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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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40640-3-II

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

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State of Washington  
Respondent

v.

**JONATHAN P. JONES**  
Appellant

**40640-3-II**

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On Appeal from the Superior Court of Clallam County

Cause No. 09-1-00197-8

The Honorable Ken Williams

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**REPLY BRIEF**

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A. AUTHORITIES CITED

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I. **SUMMARY OF THE CASE**

Jones was charged with possession of methamphetamine found during a search incident to his arrest for driving with a suspended license. He moved under CrR 3.6 to suppress the evidence because it resulted from an unlawful seizure.

An officer unlawfully investigated Jones after following him into a parking lot and blocking him in and preventing him from walking away after he declined the officer's invitation to stay and talk about his window tint. On appeal, Jones challenges the sufficiency of the grounds for the stop. The State claims the officer lawfully seized Jones after observing two turn signal infractions and a possible window tint violation.<sup>1</sup>

II. **ARGUMENTS IN REPLY**

**THE STOP WAS PRETEXTUAL**

When a police officer observes someone engaged in unlawful behavior, probable cause exists to stop the individual. *State v. Larson*, 93 Wn.2d 638, 641, 611 P.2d 771 (1980). But when the officer stops the individual not to enforce the law, but to conduct an unrelated criminal investigation, the stop is a pretext. *State v. Ladson*, 138 Wn.2d 343, 349,

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<sup>1</sup> Ms. McCabe withdraws the term "demoted" and regrets any perceived disrespect to the officer. The record does show, however that Corporal Winfield was "reassigned" to street patrol after several years as a detective. Counsel mentioned this solely as background for Winfield's being a bit rusty on the fundamentals and recent developments in Washington search and seizure law.

979 P.2d 833 (1999). A pretextual stop violates art. 1, §7. When determining whether a given stop is pretextual, the court considers the totality of the circumstances. Besides the officer's subjective account, the court must consider the "objective reasonableness of the officer's behavior." *Ladson* at 358-59.

The State claims the record does not show that Winfield's stop of Jones was pretextual. BR 11. But the burden was on the State to make a record that affirmatively establishes that the stop was not "arbitrary or harassing." *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

On this record, the State failed to meet its burden. The record strongly suggests that Winfield stopped Jones on a hunch that an investigation and search might turn up evidence of some crime or other.

The State offers no authority for the notion that a stop cannot be pretextual unless the officer recognizes the vehicle or its occupants. BR 11; 10/8 RP at 56. Pretext occurs whenever the officer constructs artificial grounds to justify acting on a hunch. *Ladson*, 138 Wn.2d at 362.

The State also denies that Winfield detained Jones because of his demeanor. BR 13. But the uncontroverted testimony of Winfield was that, when people are nervous, it means they are wanted, have a suspended license, or have drugs in their pocket or "something going on that you

don't know about." 10/8 RP 15. The facts strongly suggest that Winfield detained Jones because he felt like it and thought he could come up with a plausible excuse if challenged. This did not work because the seizure simply failed to comport with the elements of any lawful seizure.

***This Was Not a Traffic Stop:*** Police may stop motorists to enforce traffic laws. RCW 46.61.021(1). When a driver commits a misdemeanor violation, an officer may pull him over for the purpose of serving a traffic citation and notice to appear in court. But the officer may not detain the motorist for longer than is reasonably necessary to issue the citation and notice. RCW 46.64.015(1).

Accepting for the sake of argument that Winfield had authority of law to stop Jones to issue a traffic citation or warning (BR 8, 12), the State concedes that Winfield did not stop Jones either to write a citation for a signal infraction or to investigate the window tint. He merely wanted to "discuss" possible infractions. BR 2-3, 10, 11. This was beyond the scope of his authority.

There is a difference between writing a ticket and discussing possible infractions. The former implies a degree of certainty sufficient to constitute lawful authority for the government to intrude upon a citizen's private affairs. The latter does not; it not only permits, but encourages, arbitrary and unconstitutional intrusions on liberty.

Here, Winfield claimed to have observed traffic infractions but did not invoke any infraction when he detained Jones. He did not issue a citation and notice for the turn-signal violations. And Jones did not commit any infraction. The prosecutor conceded that the turn at the T-intersection that allegedly aroused Winfield's lawful interest in Jones likely was lawful. 10/8 RP 52.

Likewise, the window tint statute specifies that "total reflectance of thirty-five percent or less, and a light transmission of twenty-four percent or more" constitutes a window tint violation. RCW 46.37.430(5)(a). Winfield merely thought that Jones's window tint was "considerably dark" (BR 9). The former is an objective statutory basis whereby Winfield could have detained Jones to employ the measuring device provided by tax-paying citizens for that purpose. The latter is an arbitrary subjective determination of the sort that invites pretextual stops, as it did here.

The State argues that Winfield's inability to determine the race and gender of the occupants of Jones's car gave rise to investigate a possible window tint violation. BR 2.<sup>2</sup> This, together with the signaling infraction is proposed as lawful grounds for Winfield to detain Jones to "talk about the infractions." The facts and the law defeat this argument.

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<sup>2</sup> The prosecutor has air-brushed "race" out of the argument, but that is what Winfield testified to. 10/8 RP 9.

The State offered no evidence that Jones's tinting was not within lawful limits, lawfully installed by the manufacturer, or lawful by reason of medical necessity. RCW 46.37.430(5)(a), (5)(b) or (5)(d). The seizure of Jones cannot be justified as a legitimate traffic stop on this record.

The fact that no infraction citation was issued is not dispositive in determining an officer's subjective intent for making a stop, but it is a factor to be considered. *State v. Hoang*, 101 Wn. App. 732, 6 P.3d 602 (2000). Here, the State correctly argues that it needed to show only articulable grounds for a stop. But the fact that the State cannot establish any genuine infraction is another significant factor in the pretext analysis.

Moreover, not only did Winfield not issue a citation, he did not even mention any signal infraction and made no attempt to quantify the window tint, even though he had a measuring device in his patrol car and claimed to be particularly concerned about window tinting and to have studied the subject. 10/8 RP 10.

***Not a Terry Stop:*** In addition to traffic stops, the police may briefly detain an individual for investigation without a warrant upon reasonable suspicion the person is engaged or about to be engaged in criminal conduct. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). For an investigative stop to pass constitutional muster, however, the State must

show that the stop is justified from its inception. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A stop is justified if an officer has “a reasonable, articulable suspicion, based on specific, objective facts, that the person has committed or is about to commit a crime.” *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). The facts must suggest specific, identifiable criminal activity, as opposed to some vague suspicion that a person is up to no good. *State v. Rowell*, 144 Wn. App. 453, 457, 182 P.3d 1011 (2008).

The State failed to establish a non-traffic basis for a *Terry* stop. Winfield had no articulable suspicion that Jones was engaged in criminal conduct. Jones was unlawfully seized and the evidence obtained during the subsequent search must be suppressed.

***Not a Social Contact:*** The State did not attempt to justify this stop as a social contact, but that is what Winfield’s interaction with Jones most resembles, except that Jones’s movements were restrained.

An officer may simply invite a citizen to stop and chat so long as he does not restrain the individual’s freedom to walk away. Here, Winfield blocked Jones’s egress and prevented him from walking away. Therefore, Jones was seized. *State v. Nettles*, 70 Wn. App. 706, 709-10, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994).

*Search Not Incident to Lawful Arrest:* Under art. 1, § 7, a lawful arrest is a prerequisite to a lawful search. *Id.*; *State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004); *State v. Parker*, 139 Wn.2d 486, 497, 987 P.2d 73 (1999). If a police officer unconstitutionally seizes an individual before his arrest, the exclusionary rule requires suppression of the evidence obtained from the illegality. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

The State claims Winfield searched Jones incident to his arrest for driving with a suspended license, a recognized exception to the warrant requirement. *State v. O'Neill*, 148 Wn.2d 564, 585, 62 P.3d 489 (2003). But Winfield said he did not know, as he handcuffed and searched Jones, what his “custody status” was going to be. 10/8 RP 18-19. The State now refutes that. BR 14. But the record speaks for itself. Winfield said it, and there is no conflicting testimony on this point.

Winfield’s ambivalence about whether he was arresting Jones or not eliminates any possibility of relying on the ‘search incident to arrest’ exception to the requirement for a warrant to search Jones, even if the initial unlawful seizure did not. If Winfield did not know, as he handcuffed and searched Jones, what his custody status was going to be, then the search was not incident to a lawful arrest, and Winfield was anticipating that searching Jones’s pockets would turn up defensible

grounds for his unwarranted intrusion into Jones's privacy. Therefore, nothing Winfield found in Jones's pockets is admissible.

***Suppression is Required:*** If a traffic stop is unlawful, evidence obtained in a subsequent search is fruit of the poisonous tree and must be suppressed. *Day*, 161 Wn.2d at 894. The record here suggests no legitimate reason for detaining or investigating Jones. Winfield's conduct was arbitrary and harassing, and suppression is the appropriate remedy.

C. CONCLUSION

For these reasons, the Court should reverse Mr. Jones's conviction and vacate the judgment and sentence.

Respectfully submitted this 15<sup>th</sup> day of October, 2010.



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BY J. Jones  
DEPUTY

**CERTIFICATE OF SERVICE**

On October 15, 2010, Jordan McCabe, WSBA No. 27211 deposited in the U.S. mail, first class postage prepaid, a copy of this Designation of Clerk's Papers addressed to:

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