

NO. 43567-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

NATHAN DELGADO

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Brooke Taylor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to suppress the blood alcohol test results.

2. Appellant assigns error to finding of fact 1 (CP 27).

3. Appellant assigns error to conclusion of law 1 (CP 27).

4. Appellant assigns error to the trial court's order finding that the police officer had reasonable articulable suspicion to perform a stop.

5. The trial court erred by denying the motion to suppress all evidence as a result of the illegal stop.

Issues Presented on Appeal

1. Did the trial court err by refusing to suppress the blood alcohol test results?

2. Did the trial court err by finding that the police officer had reasonable articulable suspicion to perform a stop?

3. Did the trial court err by denying the motion to suppress all evidence as a result of the illegal stop?

B. STATEMENT OF THE CASE

Mr. Delgado was charged with felony driving under the influence. CP 220. Following a several motions to suppress, the trial court granted the motion to suppress the refusal to take the BAC, and denied the motion to

suppress the blood test and denied the motion to dismiss the case for a lack of reasonable articulable suspicion to justify the stop. CP 27, 61, 153, 157. Following a stipulated trial, Mr. Delgado was found guilty as charged. CP 7, 26, 13. This timely appeal follows. CP 11.

a. Motion to Suppress Blood Test Results For Violation of Right to Counsel.

Mr. Delgado filed a 3.6 motion to suppress all evidence obtained after the illegal stop which the court denied. The motion trial court granted a motion to suppress his refusal based on a denial of counsel. CP 61, 153, 157. The trial court agreed concluding that after Mr. Delgado and his attorney requested privacy which the officer denied, Mr. Delgado was denied his right to counsel. CP 153, 157. Mr. Delgado moved the trial court to suppress all other evidence taken after his refusal: the court denied the request concluding that:

The result of the blood test taken pursuant to a duly granted search warrant subsequent to the denial of the right to counsel was not tainted, for the simple reason that Mr. Delgado's attorney could have done nothing but instruct Mr. Delgado to submit to the blood test. The attorney's advice or lack thereof was completely irrelevant to the search warrant authorizing the blood draw.

CP 153, 157 (Conclusion of Law. 6).

b. Stop

The trial court's findings of fact regarding the reasonableness of the stop are as follows:

On November 16, 2012, at approximately six p.m. Border Patrol Supervisor Agent Jose Romero observed the Defendant Nathan J. Delgado driving erratically. After following Defendant FOR SEVERL ABLOCKS Romero lost contact with him when he made an abrupt illegal turn. Shortly thereafter, Agent Romero saw Defendant at a fuel station in Port Angeles Washington. Agent Romero made contact with Defendant and ultimately learned that he had out-of-state warrants. Romero then contacted Port Angeles Police and officer Dallas Maynard came and took Delgado into custody on the warrants.

CP 27.

The trial court did not make a specific finding that Mr. Romero had reasonable articulable suspicion to stop Mr. Delgado but orally ruled as follow:

1 waterfront and those concerns that the officer had not been
2 renewed. So that's the second issue, that there is no basis
3 for him to contact my client at the Texaco station given his
4 testimony that he was concerned with immigration matters and
5 not with driving.

6 THE COURT: All right. Any response, Ms.
7 Kelly?

8 MS. KELLY: Actually, I think I've covered
9 those particular items so I won't respond.

10 MR. ANDERSON: I think actually you did and I
11 felt I hadn't said it.

12 THE COURT: Well, this seems pretty
13 straightforward to the Court. It is a little bit of a
14 unusual situation when normally in cases like this we would
15 be dealing with the Port Angeles Police Department, Clallam
16 County Sheriff's Department, Sequim Police Department rather
17 than a Federal law enforcement agency whose duties are
18 different and responsibilities are different and focus is
19 different.

20 I understand that the Border Patrol does not do
21 traffic. Just as well, we have plenty of people to do
22 traffic. Their mission is different, but their focus is to
23 be alert for any kind of suspicious activity in border areas.
24 And we certainly know that right across the street from where
25 Agent Romero was parked pulling onto Railroad Avenue is where

1 Mr. Rassom set foot on American soil for the first time. So
2 the Court can certainly take judicial notice of the fact that
3 this is an area where there has been serious terrorist
4 activity. It's also an area where there has been illicit
5 drug importation coming across the border through the ferry
6 system. So it's a logical place for him to be. The
7 activities of Mr. Delgado are curious. They would catch his
8 attention. Stopping in the middle of the streets, even if
9 there is no traffic, and looking around, then moving ahead
10 and stopping abruptly and looking around, that's the sort of
11 thing that a Border Patrol agent is trained to look for.
12 This is suspicious activity.

13 Now there's no basis to make a stop or detain
14 Mr. Delgado at this point. But what happens after that seems
15 to me could very logically be interpreted as a person who is
16 being followed in a relatively casual way realizing that he's
17 been followed and trying to evade. Particularly the bizarre
18 driving at First and Lincoln Streets. Pulling into the
19 right-hand lane like you're going to go south on Lincoln and
20 then crossing two lanes of traffic in a turn lane to make a
21 left turn is either an evasive maneuver or extremely
22 dangerous driving at the busiest intersection in all of Fort
23 Angeles.

24 So at that point it seems to me that there is a
25 reasonable suspicion to justify continuing to follow this

1 individual to find out exactly what he's up to, because now
2 it appears like he's trying to avoid detention.

3 Then the officer loses sight of the suspicious
4 vehicle. Decides that if he does leave the Port Angeles
5 downtown area probably his following is done. Nothing is
6 going to happen downtown at any rate. He goes to the Texaco
7 Station to get gas and Mr. Delgado arrives shortly
8 thereafter. And when is a observed by the officer who had
9 been watching him for several minutes just before that, he
10 again gives indications that something is not right. He's
11 not acting normally. He is slumped over in the seat of his
12 car. I think any good law enforcement officer at this point
13 regardless of what his mission is would go over and do what
14 Officer Romero did and say, are you okay, sir? Is something
15 wrong? He's observed this erratic driving, possibly evasive
16 behavior, now he's looking at somebody who does not appear to
17 be well. As it turns out the evidence would suggest he was
18 extremely intoxicated, but Agent Romero certainly doesn't
19 know that.

20 At this point when he gets identification,
21 which I think he's entitled to do, Mr. Delgado is not seized
22 or detained at this point. He gets identification and finds
23 out there are outstanding warrants then the whole situation
24 changes. The only issue before the Court is were the
25 officer's actions up to that point reasonable based upon a

1 reasonable articulated suspicion. The Court finds that they
2 were. That the conversation with Mr. Delgado was
3 appropriate, it was legal, and it ultimately led to an arrest
4 which had already been ruled on in terms of its legality.

5 So the Court will deny the motion to suppress
6 the evidence and will find that the detention was based on
7 reasonable suspicion and was appropriate. I will sign
8 appropriate findings to that effect. Where are we on our
9 trial date, counsel?

10 MR. ANDERSON: Monday, I believe, your Honor.

11 THE COURT: Are we ready to go?

12 MR. ANDERSON: I'm going to talk to Mr. Delgado
13 and I'll know by midday tomorrow whether we are going to
14 stipulate. There's two possibilities. One is we're ready, I
15 believe, for trial, but I think probably we may very
16 seriously consider to stipulate and file our notice of
17 appeal. He's being held on a detainer from Colorado, so no
18 matter what happens here he probably will be extradited to
19 Colorado. And then he also has probation matters in three
20 other counties, which Ms. Kelly and I put a lot of effort
21 into figuring out what went on. There's an issue Ms. Kelly
22 and I need to talk about whether one of the priors is a prior
23 or not, and if Ms. Kelly convinces me of that my
24 recommendation would probably be to consider going ahead and
25 stipulating on Monday if my client wants a trial. And if we

In summary, in his oral ruling, Judge Taylor acknowledged that Mr. Romero did not enforce traffic or DUI matters and that Mr. Romero was “curious” about Mr. Delgado. RP 66 (May 30, 2012). The judge agreed that based on Mr. Romero’s driving, there was no reasonable articulable suspicion of criminal activity but “reasonable suspicion to justify continuing to follow this individual to find out exactly what he’s up to, because now it appears like he’s trying to avoid detention.” RP 67-68 (May 30, 2012).

Judge Taylor ruled that Mr. Romero had reasonable articulable suspicion and that Mr. Delgado was not detained or seized when Mr. Romero took Mr. Delgado’s identification. Judge Taylor did not acknowledge in his oral ruling that Mr. Romero took Mr. Delgado’s keys with his identification, thus making it impossible for Mr. Romero to leave. RP 68-69.

b. Denial of Motion to Dismiss for Lack of Reasonable Articulable Suspicion to Stop Mr. Delgado.

Mr. Delgado was driving slowly in downtown Port Angeles in the evening near 6:00PM. RP 5-6 (May 30, 2012). Jose Romero, a Border Patrol officer observed Mr. Delgado and became suspicious because Mr. Delgado stopped several times in the middle of the road near the ferry landing area,

and Mr. Delgado had a pair of binoculars on his dash board. RP 5-8, 11-13 (May 30, 2012). Mr. Romero testified that he was “just suspicious” and “curious” so he continued to follow Mr. Delgado. RP 8-9, 28 (May 30, 2012). Mr. Romero does not normally perform traffic stops. RP 23 (May 30, 2012). Mr. Romero is a customs and border patrol agent who normally looks for terrorists and smugglers trying to enter the United States from Canada on the ferry or from a sea vessel. RP 5, 7, 27 (May 30, 2012).

Mr. Romero had no information to look for suspicious persons in the area that might be trying to smuggle contraband into the United States from Canada. RP 27. Mr. Romero never saw Mr. Delgado use the binoculars and had no information that there might be a terrorist or smuggler on the incoming ferry that evening. RP 27 (May 30, 2012). Mr. Romero also did not know of anyone being arrested or contacted for drug smuggling in the area where Mr. Delgado was driving that evening. Id.

While Mr. Romero was following Mr. Delgado he called in Mr. Delgado’s license plates and did not receive any information indicating that Mr. Delgado might be involved in any terrorist or smuggling activities. RP 34 (May 30, 2012).

Mr. Romero lost sight of Mr. Delgado and pulled over to purchase gas at a local station. Mr. Delgado was slumped over while parked at a gas

pump at the same station. RP 13(May 30, 2012). Mr. Romero approached Mr. Delgado to ask if he was ok. Id. According to Mr. Romero, Mr. Delgado was difficult to understand. RP 14 (May 30, 2012). Mr. Romero asked Mr. Delgado where he was going and demanded Mr. Delgado's driver's license. Mr. Delgado did not answer the question but produced an insurance card and a state identification card. RP 15. Mr. Delgado did not smell of alcohol, but Mr. Romero nonetheless **took Mr. Delgado's car keys** because he believed that Mr. Delgado either had a medical issue or was under the influence of intoxicants. RP 16 (May 30, 2012). Mr. Romero is not a medical professional and could not determine that Mr. Delgado was simply very tired and distraught. RP 35, 47.

Mr. Delgado clarified, that he was never slumped over in his car, but rather had his head down because he was extremely distraught over losing his telephone, his only means of communicating with his family. RP 41-44, 55 (May 30, 2012).

C. ARGUMENT

1. ALL EVIDENCE MUST BE SUPPRESSED FOLLOWING A PRETEXTUAL POLICE STOP WHERE THE OFFICER LACKED REASONABLE ARTICULABLE SUSPICION TO STOP AND SEIZE MR. DELGADO.

Based on the facts presented, Mr. Romero did not have reasonable articulable suspicion to stop and seize Mr. Delgado.

The Fourth Amendment to the United States Constitution protects against unlawful search and seizure. Article I, section 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. Our state courts have held that warrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn. 2d 57, 61, 239 P.3d 573 (2010). *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). These exceptions are “‘jealously and carefully drawn.’” *Id.* (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991)). One exception to the warrant requirement is the *Terry*¹ stop, a brief investigatory seizure.

a. Terry Stop

A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct. *Doughty*, 170 Wn. 2d 61-62, citing, *Terry*, 392 U.S. at 21; *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). “[I]n justifying the particular intrusion the police officer must be able to point to

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Doughty*, 170 Wn. 2d at 62, quoting, *Terry*, 392 U.S. at 21, 88 S.Ct. 1868. The *Terry* stop, permits police officers to stop and briefly detain drivers on the basis of a reasonable and articulable suspicion of drunk driving. See *State v. Ladson*, 138 Wn. 2d 343, 352, 979 P. 2d 833 (1999); *State v. Duncan*, 146 Wn.2d 166, 172–74, 43 P.3d 513 (2002) The reasonable, articulable suspicion, must be based on specific, objective facts, that the person stopped has committed or is about to commit a crime or a civil traffic infraction.

This Court reviews the denial of a suppression motion to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. *State v. Gibson*, 152 Wn. App. 945, 951, 210 P.3d 964 (2009); *State v. Carney*, 142 Wn. App. 197, 201, 174 P.3d 142_ (2007), citing, *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.’ ” *Gibson*, 152 Wn. App. at 951, quoting, *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

Whether a seizure occurred is a mixed question of law and fact.

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

Although the trial court's factual findings are entitled to great deference, whether those facts constitute a seizure is a question of law that this Court reviews de novo. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

A seizure under article I, section 7 of the Washington State Constitution occurs when, based on an objective determination, an individual's freedom of movement is restrained and when, considering all the circumstances, a reasonable person in the individual's position would not believe that he is free to leave or decline a request due to an officer's use or display of authority. *O'Neill*, 148 Wn.2d at 574; *State v. Kinzy*, 141 Wn.2d 373, 388, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001).

An officer seizes a person by applying physical force or making a show of authority to which the person submits, and a reasonable person would not feel free to leave, refuse to answer, or otherwise go about his business. "[T]he police are permitted to engage persons in conversation and ask for identification even in the absence of an articulable suspicion of wrongdoing." *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). But when the police retain the suspect's identification, the suspect is no longer free to leave and a seizure has occurred. *State v. Aranguren*, 42 Wn.App. 452,

457, 711 P.2d 1096 (1985); *Crane*, 105 Wn.App. at 310.

In *Aranguren*, the defendants were not seized when the officer initially asked for identification. However once the officer retained the identification, the defendants were seized because they were no longer free to leave. *Aranguren*, 42 Wn.App. at 457.

In *Carney*, the police officer detained a car, driver and passenger when he shined his overheard lights and approached the parked car, demanding that the women provide identification and raise their hands. *Carney*, 142 Wn. App. at 202, citing, *State v. Rankin*, 151 Wn. 2d 689, 92 P. 3d 202 (2004). The police officer detained the women because he believed that they might have had information about a crime committed by a motorcyclist. The Court held that this detention was not reasonable and violated the defendants' state and federal constitutional rights to be free from warrantless seizures. *Carney*, 142 Wn. App.at 202, 204

In *Rankin*, the Supreme Court held that article I, section 7 of the Washington State Constitution affords car passengers freedom from disturbance in "private affairs". *Rankin*, 151 Wn. 2d at 699. In *O'Neill*, 148 Wn.2d at 579 the Supreme Court held that that where a vehicle is parked in a public space, persons seated in vehicles parked in public places are entitled to the same privacy protections as a passenger or pedestrian. *Id.*

In Mr. Delgado's case, as in these cases, under the totality of the circumstances, Mr. Delgado was seized when Mr. Romero took his identification and car keys because this prevented him from leaving the gas station. *Aranguren*, 42 Wn.App. at, 457; *Crane*, 105 Wn.App. at 310.

The state may argue that Mr. Romero was justified in detaining Mr. Delgado under the community caretaking exception to the warrant requirement, but this would be incorrect because that "the community caretaking function exception is totally divorced from a criminal investigation." *Kinzy*, 141 Wn.2d at 386, quoting, *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). Here Mr. Romero was pursuing a hunch about potential criminal activity.

b. Analogous to Pretext Stop Cases

This case is also analogous to a pretextual stop. Pretextual traffic stops are warrantless seizures that violate article I, section 7 of the Washington State Constitution. *Ladson*, 138 Wn. 2d at, 358. A pretextual traffic stop occurs when an officer stops a citizen to investigate suspicions unrelated to driving, rather than for a traffic infraction. Pretext means a "false reason used to disguise a real motive." *Ladson*, 138 Wn. 2d at 351, 359 n. 11. When an officer stops for the purpose of enforcing the traffic code, the stop is not pretextual even if the officer also suspects other

criminal activity. *State v. Hoang*, 101 Wn.App. 732, 742, 6 P.3d 602 (2000), *review denied*, 142 Wn.2d 1027, 21 P.3d 1149 (2001). In determining whether a traffic stop is pretextual, the reviewing Court considers the totality of the circumstances of the stop, including the officer's subjective intent and the objective reasonableness of the officer's behavior. *Gibson*, 152 Wn.App at 952, *citing*, *Ladson*, 138 Wn. 2d at 358– 593.

In *Ladson*, the officers admitted that they relied on a vehicle's expired license tabs as pretext to stop a vehicle and investigate suspected drug activity. The officers were part of a “gang patrol” that stopped citizens for traffic code violations, to investigate other criminal activity. *Ladson*, 138 Wn. 2d at 346. In *State v. DeSantiago*, 97 Wn.App. 446, 983 P.2d 1173 (1999), the officer engaged in monitoring an apartment building for suspected drug activity, saw the defendant quickly enter and exit the building and drive away. The officer, looking for a reason to stop defendant's vehicle, followed it for several blocks, eventually stopping the vehicle for an illegal left turn. The Court of Appeals reversed the defendant's conviction, holding that the stop was pretextual because the officer was looking for an excuse to investigate suspected drug-related activity. *DeSantiago*, 97 Wn.App. at 452–53.

Similarly, in *State v. Myers*, 117 Wn.App. 93, 69 P.3d 367 (2003),

review denied, 150 Wn.2d 1027, 82 P.3d 242 (2004), an officer on business not patrol recognized the defendant driving his car and remembered that the defendant had a suspended license one year earlier. The officer ran a license check while following the defendant, and stopped the defendant before the results of the check returned. *Myers*, 117 Wn.App. at 95. The Court held that the stop was pretextual because the officer's true purpose in stopping the defendant was to investigate him for driving with a suspended license. *Myers*, 117 Wn.App. at 97.

Just as in each of these cases in which the officers suspected criminal activity and followed the vehicles looking for an opportunity to stop them for a traffic violation, Romero here too followed Mr. Delgado waiting for him to do something criminal to justify a detention. *Ladson*, 138 Wn. 2d at 346; *DeSantiago*, 97 Wn.App. at 452–53; *Myers*, 117 Wn.App. at 97. While Romero testified that he did not enforce DUI or traffic infractions, he continued to follow Mr. Romero because he had a hunch about criminal activity based on the binoculars in the car and the start and stop driving. Romero's reasons for detaining Mr. Romero were not preceded by a pretextual stop, however like these cases, Romero illegally detained Mr. Romero based on his desire to investigate potential criminal activity. *Ladson*, 138 Wn. 2d at 346; *DeSantiago*, 97 Wn.App. at 452–53; *Myers*, 117

Wn.App. at 97. While these cases stand for the proposition that an officer may not use a traffic infraction as a pretext to conduct criminal investigation. The corollary must prohibit any detention to investigate suspected criminal activity without reasonable articulable suspicion. *Terry, supra*.

Here Mr. Romero never had specific, objective facts to believe that Mr. Delgado, while driving, had committed or was about to commit a crime. RP 27-29. Mr. Romero testified that he saw Mr. Delgado drive erratically and saw binoculars on the dashboard but that Mr. Delgado did not commit a crime nor did Mr. Romero believe that Mr. Delgado was going to commit a crime. Mr. Romero was just curious and suspicious. RP 9, 27-29 (May 30, 2012).

After Mr. Delgado pulled into the gas station and turned off his car engine, Mr. Romero approached him and asked where he was from and asked for his name. RP 13-15. According to Mr. Romero, Mr. Delgado did not want to answer. RP 14. Mr. Romero stated that Mr. Delgado was slumped over in the car. RP 13. Mr. Delgado stated that he had his head down because he was distraught. RP 35, 47 (May 30, 2012). Mr. Romero described Mr. Delgado as “evasive” and “bewildered” RP 14, 15. These facts do not rise to the level of reasonable articulable suspicion of criminal activity.

Just as in *Carney, O'Neill Aranguren* and *Terry*, as well as the pretext

cases, Romero had no more than a hunch; he did not observe a crime being committed, he did not have reasonable articulable suspicion that Mr. Delgado was about to commit a crime, rather as in these cases Romero was fishing for information. The detention occurred as soon as Romero took Mr. Delgado's identification and keys which violated Mr. Delgado's state and federal constitutional rights to be free from warrantless seizures and intrusion into his privacy. *Carney*, 142 Wn. App.at 202, 204; *Ladson*, 138 Wn.2d at 359-360.

For this reason ,the evidence must be suppressed.

c. Suppression is the Remedy

Evidence which is the product of an unlawful search or seizure is not admissible. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). However, "evidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' cause of the discovery of the evidence. Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.'" *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984) (quoting *United States v. Crews*, 445 U.S. 463, 471, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980)). In determining whether there is a nexus between the evidence in question and the police conduct, the court essentially makes a common sense evaluation of the facts and circumstances of the particular case. *United States v.*

Kapperman, 764 F.2d 786 (11th Cir.1985).

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *Ladson*, 138 Wn.2d at 359-360; *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). *Carney*, 142 Wn. App. at 204-205. Under article I, section 7, suppression is constitutionally required. *State v. Boland*, 115 Wn.2d 571, 582-83, 800 P.2d 1112 (1990). “We affirm this rule today, noting our constitutionally mandated exclusionary rule “saves article 1, section 7 from becoming a meaningless promise.” *Ladson*, 138 Wn.2d at 359, quoting, Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L.Rev. 459, 508 (1986). “Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence” *Ladson*, 138 Wn.2d at 359, quoting, *State v. Crawley*, 61 Wn.App. 29, 34-35, 808 P.2d 773 (1991).

Under both *Mapp v. Ohio* and *Ladson*, but for the illegal seizure, the state would not have collected any evidence against Mr. Romero, thus all evidence seized following the illegal seizure should have been suppressed as the fruit of the poisonous tree.

d. Inadequate or No Findings

Here the trial court entered written findings following the stipulated trial and following the first suppression hearing, but only entered a vague finding with regard to the second motion to suppress based on the illegal stop. CP 27. The trial court's oral findings are more detailed, but still confusing.

When reviewing the trial court's denial of a suppression motion, the reviewing Court determines whether substantial evidence supports the trial court's factual findings and whether those findings support its conclusions of law. *State v. Bliss*, 153 Wn.App. 197, 203, 222 P.3d 107 (2009). To facilitate our review, the trial court is required to enter written findings of fact and conclusions of law at the conclusion of a suppression hearing. CrR 3. 6(b); *see also State v. Head*, 136 Wn.2d 619, 622–23, 964 P.2d 1187 (1998) (acknowledging that entry of written findings and conclusions is necessary for a meaningful review); *State v. Cruz*, 88 Wn.App. 905, 909, 946 P.2d 1229 (1997) (stressing consistent and firm enforcement of CrR 3. 6).

The Court of Appeals may overlook the absence of written findings, but will only do so where the trial court clearly and comprehensively states in its oral opinion the basis of its decision. *Cruz*, 88 Wn.App. at 907–08; *see also State v. Radka*, 120 Wn.App. 43, 47–48, 83 P.3d 1038 (2004). The defendant bears the burden of establishing actual prejudice when a trial court

fails to enter *any* findings and conclusions. *Head*, 136 Wn.2d at 624–25.

“An appellate court should not have to comb an oral ruling to determine whether appropriate ‘findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” *Id.*

Lack of written findings of fact on a material issue in which the State bears the burden simply cannot be harmless unless the oral opinion is so clear and comprehensive that written findings would be a mere formality. *See State v. Leach*, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989) (“[T]he burden rests firmly upon the State to rebut the presumption [that warrantless searches and seizures incident thereto are per se unreasonable] by establishing the existence of one of the ‘carefully delineated’ exceptions to the warrant requirement.”) (*Arkansas v. Sanders, supra*)

In *State v. Clark*, 46 Wn.App. 856, 859, 732 P.2d 1029 (1987), the court overlooked the failure to enter findings and conclusions because the trial court's “comprehensive oral opinion and the record of the hearing render[ed] the error harmless.” *Id.* In *Clark*, no testimony was taken at the suppression hearing and there were no disputed issues of fact. The only evidence as to whether probable cause to issue the search warrant existed was an affidavit of the officer. Under those circumstances, the court found no

prejudice to the defendant from the lack of findings and conclusions and proceeded to review the trial court's oral decision. In *State v. Smith*, 68 Wn. App. 201, 208-209, 842 P.2d 494 (1992), the Court of Appeals reversed where the trial court did not enter written findings and the court's oral ruling was confusing. *Id.*

Here the trial court's written findings and conclusions are far from clear; they in fact provide no guidance on the issue of the trial court's reasoning for denying the motion to suppress. The oral findings regarding the motion to suppress are also incomplete and not supported by the evidence presented in this case and thus cannot support the conclusions of law. Because the written findings are not clear and the oral findings incomplete, this Court should find that Mr. Delgado has suffered prejudice and dismiss the charges.

D. CONCLUSION

Mr. Delgado respectfully requests this Court reverse the trial court's order denying the motion to suppress all of the evidence obtained subsequent to the illegal seizure.

DATED this 9th day of November 2012.

Respectfully submitted,

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I, Lise Ellner, a person over the age of 18 years of age, served the Clallam County Prosecutor's Office – lschrawyer@co.clallam.wa.us true copy of the document to which this certificate is affixed on November 9, 2012. Service was made by electronically to the prosecutor and to Nathan Delgado DOC 885431 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520 by depositing in the mails of the United States of America, properly stamped and addressed.

Lise Ellner

Signature

ELLNER LAW OFFICE

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