dispositive. The State must show that the officer's motivation in making the stop was to enforce the traffic code and not to discover evidence of crimes. Ladson at 259-60.

Sergeant Renfro admitted in his testimony that his stop of Mr. Das was primarily to investigate secondary crimes like driving under the influence of alcohol. RP, 12. He stated that having people driving at midnight creates an “unsafe” environment. RP, 12. Sergeant Renfro’s statements of his subjective intent to investigate the vehicle coupled with the de minimus traffic infraction of changing the turn signal from the left to the right supports a conclusion that the traffic stop was pretextual. It is worth repeating that the first pretext stop case in Washington involved a driver who failed to turn on his turn signal at all. State v. Michaels, 60 Wn.2d 638, 374 P.2d 989 (1962). Further evidence of this conclusion is the fact that he could not remember when he noticed an “improper” muffler or any details about what made the muffler improper. The stop was pretextual and unlawful. All evidence obtained pursuant to the illegal stop should have been suppressed.

D. Conclusion

This Court should reverse the trial court's determination that the traffic stop was lawful and dismiss the case for insufficient evidence.

DATED this 10th day of September, 2010.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

1 On September 13, 2010, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT,
2 to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-
3 4683.

4 On September 13, 2010, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT,
5 to LEGAL MAIL, Mr. Shalam A. Das, DOC #707135, McNeil Island Corrections Center, P.O.
6 Box 88900, Steilacoom, WA 98388.

7 Dated this 13th day of September, 2010.



8
9
10 Thomas E. Weaver
WSBA #22488
Attorney for Defendant

11
12 SUBSCRIBED AND SWORN to before me this 13th day of September, 2010.



13
14
15 Christy A. McAdoo
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 07/31/2014