

NO. 49823-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CADE GREY HENDRICKS,

Appellant.

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

The Honorable Christopher Melly, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that transfer of the title within fifteen days of changing ownership of the vehicle, insofar as the court found the failure to transfer title constituted probable cause for the traffic stop. (Finding of Fact (FF) 2); Clerk's Papers (CP) 42.¹

2. The trial court erred in finding that the officer was "unable to clearly read the rear license plate due to a trailer hitch that partially obscured the view" insofar as the court found probable cause for the traffic stop. (FF 3); CP 42.

3. The trial court erred in concluding that "[f]ailure to apply for a new certificate of title constituted a traffic infraction pursuant to RCW 46.63.020." (Conclusion of Law (CL) 6); CP 44.

4. The trial court erred in concluding that "[i]t is no less a traffic infraction because the penalty is collected by the Washington Department of Licensing, a County Auditor, or other agent." (CL 7); CP 44.

5. The trial court erred in concluding that "the return received by Deputy Federline from his computer inquiry on the license plate of the vehicle indicated that more than fifteen days had elapsed since transfer of ownership. Deputy Federline had a reasonable, articulable suspicion that a traffic infraction occurred." (CL 8); CP 44.

¹ A copy of the Findings of Fact and Conclusions of Law on CrR 3.6 motion to suppress is attached.

6. The trial court erred in concluding that “Deputy Federline had a reasonable, articulable suspicion that a traffic infraction occurred.” (CL 15); CP 44.

7. The trial court erred in concluding there was probable cause to believe the driver of the truck in which Mr. Hendricks was a passenger committed traffic infraction in violation of RCW 46.12.650(7) and RCW 46.63.020, and RCW 46.16A.200(7).

8. The trial court erred in denying appellant's motion to suppress the evidence.

9. There was insufficient admissible evidence to convict Mr. Hendricks of violation of the no contact order with Kymberlie Ciulla.

10. A *de novo* review of the totality of the circumstances demonstrate the stop of the vehicle for alleged traffic infractions was a pretext to investigate the officer’s suspicions of other criminal activity.

11. The trial court erred by admitting evidence of violation of a no contact order because the State failed to prove the deputy stopped the vehicle for the purpose of enforcing the traffic code and not for the unconstitutional purpose of conducting a warrantless criminal investigation.

12. Defense counsel’s failure to move for suppression of the fruits of a pretext arrest was ineffective assistance of counsel.

hereto as an appendix and can also be found at CP 42-45.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 46.63.020 provides “failure to perform any act required or the performance of any act prohibited by this title . . . relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction[.]” Do the rules of statutory construction show the legislative intent of RCW 46.63.020 is to designate only actions involving the movement of traffic and pedestrian as infractions and not administrative tasks such as transferring a vehicle title? Assignments of Error 1, 3, 4, 5, and 6.

2. Where Deputy Paul Federline saw the front license plate of a vehicle and where the deputy testified that he was able to read all but one number of the rear license plate due to a trailer hitch mounted on the rear of the vehicle, did the driver substantially comply with RCW 46.12.650(7) such that there was not reasonable suspicion he committed an infraction sufficient to justify the traffic stop? Assignments of Error No. 2 and 7.

3. Was the stop of the vehicle lawful where the deputy had no factual or legal basis to stop the vehicle in which Mr. Hendricks was a passenger? Assignments of Error No. 1, 2, 3, 4, 5, 6, 8, and 9.

4. Article 1, § 7 of the Washington Constitution protects citizens from pretext stops. When determining whether a stop is pretextual, courts should consider the totality of the circumstances, including both the objective reasonableness of the officer’s behavior and the officer’s subjective intent. Here, the evidence suggests the stop was conducted for the purpose of criminal

investigation and not to enforce the traffic code. Where the totality of the circumstances indicates the stop was made to conduct a criminal investigation, should the after-acquired evidence be suppressed? Assignments of Error 10 and 11.

5. Did the State present sufficient evidence to convict Mr. Hendricks where all evidence that he was in the vehicle with the protected party of a no-contact order should have been suppressed? Assignment of Error 9.

6. Where defense counsel failed to challenge the admissibility of evidence obtained on the grounds that the stop was pretextual, did counsel fail to provide the effective assistance required under the Sixth Amendment? Assignment of Error 12.

C. STATEMENT OF THE CASE

Cade Hendricks was a passenger in a 1993 Mazda pickup truck driven by Steven Collier, in Port Angeles, Washington on September 7, 2016. Report of Proceedings² (RP) at 20. At approximately 11:30 p.m. Clallam County Deputy Sheriff Paul Federline saw the truck traveling toward his vehicle while driving southbound near the intersection of Cotton Wood and Newbridge Road in Four Seasons Park. RP at 20-21. Using the numbers he saw on the

²The record of proceedings consists of the following transcribed hearings: October 7, 2016, October 14, 2016, October 21, 2016, November 7, 2016 (CrR 3.6 suppression hearing), November 9, 2016 (morning hearing), November 9, 2016 (afternoon hearing), November 14, 2016 (stipulated facts bench trial), December 13, 2016, December 15, 2016,

front license plate of the truck as it approached him, Deputy Federline ran the plate and was notified that the vehicle registration had not been transferred within 45 days and that it had “been over 15 days.” RP at 21, 26. The deputy turned his vehicle around, and while following the truck, he testified that one of the numbers on the rear license plate was illegible because it was blocked by a trailer ball hitch.³ RP at 21- 23, 25. Deputy Federline activated his overhead lights, stopped the truck, and made contact with the driver, Mr. Collier. RP at 20-22. Kymberlie Ciulla was in the front right passenger seat and Cade Hendricks was in the back right passenger seat of the truck. RP at 22.

Deputy Federline testified that he was able to see the single number on the truck’s rear license plate that he previously said that he was unable to see, after he stopped the vehicle and “looked past the trailer ball hitch” as he approached the truck. RP at 23. The deputy testified that as he looked past the trailer hitch he could “see that it was a three.” RP at 23.

Deputy Federline testified that after he stopped the truck and asked Mr. Collier for his license and proof of insurance he recognized Kymberlie Ciulla, who was in the front passenger seat, and Mr. Hendricks, who was seated behind Ms. Ciulla. RP at 29-30. He stated that he recognized Mr. Hendricks and Ms. Ciulla from previous contacts and that Ms. Ciulla “has a very

(sentencing) and December 16, 2016.

³The truck’s license plate is Washington C77258F. CP 61.

distinctive, large neck tattoo.” RP at 29-30. A no contact order prohibits Mr. Hendricks from having contact with Ms. Ciulla. Exhibit 4.

Mr. Hendricks was charged in Clallam County Superior Court with violation of a no contact order-third or subsequent violation, on September 8, 2016. RCW 26.50.110(5). Clerk’s Papers (CP) 57.

Defense counsel moved to suppress evidence obtained as result of the traffic stop pursuant to CrR 3.6 on October 19, 2016. CP 51. The motion was heard on November 7, 2016, by the Honorable Christopher Melly. RP 17-53. Defense counsel argued (1) the officer did not have probable cause to stop the truck because the obligation to register a vehicle under RCW 46.12.650 did not occur until 45 days after the vehicle was transferred, and (2) the rear license plate was visible and was not “illegible” as contemplated by RCW 46.16A.200. RP at 37-45. Counsel argued that the trailer hitch did not obstruct the number “2” on the rear license plate and that it was visible as seen in Exhibit 2. RP at 45. Counsel argued:

[I]f you look at that picture, if the court wants to look at the exhibit, you actually can read it. It is a 2, even from basically the most obscured position. You can see the curvature of it, it is a 2. There’s no other number it could possibly be and so the court can look at that exhibit and see.

RP at 45.

The trial court subsequently denied Mr. Hendricks’s motion to suppress and findings of fact and conclusions of law were entered November

9, 2016. CP 42. Following the ruling, Mr. Hendricks waived his right to a jury trial and proceeded by stipulated bench trial on November 14, 2016. RP at 66-86. Defense counsel stipulated that a judgment and sentence entered in in Clallam County District Court shows a valid domestic violence no contact order prohibiting Mr. Hendricks from having contact with Ms. Ciulla. RP at 67. Ex. 3. The defense also stipulated that Mr. Hendricks was convicted of a violation that the protection order in Clallam Superior Court cause number 16-1-00100-8. RP at 67-68. Ex. 4.

The Court found Mr. Hendricks guilty of the offense as charged. RP at 79-80; CP 15.

At sentencing, Ms. Ciulla testified that she asked Mr. Hendricks to ride with her in the truck because “he’s one of the only people that I feel safe with,” and so she asked him to come with her on the night that they were stopped. RP at 96-97. Ms. Ciulla also stated that she did not want another no contact order put in place and told the court that she had previously requested that the no contact order be vacated. RP at 99-100. Ms. Ciulla stated that the violation of the no contact order occurred because she “chose to do drugs instead of take care of [the no contact order].” RP at 100. She stated that she “was on the run, I had warrants and I was on drugs and I was left and because of that he’s paying for it.” RP at 100. She stated that Mr. Hendricks has been her boyfriend for the past four years and that she loves him and that her choice to do drugs took precedence over his wellbeing. RP at 100.

The State requested a midrange sentence of 38 months. RP at 104. Defense counsel asked for a downward departure based on mitigating circumstance that she was an initiator or willing participant in the offense. RP at 108. In the alternative, defense counsel requested sentencing under the drug offender sentencing alternative (DOSA). RP at 112. The court declined to impose a downward sentence but granted prison-based DOSA based on Mr. Hendrick's statement that he was using heroin at the time of the offense. RP at 115-117.

The Court imposed legal financial obligations including \$500.00 for victim assessment, \$200.00 in court costs, and \$100.00 felony DNA fee. CP 22-23.

Timely notice of appeal was filed December 21, 2016. CP 7. This appeal follows.

D. ARGUMENT

1. **MR. HENDRICKS' RIGHT TO PRIVACY UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION WAS VIOLATED BECAUSE THE TRAFFIC STOP WAS MADE WITHOUT LEGAL AUTHORITY AND WAS A PRETEXT TO INVESTIGATE SUSPECTED CRIMINAL ACTIVITY UNRELATED TO THE ALLEGED TRAFFIC INFRACTIONS**
 - a. **The seizure in an automobile traffic stop requires reasonable suspicion of a violation.**

The Fourth Amendment to the United States Constitution, made

applicable to the states through the Fourteenth Amendment, guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .” U.S. Const. amend. 4; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Under Article 1, § 7 of the Washington Constitution, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. 1, § 7. Washington courts have long recognized that Article 1, § 7 provides greater protections to citizens’ privacy rights than those provided by the Fourth Amendment. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *Seattle v. Messiani*, 110 Wn.2d 454, 457-58, 755 P.2d 775 (1988). Traffic stops are constitutional as investigative detentions under WA Const. Art 1, sec 7 and the Fourth Amendment only if based on at least a reasonable suspicion of either criminal activity or a traffic infraction, and only if reasonable limited in scope. *State v. Snapp*, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012).

b. The State must prove the legality of the warrantless seizure.

The State always bears the burden of proving the applicability of one of the narrow exceptions to the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999); *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996); *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

In order to meet this burden, the State must prove the traffic stop was justified at its inception and reasonable. *Ladson*, 138 Wn.2d at 350 (citing *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

- c. **Article 1, section 7's protection against warrantless seizures is violated when a traffic stop is used as a pretext to avoid the warrant requirement.**

Law enforcement officers may conduct a warrantless traffic stop if they have a reasonable and articulable suspicion that a traffic violation has occurred or is occurring. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). A reasonable, articulable suspicion means there "is substantial possibility that criminal conduct has occurred or is about to occur." *Snapp*, 174 Wn.2d at 198; *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

However, probable cause cannot justify a stop if the stop was pretextual and actually made in order to conduct a criminal investigation. Officers may not use the traffic stop as a pretext to conduct a criminal investigation unrelated to driving for which reasonable suspicion is lacking *Ladson*, 138 Wn.2d at 349. A pretextual traffic stop occurs when police make a stop, not to enforce the traffic code, but to conduct an investigation unrelated to driving. *Ladson*, 138 Wn.2d at 349.

Pretextual stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations—violations for

which the officer does not have probable cause.” *State v. Myers*, 117 Wn.App. 93, 94-95, 69 P.3d 367 (2003). The central feature of a pretextual stop is that the stop is a pretext for an investigation to discover grounds for a more extensive search, regardless of whether the pretextual arrest was facially valid. *Ladson*, 138 Wn.2d at 353-54.

When determining whether a stop is pretextual, courts consider the totality of the circumstances, including “including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.” *Ladson*, 138 Wn.2d at 358-59.

d. The State failed to prove probable cause existed for the stop.

On appeal, this Court must independently review the evidence, determine whether substantial evidence supported the trial court's finding of fact, and assess whether the findings in turn supported the trial court's denial of Mr. Hendricks' suppression motion. See e.g., *State v. Sandholm*, 96 Wn.App. 846, 848, 980 P.2d 1292 (1999); *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997).

Preliminarily, notwithstanding the *Ladson* challenge contained below, it was unlawful for Deputy Federline to stop the vehicle based on an alleged failure to transfer the title within 15 days. RCW 46.12.650 provides:

(5)(a) Transferring ownership. A person who has recently acquired a vehicle by purchase, exchange, gift, lease, inheritance, or legal action shall apply to the department, county auditor or other agent, or subagent appointed by the director for a new certificate of title *within fifteen days of delivery of the vehicle.*

...
(7) Penalty for late transfer. A person who has recently acquired a motor vehicle by purchase, exchange, gift, lease, inheritance, or legal action *who does not apply for a new certificate of title within fifteen calendar days of delivery of the vehicle is charged a penalty*, as described in RCW 46.17.140, when applying for a new certificate of title. It is a misdemeanor to fail or neglect to apply for a transfer of ownership within forty-five days after delivery of the vehicle. The misdemeanor is a single continuing offense for each day that passes regardless of the number of days that have elapsed following the forty-five day time period.

Deputy Federline testified that he ran the truck's plate and was informed that the title had not been transferred within forty-five days, and it had been fifteen days since the truck changed ownership. RP at 21. The State did not allege at the suppression hearing that 45 days had elapsed since the transfer of the vehicle. The period in question, therefore, is the thirty-day period after the initial fifteen days and prior to the forty-fifth day, at which point failure to transfer becomes a misdemeanor. RCW 46.12.650. In contrast to the facts of *State v. Bonds*, 174 Wn.App. 553, 299 P.3d 663 (2013), in which this Court found that failure by a new owner to transfer title in his own name within 45 days is a continuing misdemeanor, the State in this case

argues that failure to transfer within the 30 day period constitutes an infraction under RCW 46.63.020. RP at 35, 46-47. The State's reliance on the statute, however, is misplaced. The statute provides in relevant part:

Failure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction and may not be classified as a criminal offense[.]

RCW 46.63.020.

The primary issue in is one of statutory construction, a question of law this Court reviews de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). When interpreting the meaning and scope of a statute, the Court first looks to the plain language of the statute as “[t]he surest indication of legislative intent.” *State v. Ervin*, 169 Wash.2d 815, 820, 239 P.3d 354 (2010).

Under the rules of statutory interpretation, failure to transfer a car within fifteen days is not within the scope of infractions contemplated in RCW 46.63.020. By finding that failure to apply for title within fifteen days under RCW 46.37.200 constitutes an infraction under RCW 46.63.020, the trial court violated the doctrine of *ejusdem generis*. This Court in *State v. Van Woerden*, 93 Wn. App. 110, 117, 967 P.2d 14 (1998), quoting the Supreme Court's decision in *Electrical Contractors Ass'n v. Pierce County*, stated:

[u]nder the doctrine of *ejusdem generis*, general words

accompanied by specific words are construed to embrace only similar objects. Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wn.2d 109, 116, 667 P.2d 1092 (1983).

State v. Van Woerden, 93 Wn. App. at 117. Under the principle of *ejusdem generis* “specific words modify and restrict the meaning of general words when they occur in a sequence.” *State v. Gonzales Flores*, 164 Wash.2d 1, 13, 186 P.3d 1038 (2008). “The *ejusdem generis* rule is generally applied to general and specific words clearly associated in the same sentence in a pattern such as ‘[specific], [specific], or [general]’”. *Elec. Contractors Ass'n v. Pierce County*, 100 Wn. 2d at 116.

The plain language of RCW 46.63.020 indicates that the legislature intended the illustrative examples to limit the scope of the statute. This is in accordance with the principle of statutory interpretation that “general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or ‘comparable to’ the specific terms.” *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wash.2d 139, 151, 3 P.3d 741 (2000) (quoting *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wash.2d 878, 883–84, 558 P.2d 1342 (1976)); see also *State v. Gonzales Flores*, 164 Wn.2d 1, 13, 186 P.3d 1038 (2008) (describing the principle of *ejusdem generis*) (citing *State v. Roadhs*, 71 Wn.2d 705, 708, 430 P.2d 586

(1967)).

Application of the rule to RCW 46.63.020 is a straightforward exercise. The general term “traffic” is followed by the specific terms, “including parking, standing, stopping, and pedestrian offenses.” This categorical relationship shows that the term used by the legislature all pertain to the physical movement of traffic and vehicles (parking, standing, stopping), or pedestrians, rather than registration, transferring titles, and other administrative tasks.

Furthermore, a court must interpret statutes to avoid absurd results. *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) (citing *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007)). Under the trial court’s interpretation, a violation of any of the plethora of ministerial tasks involved in the licensing and registration of vehicles would fall within the scope of RCW 46.63.020 and become traffic infractions, with clearly absurd results. Only through a strained construction can the class of specific terms contained in the statute include administrative functions such as transferring vehicle titles. The rule of *ejusdem generis* persuasively shows why failure to register a vehicle prior to the forty-fifth day is not an infraction, and therefore the deputy did not have probable cause to stop the truck.

- e. **The “illegibility” of a single number of the rear license plate does not cure the probable cause violation.**

The trial judge concluded there was probable cause to stop the vehicle based on the deputy's perception of a violation of RCW 46.16A.200(7). The statute provides that it is unlawful to:

[u]se holders, frames, or other materials that change, alter, or make a license plate or plates illegible. License plate frames may be used on license plates only if the frames do not obscure license tabs or identifying letters or numbers on the plates and the license plates can be plainly seen and read at all times[.]

RCW 46.16A.200(7)(c).

The reasoning cited by the deputy in support of his contention that plate was "illegible" because he could not read a single number strains believability, particularly since he was able to clearly read the complete front plate and therefore knew the rear plate number matched the front, inasmuch the evidence shows that all but a portion of the center number was visible. The deputy stated that although he knew the correct license plate number, and that all of the numbers on the rear were visible except "2," he was unable to ascertain that the number was in fact a "2", despite his demonstrated knowledge of the correct plate number. This type of game-playing and flaunting of the traffic code is precisely why *Ladson* was decided as it was. In order to lawfully stop the vehicle, the officer had to know of facts and circumstances sufficient to cause a

reasonable officer to believe that an infraction was occurred. Deputy Federline did not testify to information that would allow the trial court to conclude there was probable cause at the inception in order to make the stop. Because the State failed to meet its burden of proving the deputy had probable cause to believe the owner of the truck committed a traffic infraction, this Court should reverse the trial court's suppression ruling.

f. The traffic stop was a pretext to conduct an unrelated criminal investigation.

Assuming arguendo there was probable cause that a traffic infraction occurred, the stop was unconstitutional if, as Mr. Hendricks argues, the purpose of the stop was to conduct a criminal investigation. *Ladson*, 138 Wn.2d at 349. In this case, “the Court should [have] consider[ed] the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.” *Ladson*, 138 Wn.2d at 359 (disapproving of strictly objective inquiry set forth in *State v. Chapin*, 75 Wn. App. 460, 464, 879 P.2d 300 (1994)). Accordingly in order to determine the legality of the stop, the court must assess the true motives behind the stop. *Ladson*, 138 Wn.2d at 359.

Under the totality of the circumstances present, all inferences suggest the stop was a pretext for conducting an unconstitutional warrantless criminal

investigation. In denying Mr. Hendricks' suppression motion, the trial court considered only the alleged infractions as a basis for the stop. In this case, however, "the court should [have] consider[ed] the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." *Ladson*, 138 Wn.2d at 359 (disapproving of strictly objective inquiry set forth in *State v. Chapin*, 75 Wn. App. 460, 464, 879 P.2d 300 (1994)). Accordingly in order to determine the legality of the stop, the court must assess the true motives behind the stop. *Ladson*, 138 Wn.2d at 359.

Under the totality of the circumstances present, all inferences suggest the stop was a pretext for conducting an unconstitutional warrantless criminal investigation. By denying Mr. Hendricks' suppression motion, the trial court considered only one possible basis for the stop; the alleged infractions. The evidence, however, demonstrates the unconstitutionality of the stop. Deputy Federline's basis for stopping the truck, a decision which he said was made even before before seeing the rear license plate, was based on an alleged violation of RCW 46.12.650(7). The statute, as discussed supra, imposes a monetary penalty due for failure to register within a 15 day period after transfer of a vehicle. As previously argued, the plain meaning of RCW 46.63.020 statute does not show a legislative intent that failure to comply with portions of

Title 46 pertaining to non-traffic or pedestrian violations is not intended to be an infraction.

The deputy testified that he recognized several of the occupants of the truck, including Mr. Hendricks. It is reasonable to conclude that the deputy suspected drug activity and used the alleged failure to apply for new title within 15 days and the allegation that the rear plate was “illegible” as a pretext to stop the truck in order to search for drugs.⁴ The officer’s stop makes no sense otherwise. The only way to make sense of the deputy’s behavior is to consider it in the context of his attempt to find a reason to stop the truck. Once he saw the truck, the deputy made a U-turn and fell in behind him. In addition, the deputy’s explanation that he received notice of failure to apply for new title prior to the following the moving truck seems far-fetched, given that his vehicle was travelling in the opposite direction than the truck, yet his testimony is that he read the plate of an oncoming vehicle, received the information regarding the alleged “infraction” *before* turning around and following the truck. A more reasonable explanation is that he recognized the vehicle or its occupants and turned around before recognizing information about the title. Under Article 1, § 7 of the Washington Constitution, such a stop cannot be tolerated. *Ladson*, 138

⁴ This was ultimately bolstered by Mr. Hendricks’ statement at sentencing that he was using heroin at the time of the stop. RP at 117.

Wn.2d at 349.

Despite the clear holding of *Ladson*, the trial court still believed that it is legitimate for officer to use the extensive traffic code as a way to invade citizens' constitutionally protected privacy. Based on this erroneous belief, the trial court allowed for the blatant violation of Mr. Hendricks' Article 1, § 7 rights to go uncorrected.

g. Fruits of the illegal stop must be suppressed.

Evidence uncovered as the result of an unconstitutional search or seizure must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 485-86, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); *Ladson*, 138 Wn.2d at 359.

In light of the evidence indicating the stop was pretextual and the presumption that the State failed to satisfy its burden of proof, this Court must find the stop was an "inherently unreasonable" pretext stop. *Ladson*, 138 Wn.2d at 351. Accordingly, this Court should reverse the suppression decision of the trial court and dismiss the case. *Wong Sun*, 371 U.S. at 485-86; *Kennedy*, 107 Wn.2d at 4.

2. COUNSEL'S FAILURE TO CHALLENGE THE CONSTITUTIONALITY OF THE PURPORTED TRAFFIC STOP ON THE BASIS OF PRETEXT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000). “Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought.” *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991(2006). In that case, Meckelson’s lawyer was held to have rendered ineffective assistance of counsel because he failed to argue to the trial court that Meckelson was stopped on the pretext of a minor traffic violation when the reason for the stop was that the accused had given the arresting officer a funny look. *Id.* at 435-36. In this case, as in *Meckelson*, defense counsel misapprehended or did not recognize the factual issues presented in challenging a pretextual stop.

As argued in Section 1(f) of this brief, where the asserted basis for a traffic stop is a pretext for a warrantless investigation, the stop violates article I, section 7 of the Washington Constitution. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). In this situation, the officer “relies on some legal authorization as ‘a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.’” *State v. Arreola*, 176 Wn.2d 284, 294, 290 P.3d 983 (2012) (quoting *Ladson*, 138 Wn.2d at 358). “Whether a vehicle stop is pretextual is a factually nuanced

question.” *Meckelson*, 133 Wn. App. at 436. In determining whether a stop is pretextual, courts 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.” *Ladson*, 138 Wn.2d at 358-59. Washington courts have found pretext where law enforcement officers follow a vehicle to search for the commission of criminal conduct. See, e.g., *Ladson*, 138 Wn.2d at 346; *State v. Montes- Malindas*, 144 Wn. App. 254, 257, 182 P.3d 999 (2008); *State v. DeSantiago*, 97 Wn. App. 446, 450-51, 983 P.2d 1173 (1999). In those cases, the court explained, the stops were pretextual because the “officers suspected criminal activity and followed vehicles waiting for commission of a traffic infraction so the vehicle could be stopped.” *Nichols*, 161 Wn.2d at 12.

The objective reasonableness of Deputy Federline’s behavior in this case and his subjective intent present factual issues. Unfortunately, those issues, partially his intent, went entirely unchallenged in this case.

Evidence shows that Deputy Federline was “running license plates” while driving. RP at 20-21. The deputy first saw the truck while it was going in the opposite direction. The deputy asserted at the suppression hearing that after running the plate he believed that the title was not transferred within 15 days and turned around and followed the truck, allegedly observing a minor

violation of the plate partially obscured by the trailer hitch. A specific *Ladson* challenge was not made at the CrR 3.6 hearing, but the record suggests the possibility that the alleged traffic infraction was not the reason Deputy Federline initiated the traffic stop. The deputy acknowledged that Mr. Hendricks and Ms. Ciulla were well known to him. Both admitted extensive drug involvement during sentencing; drug involvement that was presumably known to the deputy in the course of his prior contacts with both of them. Moreover, he testified that Ms. Ciulla in particular was recognizable by a large neck tattoo.

The possibility that police officers may “simply misrepresent their reasons and motives for conducting traffic stops . . . heightens the need for judicial review of traffic stops.” *Arreola*, 176 Wn.2d at 297. As Division One pointed out in *Meckelson*, it is defense counsel’s job “to challenge the officer’s subjective reason for the stop.” *Meckelson*, 133 Wn. App. at 438. Instead of providing the court with an opportunity to resolve the factual issues, defense counsel failed to recognize the necessity for a factual determination of the objective as well as subjective reasonableness of the deputy’s actions.

Counsel’s failure to challenge the deputy’s subjective reason for the stop deprived his client of effective assistance, meriting reversal. *Meckelson*,

133 Wn. App at 438.

3. **THIS COURT SHOULD EXERCISE ITS DISCRETION
AND DENY ANY REQUEST FOR COSTS.**

If Mr. Hendricks does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court imposed fees, including \$500.00 victim assessment, \$200.00 in court costs, and \$100.00 felony DNA collection fee. CP 22. The trial court found him indigent for purposes of this appeal. CP 8. There has been no order finding Mr. Hendrick's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in "compelling circumstances."

State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Hendricks’ indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

For the foregoing reasons, Mr. Hendricks respectfully requests this Court reverse the trial court’s ruling regarding suppression and dismiss the case. In the alternative, this Court should reserve and remand for new evidentiary hearing.

DATED: August 16, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for Cade Hendricks

CERTIFICATE OF SERVICE

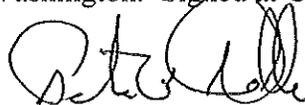
The undersigned certifies that on August 16, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Jesse Espinoza, Clallam County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 16, 2017.



PETER B. TILLER

APPENDIX A

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FILED
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BARBARA CHRISTENSEN CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
CADE HENDRICKS,)
Defendant.)

NO. 16-1-00387-6

CrR 3.6 FINDINGS OF FACT
AND CONCLUSIONS OF LAW



Record Certification: I Certify that the electronic copy is a correct copy of the original, on the date filed in this office, and was taken under the Clerk's direction and control. Clallam County Clerk, by duj Deputy #/pages: 4

FINDINGS OF FACT

1. On September 7, 2016 at approximately 11:39 PM Clallam County Sheriff's Deputy Paul Federline was on duty.
2. A vehicle in which the defendant was an occupant approached the deputy's position. The deputy ran the license plate of the vehicle using his patrol vehicle computer. The return indicated that more than 15 days had elapsed since ownership of the vehicle had changed but title had not been transferred.
3. With this information, the deputy pursued the vehicle. He was unable to clearly read the rear license plate due to a trailer hitch that partially obscured the view.
4. Exhibits 1 and 2 show the license plate. As the angle of view changed the license plate became fully visible.
5. When the vehicle pulled over, the deputy approached and recognized several of the occupants, including the defendant, Cade Hendricks.
6. The deputy was aware that the defendant had an outstanding warrant.
7. PenCom, the regional emergency dispatch entity, advised that there was an active domestic violence no contact order under Clallam County Superior Court Cause Number 16-1-00100-8 restraining the defendant from coming near or having contact with Kymberlie Ciulla, the occupant of the front passenger seat.

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8. The defendant was arrested for violation of the no contact order.

CONCLUSIONS OF LAW

1. RCW 46.12.650(5(a) provides, in pertinent part, that

A person who has recently acquired a vehicle by purchase, exchange, gift, lease, inheritance, or legal action *shall apply* to the department, county auditor or other agent, or subagent appointed by the director for a new certificate of title within fifteen days of delivery of the vehicle. (Emphasis added)

2. RCW 46.12.650(7) provides that

A person who has recently acquired a motor vehicle by purchase, exchange, gift, lease, inheritance, or legal action who does not apply for a new certificate of title within fifteen calendar days of delivery of the vehicle is charged a penalty, as described in RCW 46.17.140, when applying for a new certificate of title. It is a misdemeanor to fail or neglect to apply for a transfer of ownership within forty-five days after delivery of the vehicle. The misdemeanor is a single continuing offense for each day that passes regardless of the number of days that have elapsed following the forty-five day time period.

3. RCW 46.63.020 provides, in pertinent part, that

Failure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, *is designated as a traffic infraction* and may not be classified as a criminal offense (Emphasis added)

4. Warrantless traffic stops are constitutional under article I, section 7 as investigative stops, but only if based upon at least a reasonable articulable suspicion of either criminal activity or a traffic infraction, and only if reasonably limited in scope. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983, 988 (2012).

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- 5. The new owner of the vehicle had a duty to apply for a new certificate of title within fifteen days of delivery of the vehicle pursuant to RCW 46.12.650(5)(a).
- 6. Failure to apply for a new certificate of title constituted a traffic infraction pursuant to RCW 46.63.020.
- 7. It is no less a traffic infraction because the penalty is collected by the Washington Department of Licensing, a County Auditor, or other agent.
- 8. The return received by Deputy Federline from his computer inquiry on the license plate of the vehicle indicated that more than fifteen days had elapsed since transfer of ownership. Deputy Federline had a reasonable, articulable suspicion that a traffic infraction occurred.
- 9. RCW 46.16A.200(7) provides that is unlawful to:
 - (c) Use holders, frames, or other materials that change, alter, or make a license plate or plates illegible. License plate frames may be used on license plates only if the frames do not obscure license tabs or identifying letters or numbers on the plates and the license plates can be plainly seen and read at all times;
- 10. The term "illegible" is not defined in the statute.
- 11. When terms are not defined in a statute, they are given their ordinary meaning. *State v. Breidt*, 187 Wn. App. 534, 539, 349 P.3d 924, 927 (2015).
- 12. Webster's Seventh New Collegiate Dictionary defines "illegible" as: "not legible: UNDECIPHERABLE." It further defines "legible" as "capable of being read or deciphered: PLAIN."
- 13. The use of holders, frames or other material is unlawful if it renders a license plate incapable of being read or deciphered.
- 14. A trailer hitch is "other material" for purposes of RCW 46.16A.200(7)(c). The trailer hitch rendered the plate incapable of being read in violation of the statute.
- 15. Deputy Federline had a reasonable, articulable suspicion that a traffic infraction occurred.

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ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's motion to suppress is denied.

DATED THIS 8th day of November, 2016.



CHRISTOPHER MELLY
J U D G E

THE TILLER LAW FIRM

August 16, 2017 - 4:52 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Cade Grey Hendricks, Appellant
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