

NO. 42679-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SARA KAY LEWIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA
COUNTY

THE HONORABLE BRIAN ALTMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Should the Findings of Fact and Conclusions of Law from the Evidentiary Hearing held on June 3, 2010 that were entered on October 27, 2011, CP 103-107, be stricken as
 - a. Inadmissible hearsay?
 - b. Violating the appellant's due process rights?
 - c. Violating the appearance of fairness doctrine?
2. Should the appellant's conviction be reversed based on her trial counsel being ineffective in requesting that a second hearing be held under CrR 3.6 without first finalizing findings from the first hearing?
3. Should evidence seized during the appellant's arrest have been suppressed based on
 - a. Her stop for traffic infractions having been pre-textual?
 - b. There not having been probable cause for a crime?
 - c. There not being a valid basis to arrest her?
 - d. The search incident to arrest having been unlawful?

B. STATEMENT OF THE CASE

I. PROCEDURAL FACTS

On January 4, 2010, the appellant was charged by information with one count of Violation of the Uniform Controlled Substances Act –Possession of Methamphetamine. CP 1-2. A preliminary appearance was held the same day. RP 1-7. Bail was set at \$10,000. RP 4-5.

Arraignment was held on January 14, 2010. RP 8-10. The defendant pled Not Guilty. RP 9. Presumably, the appellant had posted bail since jury trial was set on a 90-day time frame. RP 8. Trial was set for April 12, 2010, RP 10, but was continued to June 14, 2010 at a defense motion to continue held on March 25, 2010. RP 11-12. The appellant waived her right to a speedy trial. Id.

The appellant moved under CrR 3.6 to suppress all evidence seized from her person and her car. CP 3-4. The State contested the motion to suppress evidence seized from her person but conceded that evidence seized from her car should be suppressed. CP 19-22.

On June 3, 2010, an evidentiary hearing was held on the appellant's motion to suppress evidence seized from her person. RP 13-72. Skamania County Sheriff Deputy Chadd Nolan testified.

RP 14-50. The appellant's motion to suppress under CrR 3.6 was denied. RP 66, CP 107.

After the evidentiary hearing was over, the appellant's trial counsel announced that the appellant had filed a bar complaint against him and that he wished to withdraw. RP 67. The court granted counsel's motion to withdraw and continued trial to August 9, 2010. RP 70-71. A new attorney was appointed, CP 34.

On July 29, 2010, the appellant, through her newly appointed attorney, moved to continue trial based on a desire to research a potential additional suppression issue. RP 73-74. The appellant waived her right to a speedy trial. RP 73. The court granted the appellant's motion, RP 76, over the State's objection, RP 74-75, and continued trial to October 11, 2010, RP 77.

On September 30, 2010, the State moved to continue based on the unavailability of a material witness, RP 78, CP 36-37. With no objection from the appellant, the court granted the motion to continue. RP 78, CP 38. Trial was reset to December 13, 2010.

Id.

On November 1, 2010, the State filed a motion to revoke the appellant's pre-trial release and exonerate her previously posted bond. CP 39-42. A hearing on this motion was scheduled on

November 22, 2010, but the appellant failed to appear. RP 79-80. The State requested that the court issue a bench warrant for her arrest. RP 80, CP 43-44. The Court granted the State's motion, issuing a bench warrant for the appellant's arrest with bail set at \$10,000. RP 82, CP 45. The previously set trial date was stricken. CP 82.

On January 13, 2011, the trial date was re-set to March 14, 2011. The appellant was apparently in custody since the date was set on a 60-day clock. On March 3, 2011, the State moved for the appellant to be released on personal recognizance so that trial dates could be re-set on a 90-day clock. RP 86. The appellant objected, wishing to remain in custody on bail. RP 86-87. The Court released the appellant on personal recognizance with trial date to be reset. RP 87-90.

On April 7, 2011, it came to the court's attention that a new trial date was never reset. RP 91. The appellant signed a waiver of speedy trial rights, and trial was reset to July 11, 2011. Id.

On June 30, 2011, the State indicated to the court that it was not objecting to the appellant's desire to have an additional suppression motion held. RP 94. Her trial counsel agreed and

indicated that she was signing a waiver of speedy trial. Id. Trial was reset to September 12, 2011. RP 95.

On September 1, 2011, the appellant filed a new motion to suppress evidence under CrR 3.6. CP 46-47. At a hearing that day, her trial counsel moved to continue trial to October 10, 2011 so that the new motion could be heard. RP 96-97. The appellant signed a waiver of her right to a speedy trial. RP 98.

On September 26, 2011, a new evidentiary hearing was held on the appellant's motion to suppress evidence. RP 101-176. Deputy Nolan again testified. RP 107-159. The court issued its ruling the next day, September 27, 2011, denying the motion to suppress evidence. RP 183, CP 113.

On October 10, 2011, the appellant, with no objection from the State, moved to waive jury trial and submit the matter for trial on stipulated facts, CP 75-78, RP 187-192. The Court granted the motion. RP 188. The State moved to amend the information to charge one count of Attempted Violation of the Uniform Controlled Substances Act—Possession of Methamphetamine, RP 192, CP 73-74. The court granted the motion, RP 193, CP 72.

The State offered seven exhibits for its trial evidence, RP 193, CP 79, Exhibit Numbers 2-8. The court found the appellant

guilty as charged in the amended information of Attempted Possession of Methamphetamine, RP 198, CP 117. Judgment was entered, and the appellant was sentenced within the standard range, RP 202, CP 80-90. This appeal follows.

2. SUBSTANTIVE FACTS

On December 31, 2009, Skamania County Sheriff Deputy Chadd Nolan was on stationary traffic patrol on the corner of Salmon Falls and Washougal River Road. RP 15-16, 27, 45, 108-109. He was pulled off on the side of the road. RP 17. His primary duty, purpose, and intention were the enforcement of traffic laws, RP 17, 108, 131, especially considering that the sheriff's office received many complaints about speed in that area, RP 126. Nearby is a 25-mile per hour zone. RP 126, 152. It was a rainy/snowy day. RP 111, 138.

At about 3:15 PM, Deputy Nolan saw a vehicle, driven by a person later identified as the appellant, traveling southbound on Washougal River Road with one marker light not working, RP 17-18, 28, 109, 128-129, 131, 134-135. He did not know the appellant at that time. RP 109. The appellant's vehicle also made a quick left turn without signaling within 100 feet of the intersection, RP 17-19, 31, 39-40, 109-110, 135.

Deputy Nolan started his patrol car, turned around, and got on the road about three to four car lengths behind the appellant's vehicle, which quickly pulled off onto the shoulder. RP 19, 30, 110, 136. The appellant quickly opened her door, got out of her car and started "messaging with her windshield wipers," RP 19, 111. Deputy Nolan had not activated his emergency lights. RP 110, 113, 136.

Seeing that the appellant was having some trouble, Deputy Nolan pulled over, turned on his rear hazard lights, got out of his patrol car, and walked toward the appellant's car. RP 111, 137, 155-156. He parked about eight to ten feet from the appellant's car. RP 155. The appellant ignored him, continuing to work on her windshield wipers. RP 111, 137, 147-148. She tried calling someone on her cell phone. RP 137. There was nobody else in her car. RP 111.

Deputy Nolan then asked the appellant what was wrong, and she replied that she was having malfunctioning windshield wipers. RP 20, 111, 137. At this point, he was more concerned with helping her with a safety problem than with issuing her a traffic citation, RP 20-21, 38-39, so he did not ask for identification at that time, RP 32. He also did not tell her about the traffic infractions,

again because he was more concerned with helping her with her vehicle problems than with minor traffic infractions. RP 113-114.

Deputy Nolan tried to help the appellant with her windshield wipers. RP 21, 118. She went in and out of the car, turning the wipers on and off while Deputy Nolan shook them. RP 118. The appellant tried calling someone on her cell phone and said she was going to have to have somebody come pick up her car. RP 21, 112.

Deputy Nolan requested the appellant give her name. RP 21, 113, 139, 141-142, 157. She asked him why he wanted to know her name, and he replied that dispatch was going to want to know with whom he was talking. RP 113, 139, 142-143. The appellant replied that if she was not under arrest, she did not want to give him her name. RP 21, 113, 143. Deputy Nolan said that was fine. RP 21, 113, 143, 157-158.

Upon being asked her name a second time, the appellant gave it as "Sara". RP 115. Deputy Nolan offered to have dispatch call for her because he knew cell reception was bad in that area. RP 112, 115. She gave him some names of friends in Cathmar Park. RP 115. Deputy Nolan went back to his car and relayed this

information to dispatch, but dispatch was unable to locate them.
RP 115, 150.

Upon re-contacting the appellant outside her car, Deputy Nolan advised the appellant regarding the marker light traffic infraction, RP 116, 150. She said it was not her car. RP 116. Deputy Nolan requested identification, RP 22, 117. This occurred at about 3:26 PM. RP 150. The appellant said she had lied about her name and gave the name Matilda Free and a birthday but said she did not have a driver's license on her. RP 22, 41, 117. She also stated that she did not have a license. RP 117-118. She said she once had a license in Alaska. RP 119. Running her information given through Skamania County Dispatch, Deputy Nolan found that she had a non-valid driver's license. RP 22, 34, 119-120.

At this point, Deputy Nolan again asked the appellant if she had any identification, and she again said she did not. RP 22, 119. Deputy Nolan explained that he would have to arrest her for driving without a valid license without identification if that were really true. RP 22-23, 35, 38, 43, 119-120. She still did not provide identification, so Deputy Nolan placed her under arrest for No Valid

Driver's License without ID. RP 23, 120-121. This occurred at about 3:32 PM.

Upon a search incident to arrest, Deputy Nolan found suspected methamphetamine on the appellant's person. RP 23, 121. The appellant agreed that if a reasonable person saw the baggie, they would think it was drugs. RP 27.

B. ARGUMENT

1. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE EVIDENTIARY HEARING HELD ON JUNE 3, 2010 THAT WERE ENTERED ON OCTOBER 27, 2011, CP103-107, SHOULD NOT BE STRICKEN.

The appellant makes three arguments for striking the Findings and Fact and Conclusions of Law from the June 3, 2010 hearing. She argues that they are inadmissible hearsay, Appellant's Supplemental Brief at 5-7, that their late entry violated the appellant's due process rights, Appellant's Supplemental Brief at 21-24, and that they violated the appearance of fairness doctrine, Appellant's Supplemental Brief at 24-25. None of these arguments have merit. These findings should not be stricken.

a. THE FINDINGS ARE NOT INADMISSIBLE HEARSAY.

The appellant argues that the Findings from the June 3, 2010 hearing are inadmissible hearsay, Appellant's Supplemental

Brief at 5-7. However, she cites no authority for the bald claim that an order duly entered by a judge can be hearsay.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence* to prove the truth of the matter asserted,” ER 801(c)(emphasis added). The Findings at issue in this case cannot be hearsay for the simple reason that they are not evidence. They are judicial findings and conclusions *based* on evidence presented at the hearing.

Furthermore, the appellant somewhat misconstrues the record in claiming that the trial court judge “stated unequivocally on the record that he recalled nothing about the June 3, 2010 hearing after fifteen months,” Appellant's Supplemental Brief at 6. In fact, the judge merely responded “No,” to the deputy prosecutor’s statement, “I’m not sure if your honor remembers the original hearing or--.” RP 103.

Also, even if the trial judge lacked an independent memory of the hearing, there is no authority that he may not sign Findings of Fact and Conclusions of Law that were presented by the State and “Approved as to Form Only” by defense counsel, CP 107.

Finally, and most importantly, the real issue is whether the Findings accurately reflect the testimony and the court's oral rulings, RP 15-50, 62-66. The appellant nowhere indicates that they do not.

The appellant cites several cases for her proposition that the Findings are inadmissible hearsay, none of which apply. In Jenkins v. Snohomish County Public Utility Dist. No. 1, 105 Wn.2d 99, 102, 713 P.2d 79 (1986), cited in Appellant's Supplemental Brief at 6-7, the Supreme Court ruled that a deposition *used* by a judge to formulate a ruling on child competency was not entitled to any appellate deference. However, in our case, the document at issue is the ruling itself, not evidence used to formulate a ruling.

For the same reason, the analogy the appellant makes to witnesses and the Rules of Evidence concerning their testimony, Appellant's Supplemental Brief at 7, is false.

There are simply no grounds for the Findings from the June 3, 2010 hearing to be considered hearsay. They are not evidence to which the hearsay rules apply.¹

¹ As a side note, the appellant claims that the Findings state the hearing date incorrectly. Appellant's Supplemental Brief at 6 (footnote 3). Actually, the hearing date (June 3, 2010) is stated accurately on the CrR 3.6 Findings at issue, CP 103, though it is incorrect on the CrR 3.5 Findings, CP 99, which are not at issue.

**b. THE FINDINGS DO NOT VIOLATE THE APPELLANT'S
DUE PROCESS RIGHTS.**

The appellant argues that she was prejudiced by the delay in filing the Findings from the June 3, 2010 hearing, Appellant's Supplemental Brief at 21-24. However, she fails to give any valid basis for this prejudice and again cites cases that are inapposite.

In State v. Gaddy, 114 Wn. App. 702, 704-705, 60 P.3d 116 (2003), affirmed on other grounds, 152 Wn.2d 64, 93 P.3d 872 (2004), State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996), and State v. McGary, 37 Wn. App., 856, 861, 683 P.2d 1125 (1984), cited in Appellant's Supplemental Brief at 21, the Court of Appeals was addressing situations where the *trial* court did not enter findings until after the appellant's opening brief was filed. Here, however, the trial court entered findings on October 27, 2011, CP 103-107, four months *before* the opening brief was filed and a week before appellate counsel filed the Statement of Arrangements and Designation of Clerk's Papers.

Furthermore, in none of the cases cited by the appellant did the Court find any prejudice. Here too, the appellant fails to show any prejudice.

The appellant cites State v. Oppelt, 172 Wn.2d 285, 257 P.3d 653 (2011) for an argument concerning “prosecutorial delay,” Appellant’s Supplemental Brief at 22. However, in Oppelt, the Supreme Court was discussing the framework for analyzing the due process violation caused by “*preaccusatorial* delay,” 172 Wn.2d at 288 (emphasis added). This is emphatically *not* what we are facing here since the appellant was charged four days after the alleged crime, CP 1-2.

The appellant’s argument that

withholding the suppression findings until after the appeal was filed and trial counsel was off the case denied Lewis the opportunity to seek relief under CrR 8.3(b),

Appellant’s Supplemental Brief at 23, is not supported by any basis for a CrR 8.3(b) motion in the first place. Furthermore, if such a motion were appropriate, there was no reason it could not have been brought by trial counsel, who was also not barred from objecting to any of the proposed findings.

Finally, additional time spent by appellate counsel in preparing a supplemental brief, Appellant’s Supplemental Brief at 23, is not the sort of prejudice contemplated by the case law. It is not really even prejudice since it would have been necessary

whenever the Findings were filed. To whatever extent it is prejudicial, the prejudice would not be remedied by suppressing the Findings.

c. THE FINDINGS DO NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE.

The appellant argues that

a reasonably prudent and disinterested observer would question the fairness of permitting the prosecutor to dictate dispositive suppression findings to a judge with no independent recollection of the evidence or the arguments of counsel.

Appellant's Supplemental Brief at 25. Whether correct or not, this argument mis-states the record.

First, as noted above, the trial judge never stated he had no independent recollection of the original hearing. He merely responded "No," to the deputy prosecutor's statement, "I'm not sure if your honor remembers the original hearing or--." RP 103.

Secondly, the prosecutor did not "dictate dispositive suppression findings" to the judge. First, the Findings were "Approved as to Form only" by trial counsel, CP 107. Second, the judge was free to review the record himself if he had any concerns. Third, there is nothing to suggest that the findings inaccurately

reflect the Court's oral ruling given at the time of the hearing, RP 62-66.

In sum, the Findings do not lack the appearance of fairness.²

2. THE APPELLANT'S CONVICTION SHOULD NOT BE REVERSED BASED ON TRIAL COUNSEL BEING INEFFECTIVE IN REQUESTING THAT A SECOND HEARING BE HELD UNDER CrR 3.6 WITHOUT FIRST FINALIZING FINDINGS FROM THE FIRST HEARING.

To sustain a claim of ineffective assistance of counsel, a defendant must prove that counsel's representation was "deficient" and that the "deficient" representation "prejudiced the defense." State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984), rehearing denied 467 U.S. 1267, 104 S. Ct. 3562 (1984).

To satisfy the first deficiency prong, an appellant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Thomas, 109 Wn.2d at 225, quoting Strickland, 466 U.S. at 687. "[S]crutiny of counsel's performance is highly

² The appellant argues that "[t]he appropriate remedy [for violation of Appearance of Fairness] is to reverse the conviction," Appellant's Supplemental Brief at 25, but it is not clear why this remedy is suggested when for the prior two arguments, she suggests mere suppression of the earlier Findings, id. at 5-7, 23-4.

deferential and courts will indulge in a strong presumption of reasonableness." Id. at 226.

To satisfy the second prong, an appellant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

The reviewing court can consider the prongs in either order and need not reach the issue of deficiency if the defendant was not prejudiced. Id. at 697.

The appellant concedes that since new trial counsel "thought additional suppression arguments should have been made . . . [i]t was . . . arguably a legitimate strategic reason to request a second hearing," Appellant's Supplemental Brief at 20. In reality, there is nothing "arguabl[e]" about it since the State prevailed at the original hearing, RP 66.

The appellant goes on to argue that trial counsel was deficient "by not protecting his client by requesting written findings from the first hearing," Appellant's Supplemental Brief at 20:

This would have closed the door on the State's ability to rehabilitate Nolan's testimony by omitting or obfuscating facts supporting the conclusion that

Nolan's interaction with Lewis was such as to require suppression.

Id. This constitutes a bald assertion without foundation.

There is nothing in the record indicating that "the State . . . significantly clean[ed] up Nolan's testimony to eliminate or ameliorate adverse facts he had testified to in the first hearing," Id. at 21.

In any case, the State would have been able to do this by reviewing the prior record, even had Findings already been entered. And defense counsel was fully capable of impeaching Deputy Nolan with his prior testimony without written Findings already having been entered. In fact, both attorneys *had* reviewed the prior testimony:

[B]oth Mr. Krog [trial counsel] and I [deputy prosecutor] got tapes of that hearing and have both reviewed the tapes, so we're both sort of familiar with that hearing.

RP 102.

Finally, since the trial court's original oral Findings were mostly favorable to the State, RP 62-66, there is no basis to assume that its written Findings, had they been entered prior to the second hearing, would somehow have helped defense strategically in the second hearing.

It is not even likely, let alone reasonably probable that the result of the second hearing would have been different had written Findings from the first hearing been entered in advance. Therefore, under the Strickland test articulated above, the appellant's motion to dismiss for ineffective assistance of counsel should be denied.

3. EVIDENCE SEIZED DURING THE APPELLANT'S ARREST SHOULD NOT HAVE BEEN SUPPRESSED.

The appellant advances three basic arguments for the claim that evidence seized during the appellant's arrest should have been suppressed. First, she argues that Deputy Nolan's stop of the appellant was pre-textual. Brief of Appellant at 5-11, Appellant's Supplemental Brief at 25-26. Next, she argues that there was not probable cause for an arrest, Appellant's Supplemental Brief at 28-31. Finally, she argues that the search incident to arrest was unlawful, Appellant's Supplemental Brief at 31-33.

None of these arguments have any merit, so the evidence should not be suppressed.

a. DEPUTY NOLAN'S STOP OF THE APPELLANT FOR TRAFFIC INFRACTIONS WAS NOT PRE-TEXTUAL.

In State v. Ladson, the State Supreme Court held that the Washington State Constitution

forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one.

138 Wn.2d 343, 979 P.2D 833, 839 (1999). Violation of this rule leads to the suppression of any subsequently recovered evidence. Id. at 843.

When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.

Id.

Factors that the court is to consider when determining if a stop was pre-textual include:

- Whether a criminal investigation had begun before the traffic stop was executed, State v. Myers, 117 Wn. App. 93, 96-96, 69 P.3d 367 (2003)
- Whether the officer was on routine patrol (though this is not dispositive), State v. Montes-Malindas, 144 Wn. App. 254, 261, 182 P.3d 999 (2008)
- Whether the officer proceeded with caution or called for backup, Id. at 262

- Whether the infraction citation was actually given (though this is not dispositive), State v. Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), review denied, 142 Wn.2d 1027, 21 P.3d 1149 (2001).
- Whether the officer asked the sort of questions that would be asked in a routine traffic stop, Id. at 741
- Whether the officer followed the person, waiting for a traffic infraction to be committed, State v. Gibson, 152 Wn. App. 945, 219 P.3d 964, 968 (2009).

I. THE RELEVANT CONTESTED FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

In our case, the trial court made several contested findings material to the pretext issue. Challenged findings are reviewed to determine

whether substantial evidence exists to support the trial court's findings of fact, and whether those findings support the trial court's conclusions of law.

State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Here, substantial evidence exists to support the disputed findings.

a) SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS REGARDING WHAT DEPUTY NOLAN WAS DOING AT THE INTERSECTION OF SALMON FALLS AND WASHOUGAL RIVER ROAD

The first relevant set of contested findings were that Deputy Nolan was “working routine traffic enforcement,” CP 103, “on regular patrol duty,” CP 108, and “monitoring traffic for traffic laws,” Id. Also see RP 62, 66.

To support these findings, the trial court heard Deputy Nolan’s testimony that he was “doing stationary patrol traffic,” RP 16, by

sitting at the intersection of Salmon Falls and Washougal River Road . . . [m]onitoring traffic . . . [for] [t]raffic laws and just being available for calls,

RP 108. He responded “Yes, sir” to the question of whether he was “basically pulled off on the side of the road,” RP 17. Furthermore, he testified that his intention was “[e]nforcing traffic laws,” Id., and that while he had “[n]o specific duty,” RP 131, in that situation he does “run traffic and enforce traffic laws,” RP131. That was his “purpose” of “being there,” Id.

The appellant fundamentally misconstrues the testimony on these points by only partially quoting Deputy Nolan. For instance, she claims he “testified that he was on ‘stationary patrol’ at the intersection, by which he meant just “kind of hanging out,” Appellant’s Supplemental Brief at 10 (citing RP 16). However, Deputy Nolan actually testified he “was on stationary patrol on the

corner of Salmon Falls and Washougal River Road facing north on Washougal River Road doing stationary patrol *traffic*,” RP 16 (emphasis added). He said he “was just kind of hanging out and, you know, *enforcing traffic laws*,” RP 16-17 (emphasis added).

Deputy Nolan’s testimony as to what he was doing at the time he stopped the appellant is supported by his uncontroverted testimony that the sheriff gets

a lot of complaints about speed in that 25 zone, blind corners. Residences have their driveways on the blind corners and it’s just a dangerous area because people don’t slow down.

RP 126. Deputy Nolan also was uncontroverted in his testimony that “[i]t was rainy and kind of snowy out,” RP 111, with “medium” visibility, RP 18.

b) SUBSTANTIAL EVIDENCE SUPPORTS THE COURT’S FINDINGS CONCERNING DEPUTY NOLAN’S ASSISTING THE APPELLANT

The appellant contests the finding that before proceeding to traffic infraction procedures with the appellant, Deputy Nolan “was trying to offer her assistance,” CP 104. He asked her “if he could assist her with the problem with the vehicle’s windshield wipers,” CP 104, and “[a]t one point, Deputy Nolan assisted the defendant by trying to shake the windshield wipers while the defendant turned

them off and on inside the car,” CP110. At another point, he “offered to have dispatch call someone for her” because he “knew the cell phone service was not very good at that location,” CP 110.

The Court also stated in its oral findings as follows:

I was persuaded that he felt part of his duty was, in addition to pursuing the traffic infraction appropriately, that he would help her if he could with her windshield wipers.

RP 64, and:

[T]he officer walked up to her and here’s where, for a brief amount of time, minutes only, the officer believed and the evidence shows that the community care taking function for a few minutes trumped his need to proceed with a traffic infraction procedure.

RP 180. “He expressed a desire to help her by calling in, by maybe getting some help . . . ” Id. at 181.

These findings are abundantly supported by the testimony of Deputy Nolan, who stated in the first suppression hearing said that as soon as he “got in behind her [the appellant], she quickly pulled off onto the shoulder and got out of her car and started messing with her windshield wipers,” RP 19. Similarly, in the second hearing, he said “[s]he quickly opened her door, got out and she started playing with her windshield wipers,” RP 111.

In the first hearing, Deputy Nolan testified that he "asked her what was wrong," and she replied that "she was having malfunctioning windshield wipers," RP 20. Similarly, in the second hearing on direct examination, he testified that he "asked her what the problem was and she said that she was having problems with her windshield wipers," RP 111. On cross examination, too, he testified that he "started talking to her and asking her what the problem was. And that's when she told [him] she was having problems with her windshield wipers," RP 137.

Deputy Nolan testified that he "tried to help her [the appellant] get them [the windshield wipers] un-jammed, or whatever the malfunction was," RP 21, by having "her go in and out of the vehicle to turn them off and on to see if we could get them to work because [he] shook them to get them to unfreeze," RP 118.

Finally, Deputy Nolan testified that he offered to have "Dispatch call if she needed somebody to come pick her up" because "there's not very good [cell phone] service there," RP 112. And in fact, he testified, he did have "Dispatch try to contact them [the appellant's friends] . . . but they weren't able to do so," RP 115.

All of these facts were uncontroverted. They substantially support the findings that Deputy Nolan, before starting traffic

infraction procedures, was assisting the appellant with her car problems.

Furthermore, Deputy Nolan did not just explain what he did but also gave a credible overarching explanation for his actions. In the first hearing on direct examination, he testified:

You know, if there's something safety-wise that I can help out with, I'm not going to jam somebody up on a traffic stop when there's something maybe safety-wise that it's more important to help her out with.

RP 20-21. On cross-examination, he re-iterated that

[t]here's other opportunities in law enforcement where we can help people out. She was having a problem with her windshield wipers, you know, I can buy that and help her out.

Community relations, I guess, you know, and officer friendly and it's not all about give me your license, registration, insurance. You know, I'm trying to help somebody in the community out if they're having a problem.

RP 38-39. He said the substantially the same thing in the second hearing:

Like in the last hearing, I brought up the fact that law enforcement's not all about give me your license, give me your registration and insurance, this is what you did wrong. She was obviously having a problem with her car – allegedly having a problem with her car, so I took it upon myself to maybe try to help her out with that. And the simple traffic infraction of not using her turn signal and the defective marker light can come second.

RP 113-114.

Deputy Nolan's testimony as to his trying to help the appellant is further corroborated by his uncontroverted testimony that part of his concern regarding the apparently malfunctioning windshield wipers involved "the rain and the snow and the other thing going on," RP 138, and by his affirmative response to a question on cross examination about whether it was "raining and snowing heavily enough that they [the windshield wipers] were necessary to use them [sic]," RP 138.

Nevertheless, the appellant maintains that Deputy Nolan was not "merely trying to help Lewis complete her phone call when he ran the information through dispatch," Appellant's Supplemental Brief at 13, but "testified that what he was trying to do was to extract information about Lewis's comings and goings and her social contacts," Id. (citing RP 33, 144).

Once again, this misconstrues Deputy Nolan's testimony. While he did testify that he was trying to gather information from her, RP 33, 144, this was not connected to his attempts to help her call her friends. Deputy Nolan testified that the information he was trying to get was "exactly what was going on, maybe who she was,"

RP 33, and "where she was coming from," in relation to "a possible DUI," RP 144. Who her friends were has nothing to do with this.

Furthermore, the appellant's contention that Deputy Nolan's "own testimony established that his primary purpose was to obtain information from Lewis about her private affairs unrelated to the recent left turn," Appellant's Supplemental Brief at 8-9 (citing RP 33, 144) is unsupported by the record. In the cited portions, while Deputy Nolan candidly agrees that he was trying to gather information, he nowhere says this was his primary purpose, RP 33, 144.

c) SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING CONCERNING LACK OF SUBJECTIVE CONNECTION BETWEEN DEPUTY NOLAN'S CONTACT WITH THE APPELLANT'S CAR AND HIS SIGHTING OF THE CAR EARLIER AT MR. HEATER'S HOUSE

Finally, the appellant contests the Court's finding that

[t]here was no subjective connection between Deputy Nolan's contact with the defendant's car and his sighting of the car earlier at Mr. Heater's house. Deputy Nolan did not run the license plate at Robert Heater's house before the infractions had occurred. He was enforcing the traffic code and initially subjectively intended to contact the defendant's car due to the observed traffic infractions only.

CP 111. For many of the reasons stated above regarding Deputy Nolan's purposes and actions, this finding is also supported by substantial evidence.

Furthermore, while Deputy Nolan testified he had seen the appellant's car at the home of Robert Heater earlier that day, RP 47-48, 125, 134, 144, 146, he testified that this was not one of the reasons he stopped the defendant, RP 50 (admittedly a subjective fact), and that he did not ask her any questions about contact with Mr. Heater, id. (an uncontroverted objective fact). He did not know the appellant. RP 109.

Furthermore, Deputy Nolan could not see Mr. Heater's residence from the intersection where he was on stationary patrol, RP 46, which was a well traveled segment of the road, id. His concerns there related to "complaints about speed," not to its proximity to Mr. Heater's house, RP 126.

Deputy Nolan testified that he did not run the license plate of the appellant's car when he had seen it earlier at Mr. Heater's house. RP 126, 131. This testimony was corroborated by a "CAD" or "radio history," documentary evidence admitted into evidence which showed the first time Deputy Nolan ran the license plate of the appellant's car was after he saw it make the left turn without

signaling at the intersection of Washougal River Road and Salmon Falls Road, not earlier at Mr. Heater's house, RP 127-129.

It is an uncontested finding that Deputy Nolan had seen the appellant's car earlier that day at Mr. Heater's house, Appellant's Supplemental Brief at 14, CP 111. However, the appellant, in contesting the finding regarding Deputy Nolan's true motivations, connects this uncontested finding with an claim Deputy Nolan "admitted that he contacted Lewis because he wanted to know 'just exactly what was going on, maybe who she was,'" Appellant's Supplemental Brief at 14 (quoting RP 33), and that "his curiosity was unrelated to enforcing the traffic laws," Appellant's Supplemental Brief at 14 (citing RP 144). This is a gross distortion of the record. Deputy Nolan's testimony at these points related *not* to his initial contact of the appellant but to his continued observations while he was trying to help her.

Finally, the appellant baldly asserts that Deputy Nolan "conceded that Lewis's apparent association with that [Mr. Heater's] house was the reason for his interest in her," Brief of Appellant at 8. Also See Appellant's Supplemental Brief at 25. He did no such thing.

In the very section cited by the appellant, Deputy Nolan answered “No” to the question on cross-examination as to whether the appellant’s apparent association with Mr. Heater’s house was “one of the reasons that [he] wanted to know more information from her,” RP 48. When pressed by the question “Not at all?” the most he said was that he could not “say whether it was or was not,” Id. But then he immediately clarified the response: “You know, if I had to guess, I would already have guessed that she was coming from Robert Heater’s place. I wouldn’t have to ask her.” Id. And as the appellant concedes, Deputy Nolan specifically denied that one of the reasons he stopped the appellant was to ask her about her contacts with Mr. Heater, Brief of Appellant at 9, Appellant’s Supplemental Brief at 26 (citing RP 50).

**ii. THE RELEVANT UNCONTESTED FINDINGS
ARE VERITIES ON APPEAL**

There are several uncontested findings that are material to the pretext issue. “Unchallenged findings are verities for purposes of appeal,” Ross, 106 Wn. App. at 880.

**a) THE APPELLANT COMMITTED A TRAFFIC
INFRACTION**

It is uncontested that the appellant’s vehicle “made a sudden left turn onto Salmon Falls Road without signaling within 100 feet of

the turn,” CP 109. The appellant concedes that “[t]his finding is supported by substantial evidence,” Appellant’s Supplemental Brief at 8. This is a traffic infraction in Washington, RCW 46.61.305(2). However, the appellant does suggest that “this finding is immaterial, because Nolan testified that he did not include the alleged turn-signal violation when he finally commenced the traffic stop,” Appellant’s Supplemental Brief at 11 (citing RP 150-151).

On the contrary, it is irrelevant whether Deputy Nolan mentioned the alleged turn-signal violation when commencing the traffic stop, because the question is whether there was a basis for *any* infraction. In the context even of full-fledged custodial arrests, the Court of Appeals has held that

[p]robable cause exists for a warrantless arrest where the facts and circumstances within the arresting officer’s knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that an offense has been committed. [citation omitted]. *The absence of probable cause to believe that a person committed a particular crime for which a person was arrested does not create an invalid arrest if, at the time of the arrest, the police had sufficient information to support an arrest of the person on a different charge.*

City of Seattle v. Cadigan, 55 Wash. App. 30, 36, 776 P.2d 727 (1989) (emphasis added). Certainly, *a fortiori*, this logic applies to traffic infractions.

b) DEPUTY NOLAN TRIED TO GATHER MORE INFORMATION FROM THE APPELLANT.

It is an uncontested finding that initially, “Deputy Nolan did not say he would be conducting a traffic stop because he wanted to try to gather more information from her [the appellant].” CP 109. Appellant’s Supplemental Brief at 14. However, this finding does not contradict the findings that during this phase of his contact with the appellant, he was trying to assist her.

Whether justified or not, Deputy Nolan found the appellant’s behavior while he was trying to help her “suspicious,” RP 21. She was “overly nervous,” Id., “[v]ery strange and very nervous like, and she wouldn’t make eye contact with [him],” RP 32. She was “really evasive,” RP 112, “pacing back and forth, fidgeting around,” RP 143.

Whether these observations rise to the level of probable cause or reasonable suspicion that the appellant was “under the influence” as Deputy Nolan suspected, Id. is not at issue here *because the appellant was not detained at that time.* Deputy Nolan

was parked “[e]ight to ten feet” behind the appellant’s car, RP 155, and did not have his emergency lights activated, RP 113. In fact, the emergency lights “never got turned on,” RP 118. Before informing her of the traffic infraction, Deputy Nolan did not lay hands on the appellant, restrict her movements in any way, or indicate anything suggesting she was not free to leave RP 117-118, CP 110 (uncontested finding).

Since the appellant was not yet detained, there is no reason why Deputy Nolan, in the process of helping the appellant with her car problem, cannot ask her questions. She was not yet detained and was free not to answer his questions. “By simply engaging a person in conversation, an officer does not thereby ‘seize’ that person.” State v. Mennegar, 114 Wn. 2d 304, 310, 787 P.2d 1347 (1990) (overruled on other grounds, State v. Hill, 123 Wn. 2d 641, 870 P.2d 313 (1994)).

When a citizen freely converses with a police officer, the encounter is permissive. It is not a seizure; and therefore the Fourth Amendment is not implicated [citation omitted]. If a person does freely consent to stop and talk, the officer’s merely asking questions or requesting identification does not necessarily elevate a consensual encounter into a seizure [citation omitted].

State v. Barnes, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999).

iii. THE TRIAL COURT'S CONCLUSIONS OF LAW REGARDING PRETEXT ARE SUPPORTED BY ITS FINDINGS OF FACT

The trial court concluded that "there was no pretext committed during this traffic stop," CP 104, and that

Deputy Nolan was not acting in a pre-textual manner but was initially acting to enforce the traffic code, then out of a legitimate community caretaking concern, and then back to enforcing the traffic code.

CP 112. These conclusions are supported by the trial court's findings of fact as articulated above.

First, whether Deputy Nolan was on routine traffic patrol is not dispositive, Myers, 117 Wn. App. at 97. However, in Montes-Malindas, the Court of Appeals, in determining the stop was pre-textual, noted that the "facts suggest that [the officer] was not on routine patrol; he was conducting surveillance on the van," 144 Wn. App. at 261. Here, however, no such surveillance was shown. Deputy Nolan was conducting routine patrol.

Second, unlike in Myers, where the officer "began following Mr. Myers' car because he suspected that Mr. Meyers was driving with a suspended license," 117 Wn. App. at 97, Deputy Nolan was not following the appellant's car and did not suspect criminal activity before witnessing the traffic infraction.

In Gibson, the Court of Appeals found no pretext, distinguishing Myers and other prior cases “in which the officers suspected criminal activity and followed the vehicles looking for an opportunity to stop them for a traffic violation,” by noting that “the deputies here did not follow Gibson’s vehicle waiting for him to commit a traffic violation.” 219 P.3d at 968.

Instead, the deputies were leaving a residence after unsuccessfully attempting to serve an arrest warrant on another named individual when Deputy England observed a driver, later identified as Gibson, turn without signaling. Further, Deputy England routinely patrols the area in which he stopped Gibson and he regularly writes infractions for failing to signal turns. Therefore, . . . Deputy England did not state, nor can it be inferred, that he intended to use a traffic violation as an excuse to investigate suspected criminal activity.

Id. This is quite similar to what happened in the appellant’s case.

Third, unlike in Montes-Malindas, there is no evidence that backup was called or that Deputy Nolan decided to “proceed with caution,” 144 Wn. App. at 262.

Fourth, while Deputy Nolan did not ultimately issue the traffic infraction citation in this case, that can be explained by the importance of the infraction having been overcome first by an apparent misdemeanor violation and then by an apparent felony.

In Hoang, the officer

ultimately elected not to cite Hoang for turning without signaling, or for driving while his license was suspended, or for driving without license plates on the car, and instead to book him only for unlawful possession of cocaine.

101 Wn. App. at 742. While the Court of Appeals did state that these were “among the factors to be considered in determining the officer’s subjective intent for making the stop,” the Court, in ultimately finding that the stop was *not* pre-textual, stated they “are not dispositive.” Id.

We find nothing in *Ladson* that limits prosecutorial discretion with respect to charging decisions, or that requires police to issue every conceivable citation as a hedge against an eventual challenge to the constitutionality of a traffic stop allegedly based on pretext.

Id.

The appellant may argue that her case is distinguishable from Hoang in that there:

the trial court observed that, upon making the stop, the officer asked only the questions that would be asked on a routine traffic stop: Do you have a driver's license? May I see the vehicle registration? May I see the certificate of insurance? He asked no questions regarding what Hoang was doing in that area at that time of morning.

Id. at 741. However, under the unique facts of this case, Deputy Nolan’s questions were not unreasonable.

As discussed above, Deputy Nolan was trying to help the appellant when he made certain observations that, rightly or wrongly, raised his suspicions. RP 21, 32, 112, 143. Since she was not detained yet, there was nothing preventing him from chatting with her to get "information," RP 33, 144. Importantly, his suspicions were raised by observations he made *after* he saw the traffic infraction committed. And his suspicions were not related to drug possession but to Driving Under the Influence, RP 143-144. As the appellant notes, Deputy Nolan was a "rookie," Appellant's Supplemental Brief at 12. As he himself testified:

[H]ad I known then what I know now, she was probably under the influence of methamphetamine at the time. But like I said, I was inexperienced at the time and just thought it was nervous, suspicious behavior.

RP 156. Thus, Deputy Nolan's questions do not suggest pretext and do not meaningfully distinguish this case from Hoang.

In fact, the facts of the appellant's case are remarkably similar to those in Hoang, where the Court of Appeals found there was *not* pretext:

. . . [T]he officer did not follow Hoang hoping to find a legal reason to stop him: Hoang made a left-hand turn without signaling right Before the officer's eyes, and the officer immediately pulled him over, just as he

would have for any other routine stop for a traffic infraction committed in his presence.

Hoang's position in this appeal is tantamount to a contention that this court may look behind an unchallenged finding of fact that the traffic stop in question would have been made in any event, and conclude instead as a matter of law that the stop was unconstitutionally pretextual merely because the officer who made the stop first saw the vehicle while observing a narcotics hotspot and saw the driver of the vehicle engage in behavior that could be entirely innocent (such as asking for directions) or not entirely innocent (such as asking if drugs were for sale)--and because the officer, not being entirely naïve, suspected that the behavior was not entirely innocent. But *Ladson* does not stand for that proposition. Under *Ladson*, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop. What they may not do is to utilize their authority to enforce the traffic code as a pretext to avoid the warrant requirement for an unrelated criminal investigation.

101 Wn. App. at 741-742.

The bottom line is that the trial court's findings support its conclusion that the stop was not pre-textual because the findings show that Deputy Nolan's subjective intent was to enforce the traffic code and that the stop was objectively reasonable.

iv. DEPUTY NOLAN'S TRAFFIC STOP WAS OBJECTIVELY REASONABLE

With regard to the second part of the pretext test (objective reasonableness), the Court of Appeals found "it is not reasonable to

stop a car [for not having headlights on] only after its lights have been turned on," Montes-Malindas, 144 Wn. App. at 262.

No evidence was presented to indicate the presence of other traffic on the roadway or the existence of endangerment to pedestrians on property resulting from Mr. Montes-Malindas's brief roadway travel without his headlights on. He pulled onto the street in front of a business and traveled about 100 yards, apparently without interfering with any other vehicular or pedestrian traffic, Before turning his headlights on.

Id.

In the appellant's case, however, the following facts from Deputy Nolan's uncontroverted objective testimony show the objective reasonableness of Deputy Nolan's stop:

- It was a rainy/snowy day. RP 111, 138.
- Visibility was "medium," RP 18.
- The appellant "signaled and then made a *quick* turn . . . it was not 100 feet, *it wasn't even close*," RP 19 (emphasis added).
- The sheriff gets "a lot of complaints about speed in that 25 zone, blind corners . . . it's just a dangerous area because people don't slow down." RP 126
- The area was "a well traveled segment of the road," RP 46.

In sum, Deputy Nolan's stop of the defendant was not pre-textual, and the evidence should not be suppressed on that basis.

b. DEPUTY NOLAN HAD PROBABLE CAUSE THAT A CRIME WAS COMMITTED

The probable cause standard was succinctly stated by the Court of Appeals in Cadigan:

Probable cause exists for a warrantless arrest where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that an offense has been committed. [citation omitted]

55 Wn. App. at 36. Here, Deputy Nolan had probable cause to arrest the appellant because:

1. When he ran the information he gave him through Skamania County Dispatch, he found that she had a non-valid driver's license, RP 22, 34, 119-120, CP 110. She also said she did not have a license, RP 117-118, CP 110.
2. She repeatedly claimed that she did not have a driver's license or other identification on her person, RP 22, 41, 117, 119, CP 110 even after being repeatedly warned that she would be arrested for driving without a valid license without identification if that were really true. RP 22-23, 35, 38, 43, 119-120, CP 110.

Taken together, these two facts establish probable cause for Driving without a License without Identification in Possession, a misdemeanor under RCW 46.20.005. Whether the appellant actually had identification on her is irrelevant because Deputy Nolan was not entitled to search her before an arrest and could only go by what she told him. The question at that point was not whether she was *committing* the crime but whether there was probable cause, and there certainly was under the above definition.

The appellant incorrectly cites RCW 46.20.015(a) in claiming that “[d]riving without a valid license in one’s possession is merely an infraction warranting only a citation and notice to appear,” Appellant’s Supplemental Brief at 30. In fact, the statute cited only applies if the person “[p]rovides the citing officer with an expired driver’s license or other valid identifying documentation . . . at the time of the stop,” RCW 46.20.015(1)(b). Since the appellant failed to do this, Deputy Nolan had probable cause that she was committing the misdemeanor *crime* of Driving without a License without Identification in Possession, RCW 46.20.005.

The evidence should not be suppressed for lack of probable cause.

c. DEPUTY NOLAN HAD A VALID BASIS TO ARREST THE APPELLANT.

Under RCW 10.31.100,

[a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer.

Since the appellant was driving right in front of Deputy Nolan, she committed the crime in his presence, allowing him to arrest her.

This would seem to end the discussion.

However, in State v. Hehman, the State Supreme Court held that

a custodial arrest is not proper for a minor traffic violation. However, we do not imply that a law enforcement officer must disregard custodial arrest if he has other reasonable grounds apart from the minor traffic violation itself. In those situations, the general rules of arrest control.

90 Wn.2d 45, 50,578 P.2d 527 (1978). With respect to Driving without a Valid License, with no other grounds, courts have held a custodial arrest improper. Hehman, *supra*; State v. Terazas, 71 Wn. App. 873, 863 P.2d 75 (1993); State v. Feller, 60 Wn. App. 678, 806 P.2d 776 (1991); State v. Barajas, 57 Wn. App. 556, 789 P.2d 321 (1990), *review denied*, 115 Wn.2d 1006, 795 P.2d 1157 (1990); State v. Watson, 56 Wn. App. 665, 784 P.2d 1294 (1990);

State v. Stortroen, 53 Wn. App. 654, 769 P.2d 321 (1989).

However, all of these cases were decided before the Legislature (in 1997) decriminalized driving without a valid license but *with* valid identification, RCW 46.20.015, meaning that the crime occurred merely by driving without a valid license. Given this change, it is questionable whether the current crime of Driving without a License without Identification in Possession is a "minor traffic violation" under Hehman.

Furthermore, even pre-1997, the Court of Appeals noted

that a police officer retains discretion to make a custodial arrest of one who is operating a vehicle without a valid operator's license. However, such custodial arrests are valid only where the officer has a substantial reason, beyond the infraction itself, to make such an arrest.

Watson, 56 Wn. App. at 667.

In fact, in several pre-1997 cases, the Court of Appeals ruled that certain situations legitimate custodial arrest for Driving without a License. State v. Jordan, 50 Wn. App. 170, 174, 747 P.2d 1096 (1987), review denied, 110 Wn.2d 1027 (1988)(arrest valid because defendant had "no driver's license, . . . no other identification, and he was driving a vehicle he did not own."); State v. McIntosh, 42 Wn. App. 573, 576, 712 P.2d 319 (1986)("person

who had no identification, who did not claim to own the vehicle he was driving, and who had related a suspicious account of his activity during the previous evening"). Now, of course, the lack of identification is an element of the criminal offense, RCW 46.20.005.

In State v. Reding, 119 Wn.2d 685, 688, 835 P.2d 1019 (1992), the Supreme Court indicated that the Legislature essentially codified the holding of Hehman in RCW 46.64.015, as follows:

Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. . . . An officer may not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence or when a person may be arrested pursuant to RCW 10.31.100, as now or hereafter amended. *The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:*

(1) *Where the arresting officer has probable cause to believe that the arrested person has committed any of the offenses enumerated in RCW 10.31.100(3);*

(2) *When the arrested person is a nonresident and is being detained for a hearing under RCW 46.64.035.*

RCW 46.64.015 (emphasis added).

Since Driving without a License and without Identification in Possession, RCW 46.20.005, though a misdemeanor crime, is not listed in RCW 10.31.100(3), it might seem that custodial arrest for this crime is disallowed. The Court of Appeals considered this possibility in Terrazas but then went on to state:

However, courts have followed the Hehman exception and allowed custodial arrest for minor traffic offenses when there are 'other reasonable grounds' in addition to a minor traffic violation.

71 Wn. App. at 877.

Furthermore, although the Court of Appeals did state that under RCW 46.64.015, "custodial arrests for traffic violations are limited to situations" listed in the statute, Id., the statute can also be read as contemplating a full-fledged custodial arrest for *any* traffic crime but limiting its length to the time needed to issue and serve the citation and notice. In fact, the State Supreme Court appears to read the statute this way in State v. Pulfrey, 154 Wn.2d 517, 111 P.3d 1162 (2005). That case was about Driving with License Suspended in the Third Degree, a crime that *is* listed in RCW 10.31.100(3), so it is not directly on point.

However, the Court agrees that the statute “plainly allows a police officer to cite and release an *arrested* person,” Pulfrey, 154 Wn. 2d at 525 (emphasis in original). Quoting the language of the statute, the Court states that its “language contemplates a police officer arresting a person and then deciding to cite and release him at a later point,” Id. at 525-526. The Court goes on to state that

[t]he statute even exempts arrests for driving while license suspended from the requirement that the detention be long enough only to cite and release.

Id. at 526. Obviously, this latter provision would not apply to the appellant’s case, but the previous logic does.

Since Deputy Nolan had probable cause the defendant committed the *crime* of No Valid Driver License without Identification in Possession, committed in his presence, he was entitled to arrest her under RCW 10.31.100.

To whatever extent Hehman still applies after the codification of RCW 46.64.015 and after the elimination of criminal liability for driving without a license *with* identification in RCW 46.20.005, Deputy Nolan clearly had the “other reasonable grounds” required by Hehman. The appellant said the car was not hers, RP 116, repeatedly said she did not have a driver’s license on her, RP 22, 41, 117, 119, and admitted to initially lying about her name, RP

117. This situation is similar to those in the pre-1997 cases cited above where the court upheld the arrest.

Finally, assuming *arguendo* that RCW 46.64.015 applies, Deputy Nolan was still entitled to execute a full-fledged custodial arrest as the Supreme Court explained in Pulfrey, supra. He did not, of course, immediately release her after issuing the notice of infraction, because he found methamphetamine on his search incident to arrest, RP 23, 121.

The evidence should not be suppressed based on lack of valid basis to arrest.

d. DEPUTY NOLAN WAS ENTITLED TO PERFORM A SEARCH INCIDENT TO ARREST.

The appellant concedes that “[a] search incident to arrest is an exception to the warrant requirement,” Appellant’s Supplemental Brief at 31. That would seem to close the matter.

The appellant, however, misconstrues State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999), claiming it holds that

[i]n the context of a traffic stop, the showing required to justify search a citizen is a substantial possibility that she has or is about to engage in criminal conduct.

Appellant's Supplemental Brief at 31. This is not the holding of Mendez, which relates to the authority of an officer over passengers in cars where the driver has been lawfully stopped.

Similarly, the appellant misconstrues State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011) to hold that when

officers arrested a driver for driving with a suspended license. . . it was unlawful to search him absent any evidence of [sic] grounds to suspect the driver was armed or dangerous or engaged in criminal activity .

Appellant's Supplemental Brief at 31-32. This is not the holding of Abuan, where the defendant was a *passenger* in a vehicle whose *driver* was arrested for driving with a suspended license:

In the traffic stop context, the arrest of one or more vehicle occupants does not, without more, justify a warrantless search of other, nonarrested passengers. [citation omitted] Absent a reasonable, articulable, and individualized suspicion that a passenger "is armed and dangerous or independently connected to illegal activity, the search of a passenger incident to the arrest of the driver is invalid under article I, section 7."

Abuan, 161 Wn. App. at 146 (quoting State v. Jones, 146 Wn.2d 328, 336, 45 P.3d 1062 (2002)).

The appellant, of course, was the driver, who was validly arrested and thus subject to a search incident to arrest.

The evidence should not be suppressed based on the search incident to arrest, which was lawful.

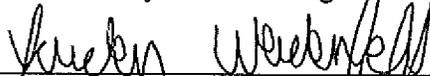
D. **CONCLUSION**

For the above reasons, the appellant's motions to strike certain Findings of Fact and Conclusions of Law made below; reverse for ineffective assistance of counsel, and suppress evidence based on pretext stop, lack of probable cause that a crime was committed, lack of valid basis to arrest, and unlawful search, should be denied.

DATED this 15th day of June, 2012.

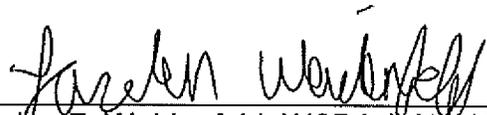
RESPECTFULLY submitted,

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Chief Deputy Prosecuting Attorney
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CERTIFICATE OF SERVICE

Electronic service of this Brief of Respondent was effected today via the Division II upload portal upon opposing counsel:
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June 15, 2012, City of Stevenson, Washington

SKAMANIA COUNTY PROSECUTOR

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