

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION II
NO. 43567-5-II
APPEAL FROM CLALLAM COUNTY
NO. 11-1-00393-0

STATE OF WASHINGTON,

Respondent,

vs.

NATHAN DELGADO,

Appellant.

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE ISSUES

ISSUE ONE

The trial court determined that a United States Border Patrol agent had a reason to stop Mr. Delgado because of his suspicious driving and then determined that the agent's contact with Mr. Delgado would have been expected of any police officer and the agent's request for identification was appropriate. Are limited findings, coupled with an oral opinion, sufficient to permit review?

ISSUE TWO

When a border patrol agent observes a vehicle stopping and starting directly on the northern land border of the United States and has experienced the same behavior in the past as a sign a person is looking for an illegal immigrant or contraband, and who then attempts to follow the vehicle away from the border area but then observes the vehicle make an evasive turn back to the border area, has the border agent supplied reasons to suspect illegal activity sufficient to make an investigatory stop?

ISSUE THREE

Because this contact was made by a federal agent, acting pursuant to his duties as a federal officer, and because his actions are measured by standards developed in federal decisions, is it error to apply Washington State constitutional analysis to the facts?

STATEMENT OF THE CASE

Mr. Delgado filed a motion to suppress evidence arising from his contact with a border patrol agent, Agent Romano. The motion was heard and decided on May 30, 2012. (RP 5/30/2012).¹

Agent Romano, a border patrol agent with the United States Border Patrol, testified he first observed Mr. Delgado on Railroad Avenue in downtown Port Angeles (RP 4,6). Railroad Avenue is “as close to the border as you can get without actually being in the water” (RP 8). The area is also near the ferry dock (RP 8). In the past, undocumented persons and individuals with terrorist ties have entered the United States on the ferry (RP 8). The ferry has also been used to transport narcotics (RP 8). In addition, Railroad Avenue borders the water and is near a marina where undocumented immigrants have been detained (RP 8).

Agent Romero observed a small pickup truck driving

¹ All reference to a report of proceedings from May 30, 2012.

west in front of him on Railroad Avenue, with only a driver, and binoculars sitting on the dashboard (RP 6). Then, he noticed that the vehicle came to an abrupt stop right in the roadway (RP 7). The driver was looking out towards the water, either towards the ferry itself or towards the harbor area (RP 7). He became interested in the driver's behavior when the driver accelerated rather quickly and then stopped again a couple hundred yards later (RP 7). Agent Romero had observed this same behavior along the southern border when smugglers were scouting an area, looking to pickup an illegal immigrant or illegal contraband (RP 7).

At this point, however, Agent Romero was merely suspicious so he followed the pickup (RP 9). The driver continued to abruptly stop in the middle of the road (RP 9). Then, the driver turned south (left) on Oak Street and then east (left) on First Avenue (RP 9). Agent Romero followed the pickup as it turned north (left) onto Lincoln Avenue and then turned west (left) on Front Street (RP 10). Because the pickup

was headed back near the border area, Agent Romero decided to obtain the license plate information (RP 10). The tags on the license plate returned as invalid (RP 11). Agent Romero was concerned about the erratic driving behavior, the rapid accelerations and sudden decelerations (RP 11). He suspected the pickup driver saw him as he closed the gap to read the license plate because the driver made a quick left (south) on Laurel Street and then a quick left (east) on First Avenue (RP 12).

The pickup driver pulled into the right hand lane on First Avenue but suddenly made a left turn (north) onto Lincoln Street while the light was still red (RP 12). Agent Romero could not safely make the same turn so he proceeded east to Peabody Avenue and then turned left (north) to get back to Front Street (RP 12).

Agent Romero lost sight of the pickup (RP 12). He turned left (south) on Lincoln Street to get to the Texaco gas station because he needed gas and to observe the vehicle to see

if it came back in that direction (RP 13; RP 31-2).

Agent Romero parked his vehicle at a gas pump at the Texaco station (RP 13). He saw the pickup driving east on First Avenue towards Lincoln Street. Rather than turn north on Lincoln for a third time, the pickup pulled into the Texaco station and parked at a pump adjacent to Agent Romero's pump (RP 13). The driver of the pickup shut off the vehicle engine and just sat in his vehicle, kind of slumped over (RP 13). He never left the vehicle or entered the Texaco station (RP 35). Agent Romero walked up to the pickup and asked the driver if he was okay (RP 13). To the agent, the driver did not look very good, did not look very healthy (RP 35). He seemed extremely tired and sleepy (RP 35). The driver responded somewhat incoherently (RP 14). Agent Romero could not understand what he was saying (RP 14). He asked the driver for his name and where he was from; the driver did not provide a name or tell the agent where he was from. Agent Romero believed the driver was being evasive (RP 14). The driver either could not

or would not answer any questions from the agent (RP 15).

Agent Romero asked the driver for some type of identification. The driver handed him an insurance card (RP 15). The agent explained that the insurance card was inadequate because it did not provide identity information. The driver looked bewildered and did nothing for a while because he was slumped over to the side of the vehicle and just laid there, unable to move (RP 15). Eventually, the driver provided a state identification card (RP 16). The identification showed that the driver's name is Nathan Delgado (RP 20).

Agent Romero thought that the driver's incoherence stemmed from either a health condition or from either narcotic or drug use (RP 16). He was also concerned that the driver's evasive manner may be an attempt to conceal his identity (RP 16). Agent Romero became concerned that the driver was concealing criminal activity (RP 16). He asked the driver for his vehicle keys and placed them on top of the vehicle while he returned to his vehicle to run an identification check (RP 16-

17).

When the identification check showed active warrants, Agent Romero contacted local law enforcement to take over (RP 18). The agent had already conducted a brief immigration check with Mr. Delgado and was satisfied he is an American citizen, so there was nothing further to do except detain the driver as a public safety issue and to determine whether the vehicle contained narcotics (RP 19). He did not believe a search based upon consent would be valid because of the driver's condition, so he turned the driver over to the Port Angeles police department (RP 20).

On cross, Agent Romero further explained that he wanted to follow the pickup when it went back to the waterfront area to see if the driver was looking for contraband or aiding terrorists (RP 32). He explained the waterfront area contained businesses, the ferry terminal, a little park area and then the marina (RP 25). The marina is a place where small boats can bring in contraband, but that agents have encountered boats on

any type of landing, including rocks, dirt, beachheads; anywhere along the land (RP 33). Agent Romero was aware that drug interdiction had occurred in the past (RP 33) and opined that a person could arrive on the ferry carrying a backpack of methamphetamines or other narcotic with great ease (RP 33).

Mr. Delgado testified that he was driving around and stopping every so often because he was looking for his lost cell phone (RP 41). He was stopping his vehicle periodically to look for the cell phone (RP 44). He explained that his behavior at the Texaco station was because his cell phone was his lifeline (RP 43). "Anymore it just seems like that's your whole life in that phone" (RP 43). He denied consuming enough alcohol to have a blood alcohol reading of .21 (RP 52). He also denied being slumped over in his vehicle, that he had remained in his vehicle and that his conversation with the agent was brief. He testified he had purchased gas and was standing at the pumps when Agent Romero spoke to him (RP 55).

To the trial court, the matter seemed pretty straightforward (RP 66). The court noted the border patrol's mission is to be alert to any kind of suspicious activities in border areas (RP 66). The court explained that Railroad Avenue is where a terrorist, [Ahmed] Resson², first set foot on American soil (RP 67).

To the court, Mr. Delgado's behavior in stopping his vehicle abruptly and looking around was suspicious but not sufficient to stop or detain Mr. Delgado (RP 67). However, the court believed that "what happens after that" can be interpreted as a person realizing he is being followed and trying to evade contact (RP 67). The court focused particularly on what it

² Ahmed Ressam, a well-known international terrorist, imprisoned for attempting to blow up a portion of LAX airport, attempted to cross the border by taking the *M/V Coho* car ferry from Victoria, British Columbia, to Port Angeles, Washington. Although there had not been any intelligence reports suggesting threats, U.S. Customs inspector Diana Dean decided to have a secondary Customs search conducted of Ressam's car, saying later that Ressam was acting "hinky".... A search of his wheel well produced materials to make a significant quantity of explosives.
Wikipedia

termed as bizarre driving at First and Lincoln Streets when Mr. Delgado turned left on a red light from the right lane (RP 67). The court found the agent had sufficient reasonable suspicion to follow this individual to find out what he is up to because it appears he is avoiding detention.³ When the agent saw the driver again, the agent noticed that something was not right with the driver because he was slumped over the steering wheel (RP 68). “I think any good law enforcement officer at this point regardless of what his mission is would go over and do what Officer Romero did and say, are you okay, sir?” The agent was now observing someone who did not appear well (RP 68). At this point, when Mr. Delgado provided the agent with his identification, he was not seized or detained (RP 68). Seizure and detainment occurred after the agent learned of the outstanding warrants (RP 68). “The only issue before the Court is [‘]were the officer’s actions up to that point reasonable based upon a reasonable articulated suspicion[?’] The Court

³ The report of proceedings uses the word “detention.” The State suggests the word probably was “detection.”

finds that they were.” (RP 68-9). After a trial to the court, this appeal followed.

ARGUMENT

ISSUE ONE

The trial court determined that a United States Border Patrol agent had a reason to stop Mr. Delgado because of his suspicious driving and then determined that the agent’s contact with Mr. Delgado would have been expected of any police officer and the agent’s request for identification was appropriate. Are limited findings, coupled with an oral opinion, sufficient to permit review?

RESPONSE

The record on appeal is sufficient to permit an appellate court to (1) find substantial evidence and (2) conclude the trial court correctly refused to suppress the stop.

STANDARD OF REVIEW

CrR 3.6 (b) requires a trial court to enter written findings and conclusions after a suppression motion.⁴ This facilitates meaningful review. *State v. Cruz*, 88 Wn.App. 905, 909, 946 P.2d 1229 (1997). When reviewing a trial court’s denial of a suppression motion, the appellate court determines whether the

⁴ The findings and conclusions are attached as Appendix A.

trial court's findings are supported by substantial evidence. *State v. Bliss*, 153 Wn.App. 197, 203, 222 P.3d 107 (2009). The appellate court may review the trial court's oral opinion to supplement the findings. Conclusions are reviewed *de novo*. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

ANALYSIS

Mr. Delgado argues the findings and the lack of a conclusion create a basis to dismiss the charge against him. Mr. Delgado, however, has only cited cases in which no findings or conclusions were presented. Even then, the remedy was remand to the superior court for entry of findings and conclusions. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). This case contains one finding, and the trial court's conclusion is clear from the court's opinion. The lack of a conclusion in the suppression order is unnecessary because the reviewing court determines the conclusion *de novo*. *State v. Hill, supra*.

The challenged finding reads:

On November 16, 2011, at approximately six p.m., Border Patrol Supervisory Agent Jose Romero observed the Defendant, Nathan J. Delgado, driving erratically. After following Defendant for several blocks 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.

In this case, there is only one finding, with three subparts:

Subpart One: “On November 16, 2011, at approximately six p.m., Border Patrol Supervisory Agent Jose Romero observed the Defendant, Nathan J. Delgado, driving erratically. After following Defendant for several blocks Romero lost contact with him when he made an abrupt illegal turn.”

The trial court’s oral opinion addressed the pattern of erratic driving. The court referred to Mr. Delgado’s stopping and starting as he drove on Railroad Avenue, which is the entrance to the United States in Clallam County. The court

explained the role of a border agent, clarifying that the agent was not looking for traffic issues but for suspicious border activity. The court found the stopping and starting suspicious but insufficient to stop the vehicle.

Agent Delgado testified the stopping and starting was reminiscent of drug activity on the southern border. It generally signified that a person was attempting to locate either an illegal immigrant or contraband.

The court then referred to the bizarre driving at First and Lincoln streets. To the court, it implied the person knew he was being followed and was attempting to evade contact. The court termed the left turn from the right lane on a red light either an evasive maneuver or extremely dangerous.

Agent Delgado testified to the behavior referred to by the court in more detail. The agent was losing interest in Mr. Delgado as he turned up Oak Street, away from the harbor. Then, Mr. Delgado turned left on Lincoln and headed toward the harbor area again. The agent followed him on Front Street,

attempting to obtain his license plate number. He testified he became so close he believed Mr. Delgado spotted him. Mr. Delgado then made the evasive turn at the corner of Lincoln and First Avenue that eluded Agent Romero.

Subpart two: “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.”

The trial court spoke directly to the chance encounter at the Texaco station:

“[Agent Romero] goes to the Texaco Station to get gas and Mr. Delgado arrives shortly thereafter. And when is a [sic] observed by the officer who had been watching him for several minutes just before that, he again gives indications that something is not right. He’s not acting normally. He is slumped over in the seat of his car. I think any good law enforcement officer at that point regardless of his mission is would [sic] go over and do what Officer Romero did and say, are you okay, sir? Is something wrong? He’s observed this erratic driving, possibly evasive behavior, now he’s looking at somebody who does not appear to be well. ...

Agent Romero’s testimony clearly showed that the chance

encounter with Mr. Delgado did not begin with a law enforcement question. Instead, the first question was whether Mr. Delgado was ill. Mr. Delgado was incoherent and slumped forward and then to the side. He was either evasive or disoriented because he would not or could not tell Agent Romero his name or where he was from. He answered questions with questions and it became very difficult for Agent Romero to understand whether he was being evasive, was medically ill, or was high on alcohol or drugs. Agent Romero finally obtained Mr. Delgado's name and learned he had an out of state warrant and a Seattle warrant.

Subpart three: "Romero then contacted Port Angeles Police and Officer Dallas Maynard came and took Delgado into custody on the warrants."

This subpart was not addressed by the trial court but it is supported by substantial evidence. Agent Romero testified that, when he learned there were warrants for Mr. Delgado, he immediately contacted the Port Angeles Police Department.

Officer Maynard showed up very quickly. By then, Mr. Delgado had given coherent responses to Agent Romero's immigration questions, so the agent left.

The conclusions of law do not include the Court's ruling on the appropriateness of the contact. The trial court was very clear that the contact was appropriate:

"At this point when he gets identification, which I think he's entitled to do, Mr. Delgado is not seized or detained at this point. He gets identification and finds out there are outstanding warrants then the whole situation changes. The only issue before this court is [whether] the officer's actions up to that point reasonable based upon a reasonable articulated suspicion. The Court finds that they were. That the conversation with Mr. Delgado was appropriate, it was legal, and it ultimately led to an arrest. ..."

The findings clearly permit review, with the addition of the trial court's oral opinion. The trial court's conclusion should be adopted by the reviewing court upon this record.

ISSUE TWO

When a border patrol agent observes a vehicle stopping and starting directly on the northern land border of the United States and has experienced the same behavior in the past as a sign a person is looking for an illegal immigrant or contraband, and

who then attempts to follow the vehicle away from the border area but then observes the vehicle make an evasive turn back to the border area, has the border agent supplied reasons to suspect illegal activity sufficient to make an investigatory stop?

FIRST RESPONSE

Agent Romero had a particularized suspicion of illegal activity under border control analysis to permit him to approach Mr. Delgado.

STANDARD OF REVIEW

A “roving patrol” may not stop a motor vehicle unless the officer can articulate a reasonable suspicion that a crime may be occurring. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The Court reviews the totality of the circumstances, the whole picture, to ascertain what the border patrol agent observed. *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

ANALYSIS

Clearly, Agent Romero observed sufficient activity in a very sensitive area that, based upon his role, his training and experience, and the later evasive tactics of Mr. Delgado, provided enough to suspect criminal activity. The trial court

did not err when it concluded there was sufficient reasonable suspicion to permit contact with Mr. Delgado. This Court should also conclude there was sufficient reasonable suspicion to permit contact with Mr. Delgado.

The touchstone decision explaining border patrol agents' authority to contact individuals is *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The Supreme Court addressed border agents' authority to utilize "roving patrols" to investigate whether a vehicle contains an illegal immigrant. Applying the U.S. Const. amend. IV, the Supreme Court held that a border patrol agent cannot stop a vehicle and question its occupants about their citizenship and immigration status "when the only ground for suspicion is that the occupants appear to be of Mexican ancestry." *Brignoni-Ponce*, 422 U.S. 876, 95 S.Ct. 2578.

The Court delineated conditions for contact, stating that "the nature of illegal alien traffic and characteristics of smuggling operations tend to generate articulable grounds for

identifying violators.” *Brignoni-Ponce*, 422 U.S. 883, 95 S.Ct. 2581. The Court then established non-exclusive factors that permit a border patrol officer to seize a vehicle and request proof of citizenship: “Officers may consider the characteristics of the area in which they encounter a vehicle It’s proximity to the border, usual patterns of traffic on the particular road, and previous experience with alien traffic.” *Brignoni-Ponce*, 422 U.S. 885, 95 S.Ct. 2582. In the Ninth Circuit, the factors are:

In the context of stops made near a border, the Supreme Court has identified a non-exclusive set of factors that may be considered in determining whether reasonable suspicion exists: (1) characteristics of the area in which a vehicle is encountered; (2) proximity to the border; (3) usual traffic patterns on the particular road; (3) previous experience with alien traffic; (4) recent illegal border crossings in the area; (5) erratic or evasive driving behavior; (6) aspects of the vehicle; and (7) the behavior or appearance of the driver.

United States v. Diaz-Juarez, 299 F.3d 1138, 1141 (2002).

The Court is to look at each of these non-exclusive standards to determine whether the officer has shown a reasonable suspicion prior to contact. “Reasonable suspicion

does not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” *United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Rather, reasonable suspicion represents a “minimum level of objective justification.” *Sokolow*, 490 U.S. 1, at 7, 109 S.Ct. 1581, (9th Circuit erred by complicating a “relatively simple concept” by attempting to divide factors into “ongoing criminal behavior” or “personal characteristics” that could be shared by drug couriers or innocent people). The Court reviews the totality of the circumstances, the whole picture, to ascertain what the border patrol agent observed. *Cortez*, 449 U.S. 411, at 417-18, 101 S.Ct. 690. The Court may not engage in a “sort of divide-and-conquer analysis” by evaluating and rejecting each piece of evidence individually, even when the factor cited by the agent may have an innocent explanation, such as occurred in Mr. Delgado’s case. *Arvizu*, 534 U.S. 267,

122 S.Ct. 744; *Diaz-Juarez*, 299 F.3d at 1141-2.

The trial court properly analyzed Agent Romero's role as a border patrol agent. Although the list of factors is non-exclusive, five of the seven factors are present. The area in which the vehicle was encountered is exactly at the entrance portal to the United States in Port Angeles, Washington. Railroad Avenue fronts the ferry portal and the land's edge. Clearly the area's proximity to the border was proven. The court took judicial notice that a famous terrorist was caught in the area in which Mr. Delgado was driving. Agent Romero was experienced; he had seen the same kind of stop and go driving on the southern border by drug or illegal immigrant accomplices. Agent Romero testified the border patrol routinely interdicted small boats all through the immediate area. The border patrol interdicts both illegal immigrants or contraband in the area, heading even farther south than the ferry terminal. The trial court also accepted Agent Romero's explanation that the area where he first observed Mr. Delgado is

an area rife with illegal drug importation. Mr. Delgado admitted his driving was erratic and the record shows he turned left from a right hand lane when the agent was directly behind him. He evaded Agent Romero, causing the agent to stop looking for him for the moment.

In *United States v. Arvizu, supra*, the United States Supreme Court reiterated that the test was whether the combination of factors supported a finding of reasonable suspicion under a totality of circumstances test. The facts developed at hearing show, in the totality, reasonable suspicion was proven.

SECOND RESPONSE

The contact with Mr. Delgado did not rise to a search. Agent Romero simply asked Mr. Delgado for proof of citizenship, which Mr. Delgado finally provided. Moreover, pursuant to United States Supreme Court decisions, Agent Romero did not seize Mr. Delgado, even after obtaining Mr. Delgado's license and keys, because Mr. Delgado was still free to go about his business, which was to fill his gas tank. Even if a seizure occurred, it was justified by what Agent Romero observed.

STANDARD OF REVIEW

A reasonable person is seized only when, by means of physical force, his or her freedom of movement is restrained to the point a reasonable person would not feel free to leave. *United States v. Mendenhall*, 466 U.S. 544, 554, 1100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Accord, State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998) (Const. art. I, § 7). Mere questioning only becomes a seizure if a reasonable person would not feel free to disregard the police and go about his business. *California v. Hodari*, 490 U.S. 621, 628, 111 S.Ct. 1547, 1552, 113 L.Ed.2d 690 (1991); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

ANALYSIS

Agent Romero did not stop Mr. Delgado so, in reality, it does not matter whether reasonable suspicion existed to contact Mr. Delgado. Agent Romero walked from his vehicle to Mr. Delgado's vehicle and spoke to him through the window. Mr. Delgado was parked at a pump to purchase fuel for his pickup. He asked Mr. Delgado if he was sick or okay. Nothing in the

record shows Agent Romero ever asked Mr. Delgado to move either himself or the pickup from where Mr. Delgado placed it. There is also nothing in the record showing that Mr. Delgado intended to leave the pump prior to putting fuel in his pickup. There is, therefore, nothing in the record showing Agent Romero stopped Mr. Delgado from going about his business, even while he possessed Mr. Delgado's identification card.⁵ A seizure would have occurred if the record showed that Mr. Delgado had intended to leave during the time Agent Romero held the identification card. Mr. Delgado has the burden to show he was interrupted as he was going about his business by Agent Romero's actions. Even if a seizure did occur, however, it was completely justified by Mr. Delgado's lack of responsiveness to Agent Romero's questions, his evasiveness, and that he appeared to be ill or intoxicated.

The United States Supreme Court has issued two lines of decisions explaining when a search or a seizure occurs. In the

⁵ Mr. Delgado's keys were never possessed by Agent Romero. They were placed on the roof of Mr. Delgado's vehicle.

only United States Supreme Court case interpreting *Brignoni-Ponce*, the Court reiterated that questioning a person about his or her citizenship does not implicate the U.S. Const. amend. IV. Asking a person whether they are a United States citizen is not a search or seizure when a person is already in custody for other reasons. *Muehler v. Mena*, 544 U.S. 93, 101, 125 S.Ct. 1465, 1471, 161 L.Ed.2d 299 (2005). In *Muehler v. Mena*, the individual was already being detained while officers searched for weapons. She was asked about her citizenship. The Ninth Circuit held that both the question about her citizenship and the timing – while she was in custody – created a 1983 action. The United States Supreme Court disagreed.

The Court reminded the Ninth Circuit that “mere police questioning does not constitute a seizure”, citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d (1991). Because the individual was already being detained for another reason, the question created no seizure issue.

The *Bostick* Court held a person is not seized even when

they are not otherwise free to leave, unless the coercion is caused by the police, citing to *INS v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758 (1984). The defendant in *Muehler v. Mena*, *supra*, was not free to leave because she was being held in another investigation. In *Bostick*, the defendant was not free to leave because he intended to stay on the bus and depart the area. *Delgado* applied the same analysis before *Bostick*. Factory workers were not seized when INS agents were stationed at the factory's exits because each individual was free to leave if he or she showed proof of citizenship. More to the point, as elaborated in *Bostick*, they could not leave anyway because they were at work at the factory. Each person was free to go about his business so long as he could show he was a United States citizen or a legal immigrant. *Delgado* reminded courts to apply the totality of the circumstances test to determine whether a person was actually detained by law enforcement's actions.

In a more recent decision, the United States Supreme

Court held that a search does not create a seizure unless the search itself prolongs the time reasonably required to complete the initial encounter. *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005). Mr. Caballes complained that a dog sniffing search was an illegal search and seizure. But he had been detained for other reasons and the exterior dog sniff did not prolong the encounter. The United States Supreme Court reiterated that a seizure occurs when a person is either free to go about his business or is being detained for another purpose. Therefore, when a person is already being detained, any further search does not become a seizure unless it prolongs the initial search. When a person is not being stopped from going about his business, there is no seizure.

Mr. Delgado was not seized. He was still free to fill his gas tank while Agent Romero checked his identification. There is no question that Mr. Delgado entered the gas station to put gas in his vehicle. Mr. Delgado testified he had paid for the gas and was then stopped by Agent Romero. Agent Romero

testified he held Mr. Delgado's identification card until he determined Mr. Delgado's status. He then completed his transaction with Mr. Delgado. Mr. Delgado bears the burden to prove that a seizure occurred. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). When the uncontroverted facts show that Mr. Delgado was at the gas station to engage in a gas purchase and when no facts show he was not free to go about the business of obtaining gas while the agent checked his identification, the trial court correctly held no seizure occurred.

Even if the reviewing court does conclude a seizure occurred when Agent Romero held onto Mr. Delgado's identification card for a brief period of time, the seizure was justified under the U.S. Const. amend. IV.

Because Agent Romero did not stop Mr. Delgado, reasonable suspicion was unnecessary before he spoke with Mr. Delgado. *Bostick* alone would have permitted the contact.

Nothing in the record shows that Agent Romero did anything more than ask for Mr. Delgado's identification. Mr.

Delgado could or would not identify himself (RP 14). He appeared evasive to the agent. When asked his name, he responded "why?" He responded to questions with another question and simply would not answer questions that Agent Romero was entitled to ask, both in his role as a federal border patrol agent or, for that matter, simply any law enforcement officer. Mr. Delgado did not produce a driver's license; instead he produced an insurance card (RP 15). It took Mr. Delgado at least a few minutes to finally identify himself with a state identification card (RP 16).

During this encounter, Mr. Delgado was incoherent (RP 14). He could not or would not answer questions. He kind of slumped over to the side of the vehicle and laid there. He could not move (RP 15). Agent Romero became concerned that Mr. Delgado suffered from a health problem or from either narcotic or alcohol use (RP 16). Either Mr. Romero was being evasive or he was not fit to drive.

Agent Romero took the identification card and placed

Mr. Delgado's keys on the roof of the vehicle. Both steps were justified by Mr. Delgado's evasiveness and his condition. Agent Romero was concerned enough about Mr. Delgado's evasiveness that the first thing he sought in his radio check was about officer safety issues (RP 17). He found that Mr. Delgado had both active warrants and a prior flight from law enforcement (RP 17). Local law enforcement were contacted and, with only a brief further discussion that proved Mr. Delgado was a United States citizen, the contact ceased (RP 19). Agent Romero was fully justified in his brief detention of Mr. Delgado.

ISSUE THREE

Because this contact was made by a federal agent, acting pursuant to his duties as a federal officer, and because his actions are measured by standards developed in federal decisions, is it error to apply Washington State constitutional analysis to the facts?

RESPONSE

The Court should apply federal law. Any attempt to measure a federal agent's activities by referring to state

decisions would create an incorrect interpretation of the situation. Even then, Agent Romero's contact comported with Const. art. I, § 7.

ANALYSIS

Mr. Delgado has also analyzed his contact with Agent Romero applying Washington state decisions. Washington decisions under Const. art. I, § 7, do not apply. This case involves a federal agent, following federal border patrol rules and federal experience, who initiated the contact for federal reasons. Applying Washington law to a contact measured by the U.S. Const. amend. IV is incorrect.

Even if Washington decisions such as *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998) and *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) were applied, the outcome would be the same. Both decisions are based on federal authority. *United States v. Mendenhall*, 466 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980) and *California v. Hodari*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 6901 (1991), plus *United States v. Bostick*, *supra*, and *Terry v. Ohio*, *supra*,

formed the basis for *State v. Young, supra*. All federal decisions cited in this brief were cited as analysis in *State v. O'Neill, supra*. The Supreme Court rejected Mr. O'Neill's assertion that Const. art. I, §7, requires an officer to provide reasonable suspicion to ask for identification. The Supreme Court held an officer can ask for identification "because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a *Terry* stop." *State v. O'Neil*, 148 Wn.2d 577, 62 P.3d 489. The Court clearly adopted the analysis of *Bostick*, which held that a consensual encounter between an officer and a reasonable person⁶ does not require a particularized suspicion. The Court also clearly asserted that the "reasonable suspicion" test of *Terry v. Ohio, supra*, applied under Const. art. I, § 7.

O'Neill provided the following test in which to measure whether a seizure occurred, at 148 Wn.2d 594, 62 P.3d 489:

"[A] seizure depends upon whether a reasonable person

⁶ "[T]he 'reasonable person' test presupposes an innocent person." *O'Neill, supra*, 148 Wn2d. 574, citing to *Bostick, supra*, 501 U.S. 438.

would believe, in light of all the circumstances, that he or she was free to go or otherwise end the encounter. Whether a seizure *occurs* does not turn upon the officer's suspicions. Whether a person has been restrained by a police officer must be determined based upon the interaction between the person and the officer." (emphasis in original)

This is the same totality of the circumstances test that the United States Supreme Court applies. *United States v. Mendenhall, supra*, 446 U.S. 554.

The major difference between the federal and the state constitutions is that Washington's provides greater protection than the federal counterpart. The *O'Neill* court explained that Const. art. I, § 7, provides greater protection to individuals than the U.S. Const. amend. IV; if a seizure occurs without a warrant, it must be based upon a "well established exception." *State v. O'Neil*, 148 Wn.2d 595, 62 P.3d 489. Reasonable suspicion is a well established exception. *State v. Kennedy*, 107 Wn.2d 1, 4-6, 726 P.2d 445 (1986).

Looking at the evidence under Const. art. I, § 7, the trial court should still be affirmed. Agent Romero exercised his law

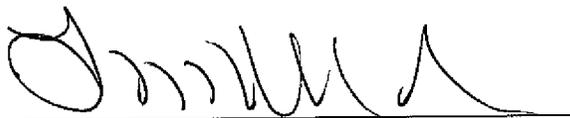
enforcement judgment based upon reasonable suspicion that Mr. Delgado was either ill or affected by drugs or alcohol and therefore a risk to the public if he continued to drive. This is what law enforcement is supposed to do. "Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, ..." *O'Neill*, 148 Wn.2d 576. If a seizure occurred under Const. art. I, §7, it was totally justified by what Agent Romero observed when he approached Mr. Delgado's vehicle.

CONCLUSION

The record clearly supports the conclusion that Agent Romero acted well within the U.S. Const. amend. IV and Const. art. 1, §7. The reviewing court should affirm the trial court's conclusion that Mr. Delgado was properly contacted and that the ensuing evidence was sufficient to detain him until he was placed under arrest by the Port Angeles Police.

Respectfully submitted this 5th day of December, 2012.

DEBORAH KELLY, Prosecutor



Lewis M. Schrawyer, #12202

DECLARATION OF SERVICE

LEWIS M. SCHRAWYER, duly sworn or upon, deposes and states that he supplied a copy of this document to Lise Ellner, Attorney at Law, through the electronic filing system, at liseellnerlaw@comcast.net.

Dated December 5, 2012.



Lewis M. Schrawyer, #12202

APPENDIX A

FILED
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BARBARA CHAMBERS

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON,
Plaintiff,
vs.
NATHAN J. DELGADO,
Defendant.

NO. 11-1-00393-0

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RULING
(Stipulated Bench Trial)

A bench trial was held in this matter on June 5, 2012. The Defendant was present in person and represented by his/her attorney, Ralph Anderson. The State was represented by Deborah Kelly, Prosecuting Attorney for Clallam County. For purposes of the determination of guilt, Defendant has stipulated to the court's consideration of the Port Angeles Police Department Police reports and witness statements, Washington State Patrol Toxicology lab reports, Department of Licensing records, and certified copies of prior Judgments and Sentences, with accompanying documentation, which have been marked and admitted as Exhibits 1-4.

Based upon careful consideration of the exhibits and the arguments of counsel, the Court rules as follows:

1 - FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RULING

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469

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I. FACTS

1. On November 16, 2011, at approximately six p.m., Border Patrol Supervisory Agent Jose Romero observed the Defendant, Nathan J. Delgado, driving erratically. After following Defendant for several blocks 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.

2. At the time of the Defendant's arrest, Officer Maynard noted the strong odor of intoxicants and that Defendant had slurred speech. Port Angeles Police again confirmed the warrants and also learned that Delgado's privilege to drive was suspended in the first degree. Defendant refused field sobriety tests.

3. Based upon his training and experience and prolonged contact with Defendant, Officer Maynard formed the belief that Defendant was intoxicated. He obtained a search warrant for the Defendant's blood and took Defendant to Olympic Medical Center where licensed phlebotomist, Cher Cabral, drew two vials of blood at approximately 8:40 p.m. which Officer Maynard subsequently sent to the Washington State Patrol Toxicology Laboratory for testing.

4. Forensic Scientist/Analyst, Brittany Ball, tested the blood sample by approved methods and obtained a blood alcohol level of .21 g/ml.

5. Utilizing Defendant's name and date of birth, Officer Maynard obtained a certified copy of the Defendant's driving record which shows that on December 23, 2005, the Defendant's privilege to drive was revoked for seven years as a habitual traffic offender.

CLALLAM COUNTY PROSECUTOR

December 05, 2012 - 10:37 AM

Transmittal Letter

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Court of Appeals Case Number: 43567-5

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- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
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Comments:

No Comments were entered.

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