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NO. 50404-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHANE PEDERSEN,

Appellant.

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

The Honorable Andrew Toynbee, Judge
The Honorable Joely A. O'Rourke, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's rights under the state and federal constitutions when it failed to suppress evidence flowing from an illegal seizure.

2. The court erred in entering the conclusions of law 2.1 (stop of appellant constituted valid investigatory detention), 2.2 (reliance database information that car was stolen was reasonable and constituted reasonable suspicion), 2.4 (discovery of facts leading to arrest stemmed from "valid" initial contact), and 2.7 (discovery of evidence in search incident to arrest was pursuant to "valid" search).¹

Issues Pertaining to Assignments of Error

A police officer stopped the appellant's car based solely on the officer's check of a database that indicated the car was stolen. But the car had been recovered by police two days earlier, and the appellant—the owner—was on his way from retrieving the car from impound. The testimony at the suppression hearing indicated the initial stolen vehicle report was correct, but that the system used by the recovering police agency was insufficient to timely remove the car from the stolen vehicle database.

¹ The related findings and conclusions are appended to this brief. CP 21-24.

1. Under factually similar Washington case law, did the State fail to meet its burden to show that the database was reliable, and therefore the police officer's reliance on it was reasonable, resulting in violations of the Fourth Amendment and article 1, section 7 of the state constitution?

2. Did the seizure violate article 1, section 7 of the state constitution, and must the resulting evidence be suppressed, where Washington recognizes enhanced privacy protections in cars, and where the Supreme Court has rejected any "good faith" exception to suppression of the evidence?

B. STATEMENT OF THE CASE²

1. Charges, denial of motion to suppress, bench trial, and sentence

The State charged Shane Pedersen with possession of methamphetamine³ and misdemeanor violation of a court order⁴ based on an incident occurring November 16, 2016. CP 1-3.

Pedersen moved to suppress the evidence, arguing that the evidence supporting the charges flowed from an illegal detention. CP 7-19. The

² This brief refers to the verbatim reports as follows: 1RP – 4/12, 4/13 and 5/4/17 and 2RP – 6/2/17.

³ RCW 69.50.4013.

⁴ RCW 26.50.110(1). The State also alleged the crime was one of domestic violence under RCW 10.99.020.

court denied the motion. CP 21-24 (written findings and conclusions); 1RP 36-39 (oral ruling).

The case was tried to the bench on stipulated facts. 2RP 2-4. The court found Pedersen guilty as charged. CP 25-28 (findings and conclusions on stipulated facts bench trial).

The court sentenced Pedersen to a first-time offender⁵ sentence of 30 days of confinement on the possession charge. CP 31. It also sentenced him to 364 days on the misdemeanor, with 334 days suspended, to run concurrently with the other count. CP 31; RCW 9.94A.650.

Pedersen timely appeals. CP 40.

2. Suppression hearing testimony

As indicated above, Pedersen moved to suppress the evidence supporting both charges. He argued a police officer's mistaken belief the car that Pedersen was driving was stolen did not supply the officer with reasonable suspicion. CP 7-19 (motion and memorandum); 1RP 26-44 (argument to suppress).

Two police officers testified at the suppression hearing. On November 19, 2016, Pedersen reported his Honda Civic stolen. 1RP 4, 9. Lewis County sheriff's deputy Tyson Brown took the report. 1RP 4.

⁵ RCW 9.94A.650

Brown testified that when a vehicle (or other item) is reported stolen, a deputy will ask “dispatch” or the sheriff’s office’s records department to enter the item into the Washington Crime Information Center (WACIC or WCIC) database. Brown followed that procedure regarding Pedersen’s report. 1RP 7.

Brown testified that he follows the same procedure when the vehicle or other item is recovered: He contacts either dispatch or the records department to ask that the vehicle be removed from the database. 1RP 7, 9.

According to Deputy Brown, the Honda Civic was located on November 14, five days after it was reported stolen. 1RP 8-9. A local towing company towed the vehicle to its lot. 1RP 7-8.

Brown followed his normal procedure to have the car removed from the database. 1RP 9-10. As far as Brown knew, the vehicle was removed from the database, but he did not check. 1RP 9-10.

Officer Douglas Lowrey, a Centralia police officer, saw a Honda near exit 77 on Interstate 5. 1RP 11. As was Lowrey’s practice with Hondas, he checked his patrol car’s mobile data computer (MDC) to see if the car was stolen. 1RP 11.

The Honda came back as stolen, so Lowrey contacted “dispatch,” which confirmed the car was stolen. 1RP 11. Despite this “confirmation,”

Lowrey acknowledged his MDC and dispatch rely on the same database, the WACIC. 1RP 22.

Lowrey followed the car westbound on state Highway 6. 1RP 11, 16. Along the way, Lowrey located a state trooper and asked for assistance stopping the Honda. 1RP 11.

Meanwhile, Lowrey noticed that another car appeared to be following the Honda. 1RP 12. Both cars turned into a gas station and stopped at adjacent gas pumps. 1RP 12-13, 16.

Lowrey pulled into the gas station parking lot and activated his lights. Lowrey contacted Pedersen, either while Pedersen was still in the Honda, or when he had just gotten out. He cuffed Pedersen immediately upon contact. 1RP 12, 17.

Pedersen said he had just retrieved the Honda, his car, from Grant's Towing. 1RP 12. Pedersen produced paperwork from the towing company.

Yet Lowrey was not convinced the paperwork proved the car was *not* stolen. 1RP 18-20. Another responding police officer, Deputy Mauerman, contacted Deputy Brown. Brown confirmed to Mauerman that the car had been recovered, and that Brown had asked for the car to be removed from the database. 1RP 22. Only then were police convinced the car was not stolen. 1RP 22.

Meanwhile, a woman emerged from the other car. She asked why Pedersen was being detained, cementing Lowrey's belief that the two were somehow associated. 1RP 13. Lowrey asked for the woman's name and learned there were mutual protection orders between Pedersen and the woman. 1RP 13, 19-20.

Police arrested both Pedersen and the woman for protection order violations. During a search incident to arrest of Pedersen's person, officers discovered a baggie containing a crystal substance that tested positive for methamphetamine. 1RP 14-15.

3. Court's oral and written decisions

The court denied Pedersen's motion to suppress. Rejecting Pedersen's argument that several Washington cases supported suppression,⁶ the court remarked that the State had demonstrated the information on WACIC was reliable and that Lowrey acted in good faith in relying on WACIC. 1RP 36-39 (oral ruling).

In its written order, the court concluded:

2.1 **The stop of Pedersen by Officer Lowrey was a valid investigatory detention pursuant to *Terry v. Ohio* and its progeny.**

⁶ In its oral ruling, the court announced that it has considered State v. Creed, 179 Wn. App. 534, 319 P.3d 80, review denied, 328 P.3d 903 (2014); State v. O'Cain, 108 Wn. App. 542, 31 P.3d 733 (2001); and State v. Mance, 82 Wn. App. 539, 918 P.2d 527 (1996). 1RP 36-38. Yet each of these cases supports suppression, and they are discussed below.

- 2.2 **Officer Lowrey's reliance on the information in WCIC was reasonable, and constituted reasonable suspicion to perform the investigatory detention.**
- 2.3 The scope and duration of Officer Lowrey's detention was reasonable.
- 2.4 **The discovery of Pedersen's identity and the restraining order stemmed from the valid initial contact to investigate the stolen vehicle.**
- 2.5 Because of the close proximity between the [woman] and the [man] throughout Officer Lowrey's observations, contacting the [woman] for her identification was lawful after learning of the restraining order.
- 2.6 Officer Lowrey had probable cause to arrest Pedersen for violating the restraining order between he and [the woman].
- 2.7 **The discovery of the methamphetamine in Pedersen's coin pocket was pursuant to a valid search incident to arrest.**

CP 23 (conclusions of law, with the text of challenged conclusions in bold face type).

C. ARGUMENT

THE TRIAL COURT VIOLATED PEDERSEN'S RIGHTS UNDER ARTICLE 1, SECTION 7 AND THE FOURTH AMENDMENT WHEN IT FAILED TO SUPPRESS EVIDENCE DISCOVERED FOLLOWING THE ILLEGAL DETENTION.

The State failed to prove the Lewis County Sheriff's Office used the stolen vehicle database in a manner that would support that the vehicles

listed in the database were indeed stolen. Thus, State did not meet its burden of showing that Officer Lowrey's reliance on the stolen vehicle report was reasonable. As a result, the court erred in entering conclusion of law 2.2, as well as conclusions 2.1, 2.4, and 2.7 which draw support from that conclusion.

Because the detention was illegal under both the state and federal constitutions, the evidence flowing from the detention—the no-contact order and its violation, as well as methamphetamine—must be suppressed. Both resulting convictions must therefore be reversed.

1. Standard of review

In reviewing a trial court's decision on a motion to suppress evidence, this Court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial if it is enough “to persuade a fair-minded person of the truth of the stated premise.” Id. (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)).

This Court reviews de novo conclusions of law relating to the suppression of evidence. Garvin, 166 Wn.2d at 249. And this Court reviews conclusions of law erroneously labeled findings of fact as it would

conclusions of law, and vice-versa. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

Finally, this Court construes the absence of a finding against the party with the burden of proof. Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986).

2. Suppression is required absent a reasonable suspicion supporting the investigative detention.

Unless an exception is present, a warrantless search is impermissible under the state and federal constitutions. U.S. CONST. amend. IV; CONST. art. I, § 7;⁷ State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

A warrantless search is presumed unlawful unless the State proves it falls within one a few narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears a “heavy burden” of establishing an exception to the warrant requirement by a preponderance of the evidence. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

⁷ The Fourth Amendment protects “[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. IV. Article I, section 7 does not mention reasonableness, instead guaranteeing that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” CONST. art. I, § 7.

The Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” CONST. art. I, § 7. A vehicle stop, “although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment and article 1, section 7 of the Washington Constitution.” State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889; State v. Lesnick, 84 Wn.2d 940, 530 P.2d 243 (1975); Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969)).

“A Terry investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on ‘specific, objective facts,’ that the person detained is engaged in criminal activity or a traffic violation.” State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007) (citing State v. Duncan, 146 Wn.2d 166, 172-74, 43 P.3d 513 (2002) (citing Terry, 392 U.S. at 218)). To satisfy the reasonable suspicion standard, the officer’s belief must be based on objective facts. Charles W. Johnson & Debra L. Stephens, Survey of Washington Search and Seizure Law: 2013 Update, 36 SEATTLE U. L. REV. 1581, 1681 (2013) (citing State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003); State v. Seitz, 86 Wn. App. 865, 869-70, 941 P.2d 5 (1997)).

This “objective basis,” or “reasonable suspicion,” must consist of “specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity.” United States v. Lopez-Soto, 205 F.3d 1101, 1105 (9th Cir.2000) (quoting United States v. Michael R., 90 F.3d 340, 346 (9th Cir.1996)). “Each individual possesses the right to privacy, meaning that person has the right to be left alone by police unless there is probable cause based on objective facts that the person is committing a crime.” State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

When an officer bases his or her suspicion on an informant’s tip (or a source of information analogous to such a tip⁸), the State must show that the tip bears some “indicia of reliability” under the totality of the circumstances. There must either be (1) circumstances establishing the informant’s reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer’s information was obtained in a reliable fashion. State v. Z.U.E., 183 Wn.2d 610, 618-19, 352 P.3d 796 (2015) (citing State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975)).

⁸ O’Cain, 108 Wn. App. at 555.

Generally, the trial court suppresses evidence seized from an illegal search under the exclusionary rule. State v. Creed, 179 Wn. App. 534, 543, 319 P.3d 80, review denied, 328 P.3d 903 (2014). “The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) (quoting Duncan, 146 Wn.2d at 176). Where evidence is obtained as a direct result of an unconstitutional search, that evidence must also be excluded as “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (internal quotation omitted).

“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.” Eisfeldt, 163 Wn.2d at 639-40 (quoting Wong Sun, 371 U.S. at 485). Verbal evidence that derives immediately from illegal police action is “no less the ‘fruit’ of official illegality than the more common tangible fruits of the unwarranted intrusion.” Wong Sun, 371 U.S. at 485.

3. The seizure violated Pedersen's rights under the state and federal constitutions because the State did not prove that the database information was reliable and therefore did not prove that the officer's suspicion was reasonable.

Ample case law from the Court of Appeals establishes that the seizure violated Pedersen's rights under the state and federal constitutions.⁹ In particular, three cases, Creed, 179 Wn. App. 534, State v. O'Cain, 108 Wn. App. 542, 31 P.3d 733 (2001), and State v. Mance, 82 Wn. App. 539, 918 P.2d 527 (1996), establish that the stop was illegal in this case because the State did not prove that the database information was reliable, and therefore did not prove that the officer's suspicion was reasonable.

- a. *The relevant case law, summarized*

The most recent of these cases is Creed, 179 Wn. App. at 543. There, the Court of Appeals held, under circumstances analogous to the one in this case, that evidence discovered following a Terry stop was correctly suppressed by the trial court.

There, an officer stopped Creed for a stolen license plate based on his misreading of and incorrect entry of the license plate number into the

⁹ When the appellant claims both state and federal constitutional violations, this Court should first turn to the state constitution. State v. Afana, 169 Wn.2d 169, 176, 233 P.3d 879 (2010). Nonetheless, Pedersen addresses factually similar cases first, and state constitutional claims second, because the most factually similar cases do not incorporate a detailed state constitutional analysis.

WACIC database. Creed, 179 Wn. App. at 538. Realizing his error after the stop, the officer entered the correct plate number, learned Creed had not been driving a vehicle with stolen plates, and approached the vehicle to inform her of his mistake. Id. As he approached, he saw her toss an item, which he could not identify, behind the driver's seat. Id. Using his flashlight to illuminate the area behind her seat, he recognized small baggies of tar-like substance that appeared to be heroin, and he arrested her. Id.

The Court held that an officer cannot reasonably believe that a car bears stolen license plates based on a WACIC report addressing an unrelated license plate number. The Court noted that “while police may sometimes reasonably rely on incorrect information provided by third parties, they may not reasonably rely on their own mistaken assessment of material facts.” Id. at 542-43.¹⁰

¹⁰ In this respect, the Creed court distinguished State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012). There, the Washington Supreme Court held that a police officer's investigative detention of a driver on a dark evening for failure to illuminate his headlights was supported by a reasonable, articulable suspicion, even though it was later demonstrated that the officer stopped the driver only 24 minutes after sunset, whereas the applicable statute, RCW 46.37.020, generally requires that headlights be illuminated beginning 30 minutes after sunset. “[T]he question of a valid stop does not depend upon [a defendant's] actually having violated the statute,” the Court held. “Rather, if [the officer] had a *reasonable suspicion that he was violating the statute*, the stop was justified.” Snapp, 174 Wn.2d at 198 (emphasis added).

In reaching its holding, the Court relied on State v. Mance, 82 Wn. App. 539, 918 P.2d 527 (1996) (police may not rely on information that is incorrect or incomplete through fault of police department); State v. O’Cain, 108 Wn. App. 542, 31 P.3d 733 (2001) (police dispatch indicating vehicle driven by defendant had been reported stolen did not provide reasonable suspicion for investigatory stop); State v. Sandholm, 96 Wn. App. 846, 848, 980 P.2d 1292 (1999) (“exclusive reliance on the WACIC stolen vehicle report would not have provided sufficient basis for the State to establish probable cause to arrest”).

Meanwhile, Creed distinguished State v. Gaddy, 152 Wn.2d 64, 71, 74, 93 P.3d 872 (2004), which held police officers were permitted to rely on erroneous license information from Department of Licensing, which is not a police agency, and whose information is presumptively reliable. In contrast, as Gaddy noted, police officers would not be permitted to rely on erroneous information subject to the “fellow officer rule.” Under that rule, if the agency or officer issuing the information lacks probable cause, then the arresting officer also lacks probable cause. Id. at 71.

In summary, under Creed, a police officer’s mistake regarding the status of a vehicle generally cannot support a reasonable suspicion.

The question becomes whether a police officer can, nonetheless, rely on mistaken information from another police agency. As the remaining

cases indicate, the State has the burden to prove such information is reliable. The failure to do so is fatal to assertion of reasonable suspicion. Not surprisingly, a showing that the relied-upon information is *inaccurate* also does not suffice.

Mance and O’Cain, relied on by Creed, are instructive, and more factually like the present case. In Mance, this Court held that police did not have probable cause to arrest the driver of a car that a police bulletin indicated was stolen. On March 4, 1994, Tacoma police arrested Mance because the car he was driving was listed on their “hot sheet,” a list of recently reported stolen vehicles. Mance, 82 Wn. App. at 540. Several days earlier, Mance had purchased the car from a dealer, but, due to a misunderstanding, the business owner reported the car stolen. The issue was resolved on March 2, and, with Mance present, the owner called police to cancel the stolen vehicle report. Id. at 540-41. The police report indicated that a call was received on March 3 attempting to cancel the stolen vehicle report, but no cancellation report was on file. Id. at 541.

This Court noted that probable cause may have existed at a previous point in time because the business owner had reported the car stolen. Id. at 542. A citizen informant, unlike a “professional” police informant or an anonymous tipster, is presumptively reliable. Id. But the owner later canceled the report and, although the police department had a record of

taking the call, at the time of the arrest police had not yet updated the bulletin. Id. at 543-44.

Mance, like Gaddy, rejected the notion that the “fellow officer rule” rendered the stop permissible. “The ‘fellow officer’ rule justifies an arrest on the basis of a police bulletin, such as a ‘hot sheet,’ if the police agency issuing the bulletin has sufficient information for probable cause The bulletin does not, however, insulate the arresting officer from problems with the sufficiency or reliability of the information known to the issuing police agency[.]” Mance, 82 Wn. App. at 542 (citing Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 568, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971)).

This Court also held that “[t]he State had the burden of proving that the two-day delay between the attempted cancellation of the stolen vehicle report and Mance’s arrest was reasonable.” Mance, 82 Wn. App. at 544 (citing 5 Wayne LaFave, SEARCH AND SEIZURE § 11.2(b) at 38 (3rd ed. 1996)). The State did not meet its burden. Mance, 82 Wn. App. at 545.¹¹

¹¹ Although this Court stated that if police had merely *detained* Mance rather than arresting him based on the erroneous report, the result may have been different. But statements that do not relate to an issue before the court and are unnecessary to decide the case constitute *orbiter dictum*, and need not be followed. State v. Potter, 68 Wn. App. 134, 150, 842 P.2d 481 (1992) (citing Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984)).

While Mance involved probable cause, rather than reasonable suspicion to detain, it supports suppression in this case, as the next case makes clear. O’Cain involved an investigative detention based on a report indicating a vehicle was stolen. But, despite the reduced predicate for an investigative detention, the Court also found the stop invalid.

In O’Cain, an officer was patrolling a neighborhood in an area known for narcotics transactions. O’Cain, 108 Wn. App. at 545-46. He saw people standing next to a car in a 7-Eleven parking lot. The officer “suspected” they were buying and selling drugs. Id. at 546. He called in the vehicle license number to dispatch, but drove on. Dispatch responded that the car had been reported stolen. Id. Based on this, the officer called for backup, returned to the parking lot, and seized the vehicle and its occupants. Id. at 546-47.

Division One of this Court held that the officer’s initial suspicion was based on no more than a hunch. Thus, the stolen vehicle dispatch was the only factual basis for the arrest. And standing alone, an unverified stolen vehicle report is no better than an anonymous tip, which is insufficient. Id. at 552-53.

In reaching this determination, O’Cain examined the United States Supreme Court’s decision in United States v. Hensley, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). There, police made an investigatory

stop based on a “wanted flyer” that had been received by teletype from a nearby town. During the stop, Hensley was found to possess handguns. He was convicted of being a felon in possession of firearms. Id. at 224-25.

The Sixth Circuit reversed Hensley’s conviction, reasoning that because police who stopped Hensley were familiar only with the flyer and not with the specific information that led to its issuance, they lacked a reasonable suspicion sufficient to justify an investigative stop. Id. at 225.

But the United States Supreme Court reinstated the conviction, stating:

Assuming the police make a Terry stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible *if the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop*, and if the stop that in fact occurred was not significantly more intrusive than would have been permitted the issuing department.

Id. at 233 (citing United States v. Robinson, 536 F.2d 1298 (9th Cir.1976) (emphasis added)).

According to O’Cain, the Supreme Court recognized that effective law enforcement cannot be conducted unless police officers can act on information transmitted by one police agency to another, and that officers, who often must act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information. Thus, an officer who acts in good-faith reliance upon the bulletin does not need to

have personal knowledge of the evidence supplying good cause for the stop. O’Cain, 108 Wn. App. at 551-52.

But, for the stop to withstand a motion to suppress, the issuing agency must have the necessary information to support the investigative stop. Id. at 552 (citing Hensley, 469 U.S. at 231 (citing Robinson, 536 F.2d at 1299-1300)).

Summarizing Hensley, Robinson, and other cases, the O’Cain Court observed that “when the legality of a warrantless seizure based on a police dispatch that a particular vehicle has been reported stolen is challenged, the State cannot justify the seizure merely by showing that the officer making the stop did so because he or she received the dispatch.” O’Cain, 108 Wn. App. at 552. Moreover, although stopping the car might constitute effective law enforcement, “the good faith of the officers executing the seizure does not relieve the State of its burden to prove that there was a factual basis for the stop—probable cause [for] an arrest, and reasonable suspicion [for] a Terry stop.” O’Cain, 108 Wn. App. at 553. When a conclusory allegation (such as that a named individual is a drug dealer) is obtained from some computerized compilation of information but no showing is made as to the basis of that allegation, it must be treated as if it were nothing more than an anonymous tip.” O’Cain, 108 Wn. App. at 555 (citing 2 Wayne LaFave, SEARCH AND SEIZURE § 3.5(e) at 277, n. 103 (1996)).

O’Cain discussed the ways the State might meet its burden. Notably, post-detention confirmation that the car actually had been stolen would not suffice. O’Cain, 108 Wn. App. at 553-54 (citing Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000)).

On the other hand, evidence regarding the procedures utilized by WACIC might suffice, provided that “such procedures are designed to enhance reliability and actually work that way most of the time.” O’Cain, 108 Wn. App. at 555-56 (quoting Sandholm, 96 Wn. App. at 848 (“the burden is on the State to establish the reliability of the radio report when the validity of a warrantless search or seizure is at issue[.]”).

b. *Application of the case law to the present case*

Progressing to the facts of this case, the State attempted to establish the reliability of the information in WACIC. The trial court determined the State met its burden. CP 23 (conclusion 2.2).

The trial court’s determination was erroneous. The State established the original report was valid. Indeed, Pedersen himself made the report. The State also presented evidence regarding the way Lewis County transfers such a report to WACIC.

The State also established the manner in which one Lewis County deputy attempted to remove the vehicle from the database following its

recovery. But the State did not present any evidence regarding the general effectiveness of that procedure. O’Cain, 108 Wn. App. at 555-56. And the evidence showed the mechanism did not work in this case.

The State had the burden to show the factual basis for the stop. O’Cain, 108 Wn. App. at 553, 555-56. Among other things, the State had the burden to show the delay in updating such records was reasonable. Id. at 556; Mance, 82 Wn. App. at 545.¹² The State did not demonstrate this, and the court made no such finding. This Court construes the absence of such a finding against the State. Smith, 106 Wn.2d at 451.

Considered another way, when an officer bases his or her suspicion on a tip (or information analogous to a tip), the State must show the tip bears some “indicia of reliability” under the totality of the circumstances. This means there must either be (1) circumstances establishing the tipster’s reliability *or* (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the information was obtained in a reliable fashion. Z.U.E., 183 Wn.2d at 618-19.

Conclusion 2.2, from which challenged conclusions 2.1, 2.4, and 2.7 all flow, states that the WACIC report indicating the Honda was stolen

¹² The Mance court found a one-day delay unacceptable. Mance, 82 Wn. App. at 540-41.

supplied Officer Lowrey with reasonable suspicion. But this is like finding reasonable suspicion based on testimony that a known police informant has an established track record—for unreliability. If anything, the State proved that Lewis County was effective at placing stolen vehicles into the WACIC database but ineffective at removing them, rendering the database inaccurate. Thus, the State did not satisfy the requirements set forth in Z.U.E., 183 Wn.2d at 618-19.

Finally, unlike in Sandholm, WACIC supplied the only basis for the stop. For example, in this case, no physical evidence corroborated the notion that the car was stolen. Cf. Sandholm, 96 Wn. App. at 848 (“strong physical evidence,” i.e., damage to vehicle’s locks, corroborated report that car was stolen).

In summary, because the State failed to prove that Lewis County used WACIC in a manner that would render the database reliable—indeed, the State proved the contrary—the State did not meet its burden of showing that Officer Lowrey’s reliance on the WACIC produced reasonable suspicion. Thus, the trial court erred in entering conclusion of law 2.2 and the conclusions flowing therefrom.

Because the initial detention was illegal, the ensuing evidence must be suppressed as the fruit of the poisonous tree. Gaines, 154 Wn.2d at 716-17.

4. The state constitution is more protective in this specific context. Therefore, under article 1, section 7, an impermissible intrusion into Pedersen's private affairs occurred, requiring suppression.

Recent state Supreme Court case law establishes that the Washington constitution is more protective in this specific context. Therefore, under article 1, section 7, an impermissible intrusion into Pedersen's private affairs occurred, and suppression is required.

Analysis under article I, section 7 consists of a two-step inquiry: first, this Court examines whether there has been a governmental intrusion into an individual's home or private affairs (the "private affairs" prong); and, if so, this Court analyzes whether authority of law justifies the intrusion (the "authority of law" prong). State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007).

Unlike the Fourth Amendment, article I, section 7 emphasizes "protecting personal rights rather than . . . curbing governmental actions." State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010) (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). This understanding of article 1, section 7 has led the state Supreme Court to conclude that the "right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." Afana, 169 Wn.2d at 180 (citing White, 97 Wn.2d at 110). Thus, while Washington's exclusionary rule also aims to

deter unlawful police action, its paramount concern is protecting an individual's right of privacy.¹³ Afana, 169 Wn.2d at 180. Therefore, if a police officer has disturbed a person's "private affairs," a reviewing court

does not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite "authority of law." *If not, any evidence seized unlawfully will be suppressed. With very few exceptions, whenever the right of privacy is violated, the remedy follows automatically.*

Id. (emphasis added)

Under the state constitution, the officer's stop constituted an impermissible, unauthorized intrusion into Pedersen's private affairs. Existing case law, as well as Gunwall itself, establishes the state constitution provides broader protections in this context.

In State v. Gunwall, the state Supreme Court set out six "nonexclusive neutral criteria" relevant in determining whether the state constitution is more protective than the federal constitution in a particular circumstance:

(1) the textual language [of the state constitution]; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

¹³ The trial court did not appear to fully recognize this. 1RP 38 (trial court's comments, during oral ruling, that "I believe that the exclusionary rule was intended to – I won't say punish but give a consequence to law enforcement for violating people's rights unlawfully.").

Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986),

The first, second, third, and fifth factors are “uniform” in any analysis of article I, section 7, and generally support analyzing our State constitution independently from the Fourth Amendment. Blomstrom v. Tripp, 189 Wn.2d 379, 401, 402 P.3d 831 (2017) (citing State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990)); cf. O’Cain, 108 Wn. App. at 545 n. 1 (“Although our state supreme court has held that the first, second, third, fifth and sixth Gunwall criteria all lead to the conclusion that art. I, § 7 provides greater protection to privacy than the Fourth Amendment, O’Cain has failed to adequately brief the fourth factor—pre-existing state law—as it relates to the issues in this case.”).

Nonetheless, “[i]t is now settled that article 1, section 7 is more protective than the Fourth Amendment, and a Gunwall analysis is no longer necessary.” State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). Rather, “[t]he only relevant question is whether article 1, section 7 affords enhanced protection in the particular context.” State v. Surge, 160 Wn.2d 65, 71, 156 P.3d 208 (2007) (recognizing a Gunwall analysis “is unnecessary to establish that this court should undertake an independent state constitutional analysis” under article 1, section 7); see also Chenoweth, 160 Wn.2d at 462-63 (“It is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas

provides greater protections than does the federal constitution. . . . Thus, a Gunwall analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis.”).

Regardless of whether the question is formulated as one of state constitutional protection in the particular context, or the fourth Gunwall factor, analysis of “pre-existing state law,”¹⁴ it is clear that the state constitution provides broader protection in this particular context.¹⁵

Again, under the state constitution, this Court determines whether there has been a governmental intrusion into an individual’s private affairs and, if so, whether authority of law justifies the intrusion. Chenoweth, 160 Wn.2d at 463. First, regarding the private affairs at stake, state case law that has developed since Mance and O’Cain indicates Pedersen has an enhanced state constitutional protection in his vehicle.

In the context of automobile stops, the Supreme Court recognizes the state constitution is more protective than the federal constitution. For a time, Washington law permitted officers to search the passenger

¹⁴ Gunwall, 106 Wn.2d at 58.

¹⁵ As for the sixth factor, it is well-established that “privacy matters are of particular state interest and local concern.” State v. Johnson, 128 Wn.2d 431, 446, 909 P.2d 293 (1996) (citing Boland, 115 Wn.2d at 576); see also Morgan v. Comm’r of Internal Revenue, 309 U.S. 78, 80, 60 S. Ct. 424, 84 L. Ed. 1035 (1940) (“State law creates legal interests and rights.”).

compartment of an arrestee's vehicle, without a warrant, for weapons and destructible evidence, immediately following arrest. See, e.g., State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), overruled in part by State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). However, when the United States Supreme Court decided Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), this expansive application of the vehicle-search-incident-to-arrest exception to the warrant requirement ended. Id. at 351. Following Gant, officers may search a vehicle incident to arrest “only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” Id.

The state Supreme Court decided several cases after Gant, culminating in Snapp, in which the Court recognized that protections under article I, section 7 of the Washington Constitution relating to the privacy interest in vehicles go beyond federal jurisprudence.

Gant allowed officers to search a vehicle incident to arrest for evidence of the crime of arrest. Gant, 556 U.S. at 351. But in Snapp, Washington rejected such a rule under our state constitution. Snapp, 174 Wn.2d at 195-96.

Thus, under article I, section 7, officers lack the legal authority to search a vehicle incident to arrest even if they reasonably believe or can

articulate probable cause that the vehicle contains evidence of the crime of arrest. Rather, they must obtain a warrant. State v. Louthan, 175 Wn.2d 751, 754, 287 P.3d 8 (2012) (analyzing Snapp).

The “particular context”¹⁶ at issue in this case may also be framed as whether a police officer’s good faith (but demonstrably false) belief a car is stolen insulates the stop from the exclusionary rule. Indeed, as of the date of Pedersen’s detention, the report that the car was stolen was two days out of date and therefore invalid. Regarding whether the vehicle stop was, somehow, nonetheless permissible—as the trial court determined—the state Supreme Court has rejected the notion that an officer’s good faith belief in the legitimacy of the stop insulates the action from operation of the exclusionary rule. Afana, 169 Wn.2d at 180 (rejecting State’s argument officer’s good faith believe in lawfulness of stop insulated illegal detention from operation of the exclusionary rule); cf. State v. Winterstein, 167 Wn.2d 620, 631-36, 220 P.3d 1226 (2009) (similarly rejecting federal inevitable discovery doctrine).

In Afana, the Supreme Court rejected the notion that a police officer’s reliance on information “in good faith” provides authority of law for a stop. “By ‘good faith,’ the Court means ‘objectively reasonable

¹⁶ Surge, 160 Wn.2d at 71.

reliance' on something that appeared to justify a search or seizure when it was made.'" Afana, 169 Wn.2d at 179-80 (citing Herring v. United States, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L.Ed.2d 496 (2009)).¹⁷ The state Supreme Court held that the good faith exception to the federal exclusionary rule is *incompatible* with article 1, section 7. Id. at 179-84.

Thus, in Afana, even if the police officer believed his search of a car incident to arrest of the passenger was permissible, suppression was still required where the search violated the constitution.

5. Summary of arguments and required relief

In summary, under Creed, a police officer's mistake cannot support a reasonable suspicion. Under O'Cain and Mance, a police officer is not entitled to rely on the mistake of others. It certainly is not permitted to do

¹⁷ In rejecting the good faith doctrine, Afana summarized the cases in which the United States Supreme Court had found an officer's good faith prevented the triggering of the exclusionary rule:

See Herring, [555 U.S. at 146-47] (quashed arrest warrant); Arizona v. Evans, 514 U.S. 1, 14-16, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (quashed arrest warrant); Illinois v. Krull, 480 U.S. 340, 349-53, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987) (statute authorizing warrantless administrative searches subsequently declared unconstitutional); [United States v. Leon, 468 U.S. 897, 922, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)] (search warrant ultimately found to be invalid).

Afana, 169 Wn.2d at 180 n. 6.

so where the State fails to prove that the underlying source of information is reliable. O'Cain, 108 Wn. App. at 555-56; Mance, 82 Wn. App. at 544-45.

Under article 1, section 7, moreover, the state Supreme Court has rejected police officers' good faith reliance on erroneous facts or law. Thus, the stop intruded into Pedersen's private affairs without authority of law, requiring suppression.

Based on the foregoing, because the detention was unlawful, the evidence flowing from the detention must be suppressed.

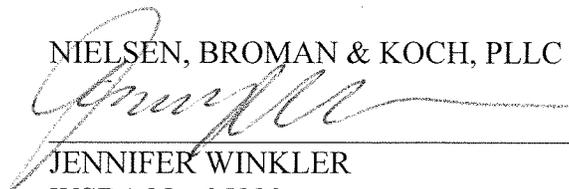
D. CONCLUSION

The trial court erred in failing to suppress the evidence flowing from the illegal detention. Because without such evidence, there is insufficient to support the charged crimes, the convictions must be reversed.

DATED this 20th day of February, 2018.

Respectfully submitted,

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APPENDIX

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Findings of Fact and Conclusions of Law
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IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHANE PEDERSEN,

Defendant.

No. 16-1-00673-21

Findings of Fact and Conclusions of Law
Re: CrR 3.6 Motion to Suppress.

On April 12, 2017, a motion to suppress made pursuant to CrR 3.6 was held in this Court before the Honorable J. Andrew Toynbee. The Defendant was present with his attorney of record, Christopher Baum. The State was represented by Deputy Prosecuting Attorney Paul Masiello. The Court considered the testimony of Deputy Tyson Brown and Officer Doug Lowrey, along with exhibits that were admitted at the hearing. The Defendant did not testify or present other witnesses. The Court made the following findings of fact and conclusions of law:

FINDINGS OF FACT

- 1.1 On November 16, 2016, Officer Doug Lowrey was at Exit 77 along I-5 in Lewis County when he observed a Honda and ran the license plate of the vehicle through the Washington Crime Information Center (WCIC).
- 1.2 WCIC is commonly used by law enforcement to check vehicles for being stolen.

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- 1.3 That WCIC check showed that the vehicle had been listed as stolen.
- 1.4 The person reporting the vehicle as stolen was Shane Pedersen, the defendant herein.
- 1.5 To report the vehicle as stolen, Pedersen was required to fill out a form detailing the circumstances involving the vehicle being stolen and sign the statement under the penalty of perjury.
- 1.6 Once this form was filled out, the information about the vehicle being stolen was added to WCIC by the Lewis County Sheriff's Office.
- 1.7 Officer Lowrey followed the Honda westbound on Highway 6 until the Honda pulled into a nearby Chevron.
- 1.8 Officer Lowrey noted that an Acura was following close behind the Honda while he followed it. It appeared to Officer Lowrey that the drivers of the vehicles were travelling together.
- 1.9 When the Honda pulled into the Chevron, the Acura also pulled into the Chevron and was occupied by a female driver.
- 1.10 After the Honda stopped, Officer Lowrey activated his overhead lights in order to investigate the stolen vehicle report from WCIC.
- 1.11 The driver of the Honda was identified as Shane Pedersen.
- 1.12 Pedersen stated he had just picked up his Honda from impound.
- 1.13 On November 14, 2017, Deputy Brown had located the Honda and impounded it.
- 1.14 After the vehicle was impounded, Deputy Brown requested to dispatch that the Honda be removed from WCIC, but it was not removed.
- 1.15 A routine check on Pedersen through dispatch during this contact showed he had an active protection order prohibiting him from having contact with Tasha Overstake.

1 1.16 The female driver of the Acura was contacted and identified as Tasha
2 Overstake.

3 1.17 Pedersen was placed under arrest solely for violating the terms of the
4 restraining order.

5 1.18 A plastic baggie containing a crystalline substance was located on
6 Pedersen during a search incident to his arrest.
7

8
9 **CONCLUSIONS OF LAW**

10
11 2.1 The stop of Pedersen by Officer Lowrey was a valid investigatory
12 detention pursuant to *Terry v. Ohio*, and its progeny.

13 2.2 Officer Lowery's reliance on the information in WCIC was reasonable, and
14 constituted reasonable suspicion to perform the investigatory detention.

15 2.3 The scope and duration of Officer Lowery's detention was reasonable.

16 2.4 The discovery of Pedersen's identity and the restraining order stemmed
17 from the valid initial contact to investigate the stolen vehicle.

18 2.5 Because of the close proximity between the female and the male
19 throughout Officer Lowrey's observations, contacting the female for her
20 identification was lawful after learning of the restraining order.
21

22 2.6 Officer Lowery had probable cause to arrest Pedersen for violating the
23 restraining order between he and Overstake.

24 2.7 The discovery of the methamphetamine in Pedersen's coin pocket was
25 pursuant to a valid search incident to arrest.
26

27 **ORDER**

28 Based on the foregoing Findings of Fact and Conclusions of Law, the Court
29
30 **HEREBY ORDERS, ADJUDGES AND DECREES:**

1 That the evidence obtained during the search incident to arrest of
2 Pedersen is admissible in the State's case in chief, subject to foundational
3 and other evidentiary requirements.
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5 DATED this 2nd day of June, 2017.

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9 Judge J. Andrew Toynbee
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NIELSEN, BROMAN & KOCH P.L.L.C.

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