

FILED
Court of Appeals
Division II
State of Washington
6/22/2018 1:20 PM

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

REPLY BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ISSUES IN REPLY</u>	1
B. <u>ARGUMENT IN REPLY</u>	1
1. THE STATE’S BRIEF IS MISLEADING AS TO EVIDENCE IN THE RECORD SUPPORTING THE RELIABILITY OF THE DATABASE AS UTILIZED IN LEWIS COUNTY.	1
2. THE PORTION OF <i>STATE V. MANCE</i> RELIED ON BY THE STATE IS MERE DICTUM AND IS, MOREOVER, INCONSISTENT WITH GENERAL AUTHORITY REGARDING INVESTIGATIVE DETENTIONS.....	3
C. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Bellevue v. Acrey
103 Wn.2d 203, 691 P.2d 957 (1984)..... 5

State v. Gaines
154 Wn.2d 711, 116 P.3d 993 (2005)..... 7

State v. Mance
82 Wn. App. 539, 918 P.2d 527 (1996)..... 1, 3, 4

State v. O’Cain
108 Wn. App. 542, 31 P.3d 733 (2001)..... 1, 2, 5, 6

State v. Potter
68 Wn. App. 134, 842 P.2d 481 (1992)..... 5

FEDERAL CASES

United States v. Hensley
469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985)..... 5

United States v. Robinson
536 F.2d 1298 (9th Cir.1976) 6

A. ISSUES IN REPLY

1. Is the State’s brief misleading as to the existence of evidence in the record supporting the reliability of Washington Crime Information Center (WACIC) for cars reported stolen and recovered in Lewis County?

2. Is that portion of State v. Mance, 82 Wn. App. 539, 918 P.2d 527 (1996) relied on by the State dictum and, moreover, is it inconsistent with controlling law regarding investigative detentions based on third party reports?

B. ARGUMENT IN REPLY

1. THE STATE’S BRIEF IS MISLEADING AS TO EVIDENCE IN THE RECORD SUPPORTING THE RELIABILITY OF THE DATABASE AS UTILIZED IN LEWIS COUNTY.

The State’s brief contains a misleading citation, suggesting that the record contains evidence that Lewis County’s procedures for interfacing with WACIC “work. . . most of the time.” Brief of Respondent (BOR) at 11. This Court should reject the State’s assertion.

The State argues the burden to show the reliability of a stolen vehicle report may be satisfied by “presenting testimony regarding the procedures utilized by WACIC—assuming that such procedures are designed to enhance reliability and actually work that way most of the time.” BOR at 11 (citing State v. O’Cain, 108 Wn. App. 542, 556, 31 P.3d 733 (2001)).

The State's brief goes on to argue that "[a]lthough the information was not up to date in this instance, the testimony provided suggests the procedures utilized by WACIC are designed to enhance reliability and 'do actually work that way most of the time.' RP (4/12/17) 9." BOR at 11.¹

The State may have been intending merely to quote from O'Cain, and to suggest that such information appears at that page in the record. But the brief, as written, suggests quoted language appears at that page of the transcripts. It does not. Moreover, as the opening brief points out, the record contains *no* information regarding the reliability of the procedures.

Deputy Brown testified the normal procedure he would follow, upon learning a vehicle had been recovered, would be to request dispatch or "records" to remove the stolen vehicle report. 1RP 9-10. But the record reveals nothing about the effectiveness, or timeliness, of such a procedure.

In other words, Brown testified as to what he (and perhaps other officers) would normally do. See 1RP 10 (acknowledgment that Brown did not, in fact, know if the report had been removed once the vehicle was recovered); cf. O'Cain, 108 Wn. App. at 555-56. But there was no information about what dispatch or the records department generally would do. There was no information about how long "records" or "dispatch"

¹ The State quotes from the verbatim report identified as 1RP in the Brief of Appellant. This brief will continue to refer to it as 1RP.

generally took to relay such information to WACIC. Perhaps personnel called in vehicle recoveries weekly. We simply don't know. But it was the State's burden to prove reliability.

And, as argued in the opening brief, the State proved the opposite—that Lewis County's system for updating the record was unreliable. Brief of Appellant (BOA) at 23. The vehicle Pedersen was driving was not stolen. Indeed, despite the earlier (and undoubtedly legitimate) report, the vehicle had been recovered—by police—two days before the vehicle stop.

Pedersen acknowledges it is unlikely the State deliberately attempted to mispresent the record in its brief. Nonetheless, this Court should disregard the misleading assertion. In summary, the State failed to prove the reliability of the Lewis County/WACIC interface.

2. THE PORTION OF *STATE V. MANCE* RELIED ON BY THE STATE IS MERE DICTUM AND IS, MOREOVER, INCONSISTENT WITH GENERAL AUTHORITY REGARDING INVESTIGATIVE DETENTIONS.

Even though the original detention in this case can be considered an investigatory detention rather than bull-blown arrest, the detention was unlawful. Relying in part on Mance, 82 Wn. App. at 545, the State argues to the contrary. BOR at 9. But the portion of Mance relied on by the State is mere dictum. Moreover, the dictum is inconsistent with controlling

authority regarding investigative detentions where the underlying suspicion is supplied by an outside entity.

In Mance, this Court held that police did not have probable cause to arrest the driver of a car for stolen vehicle possession even though a police bulletin indicated the car was stolen. On March 4, Tacoma police arrested Mance because the car he was driving was listed on their “hot sheet,” a list of vehicles recently reported stolen. Mance, 82 Wn. App. at 540. The record revealed that the reporting party, a business, had attempted to cancel the stolen vehicle report the day before the arrest, but no cancellation report was on file. Id. at 540-41. Mance was ultimately convicted on drug charges after drugs were discovered on his person during the arrest. 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 business 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.

This Court stated, however, that if police had merely *detained* Mance rather than arresting him based on the erroneous report, the result *may* have been different. Id. at 545. The State relies on this statement to

argue that Pedersen’s arrest was permissible because the initial seizure was a mere investigative detention. BOR at 9.

As pointed out in the opening brief, however, this Court’s statement should be considered obiter dictum. BOA at 17 n. 11 (citing State v. Potter, 68 Wn. App. 134, 150, 842 P.2d 481 (1992); Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984)).

Moreover, while this Court indicated the result *might* have been different, subsequent case law makes it clear that, consistent with Mance’s overarching principles, Pedersen’s detention was illegal.

Although stopping a car might be considered effective law enforcement, “the good faith of the officers executing [a] 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 an investigative detention.]” O’Cain, 108 Wn. App. at 552-53.²

In reaching this determination, O’Cain examined the United States Supreme Court’s decision in United States v. Hensley, 469 U.S. 221, 105

² As the State’s brief indicates, Deputy Brown testified law enforcement officers commonly rely on WACIC. See 1RP 6 (the WACIC database “has a lot of pertinent information and resources that law enforcement uses pertaining to stolen vehicles, stolen items, you know, warrants.”). But such testimony does not provide the requisite evidence of reliability. O’Cain, 108 Wn. App. at 552-53. Nor does it establish that Lewis County’s method of exchanging information with WACIC regarding stolen vehicles was reliable.

S. Ct. 675, 83 L. Ed. 2d 604 (1985). There, police made an investigatory detention based on a “wanted flyer” that had been received by teletype from a nearby town. During the stop, Hensley was found to possess handguns, and he was convicted of being a felon in possession. Id. at 224-25.

The Sixth Circuit reversed Hensley’s conviction, reasoning that because the 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.

Although the United States Supreme Court reinstated the conviction, the Court indicated that the police who issued the flyer or bulletin needed to, in fact, possess a reasonable suspicion justifying a stop. Id. at 233 (citing United States v. Robinson, 536 F.2d 1298 (9th Cir.1976) (emphasis added)).

Thus, whether a stop is based on probable cause, or reasonable suspicion, the underlying information relied on by the officers performing the stop must itself possess the requisite level of reliability: If the stop is an arrest, the report must itself be supported by probable cause. If the stop is an investigative detention, it must be supported by reasonable suspicion. O’Cain, 108 Wn. App. at 553.

As argued, the State did not prove that the police officers possessed a reasonable suspicion that Pedersen was committing a crime, because the

State did not prove the underlying information was reliable. Again, the State proved that it was unreliable, in that it proved the stolen vehicle report was not timely removed from the database, and there was no corresponding information that this situation presented an anomaly.

This Court should suppress the evidence flowing from the illegal stop. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

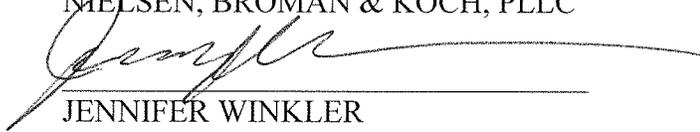
C. CONCLUSION

For the reasons stated above and in Mr. Pedersen's opening brief, this Court should suppress the evidence and reverse his convictions.

DATED this 22nd day of June, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

June 22, 2018 - 1:20 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50404-9
Appellate Court Case Title: State of Washington, Respondent v. Shane Pedersen, Appellant
Superior Court Case Number: 16-1-00673-1

The following documents have been uploaded:

- 504049_Briefs_20180622131908D2482951_6146.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was RBOA 50404-9-II.pdf

A copy of the uploaded files will be sent to:

- Jessica.Blye@lewiscountywa.gov
- appeals@lewiscountywa.gov
- teri.bryant@lewiscountywa.gov

Comments:

Coy mailed to: Shane Pedersen 143 Alder Street P.O. Box 101 Pe Ell, WA 98572-1000

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Jennifer M Winkler - Email: winklerj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180622131908D2482951