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NO. 52117-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM PILAND,

Appellant.

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

The Honorable Gregory Gonzales, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel when counsel failed to move to suppress evidence on the ground that it was the fruit of an invalid traffic stop.

2. The trial court erred when it erroneously included discretionary legal financial obligations (LFOs) in the Judgment and Sentence after it had ruled appellant would pay only mandatory LFOs due to his indigence.

Issues Pertaining to Assignments of Error

1. The evidence in this case flowed from a traffic stop. A detective contacted an officer and asked him to stop appellant's car. The car had just left the location where the detective was conducting surveillance as part of a narcotics investigation. The officer saw the car, observed its day trip permit had been illegally altered, and stopped the car. Appellant (who was driving) was removed from the car, handcuffed, and searched. Detectives from the investigative immediately responded. Although drugs were not found on appellant, a K9 unit was called in to sniff for narcotics and mistakenly alerted there were drugs. During a later search, the only thing that was found in the car was an antique revolver. Within two hours of the traffic stop, the detective who had asked that

appellant's car be stopped had obtained and was executing a search warrant for appellant's home – which happened to be at the same location the Detective had been surveilling when he asked the officer to initiate the traffic stop. Drugs were found at the residence. Despite these circumstances, defense counsel failed to move to suppress the evidence on the ground the stop was pretextual. Was appellant denied effective assistance of counsel?

2. Due to appellant's indigence, the trial court ruled it would only impose mandatory LFOs. However, the Judgment and Sentence mistakenly includes discretionary LFOs as well. Is remand required for the trial court to correct this error?

B. STATEMENT OF THE CASE

1. Procedural History

On November 16, 2016, the Clark County prosecutor charged appellant William Piland with one count of possession of a controlled substance with intent to deliver, one count of possession of a controlled substance, and one count of second degree unlawful possession of a firearm. CP 3-4, 47-48. The information also alleged the controlled substance charges took place within 1,000 feet of a school bus route stop. CP 3.

Defense counsel filed a motion to suppress evidence. CP 6-20. The motion consisted of nothing more than boilerplate text on the law as it pertains to search warrants defects. Id. A few months later, defense counsel filed the same motion, but attached a short declaration. CP 21-37. However, she did not offer any information about the contents of the search warrant. Id. Counsel also failed to identify what evidence she was seeking to suppress. CP 21-37. Consequently, the trial court concluded it was impossible to make a ruling based on the pleading, and it denied her motion for a 3.6 hearing. CP 38-41.

New counsel was later appointed. CP ___ (sub no. 35-36). However, newly appointed counsel never moved for a 3.6 hearing.

After a trial,¹ the jury found Mr. Piland guilty of all counts. CP 92-95. Mr. Piland was sentenced to 48 months confinement. CP 99. The trial court also imposed mandatory LFOs. CP 101. Finding Mr. Piland indigent, it waived all discretionary LFOs. RP 663. However, the Judgement and Sentence fails to reflect this ruling, erroneously including some of the preprinted discretionary fees. CP 101-02.

¹ There were two trials. The first ended in a mistrial because one juror had to be excused for health problems, and another had to be excused due to the anxiety and stress she felt as a juror. RP 247, 306-27.

2. Substantive Facts

On November 10, 2016, Officer James Kelly was working on routine patrol in Vancouver, when Detective Zachary Ripp contacted him. RP 43. Detective Ripp was a member of the Vancouver Neighborhood Response Team (NRT).² Mr. Piland lived in the same residence as a person the NRT was surveilling. RP 8-9, 174. Detective Ripp informed Officer Kelly he was undertaking a nearby investigation, they were looking for someone in connection with that investigation, and they believed that the person was in Mr. Piland's car. RP 8-9, 43, 370. Detective Ripp asked for the officer's assistance in stopping the car and contacting the persons in the car. RP 43.

Shortly afterward, Officer Kelly located Mr. Piland's car, observed there was an altered trip permit, and stopped the car. RP 43. Officer Kelly ordered Mr. Piland out, patted him down, and took possession of Mr. Piland's wallet and cell phone. RP 272-73.

Meanwhile, Detective Ripp and Detective Jordan Rasmussen (also a member of the NRT) arrived on the scene promptly. RP 373, 376, 380. No drugs were found on Mr. Piland, but he had \$881.00 in cash because he was on his way to a tow-yard to pay for the release

² The NRT focuses on community crime trends by spearheading investigations into such problems as "suspected drug houses." RP 57, 380.

of a car. RP 373, 555, 560. Police conducted a K-9 sniff of the car for controlled substances. CP 2.

Detective Rasmussen transported Mr. Piland back to the police station for more questioning. RP 59. Mr. Piland told the detective the car was his, and he had altered the trip permit to save a few dollars. RP 59. Rasmussen asked Mr. Piland if he ever used heroin. RP 59. Mr. Piland said he had not. RP 59. Rasmussen asked Mr. Piland to confirm his address. RP 59. Mr. Piland did so. RP 59.

Within two hours of the traffic stop, Detective Ripp had obtained a search warrant for Mr. Piland's residence, and the NRT team was executing it. RP 171, 103. Officers discovered drug residue (methamphetamine and heroin) on several items, including digital scales. RP 109-117, 531. They also discovered a baggie and a jar, each containing a small amount of meth. RP 136, 139, 533. The amount of drugs found was characterized by Detective Rasmussen as "minor," totaling only 9.2 grams. RP 85.

The next day, officers searched Mr. Piland's car. RP 73. Although the K9 dog had mistakenly alerted to the presence of drugs earlier, police only found an antique revolver. CP 2; RP 73-77. The police range master testified that based on his observation of the

functioning of the gun, it was capable of firing a projectile via an explosion of gun powder.³ RP 539-40.

C. ARGUMENT

1. MR. PILAND WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO MOVE TO SUPPRESS EVIDENCE OBTAINED FOLLOWING A PRETEXTUAL TRAFFIC STOP.

Mr. Piland was denied effective assistance of counsel when counsel failed to challenge the traffic stop as unconstitutional and move to suppress the evidence. As shown below, given the facts in this record, the failure to pursue suppression was objectively unreasonable, constituting deficient performance. Moreover, because evidence that is fruit of an illegal search must be suppressed, there is a reasonable probability that but for counsel's deficient performance the outcome would have been different.

A defendant is constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend 6; Const. art. 1 § 22. He is denied this right when his attorney's conduct: (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) this deficient performance prejudiced the

³ The gun was never test fired because the range master could not determine the proper caliber of bullet and did not want to risk the safety issues if he guessed wrong. RP 539.

defendant. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Here, defense counsel was ineffective for failing to move to suppress the evidence on ground that the stop was invalid.

Effective representation entails certain basic duties, such as the overarching duty to advocate the defendant's cause and the more particular duty to assert such skill and knowledge as will render the trial a reliable adversarial testing process. Strickland, 466 U.S. at 688; In re Personal Restraint of Yung–Cheng Tsai, 183 Wn.2d 91, 100, 351 P.3d 138 (2015). Counsel's unreasonable failure to adequately investigate the facts or research relevant law without a legitimate tactical purpose constitutes deficient performance. Tsai, 183 Wn.2d at 102; State v. Jury, 19 Wn. App. 256, 263–64, 576 P.2d 1302(1978).

When an appellant asserts his counsel was ineffective for failing to move to suppress the evidence on the ground the underlying traffic stop was invalid, the record must establish some basis for determining the pretextual nature of the stop. State v. Nichols, 161 Wn. 2d 1, 10, 162 P.3d 1122, 1126 (2007). Ineffective assistance of counsel exists where the record demonstrates the

pretextual nature of the stop, but counsel failed to effectively challenge the validity of that stop. State v. Meckelson, 133 Wn. App. 431, 436-38, 135 P.3d 991, 994 (2006) (remanding for an evidentiary hearing where due counsel was ineffective in failing to challenge a pretext stop). As shown, such a record exists here.

Pretextual traffic stops are unconstitutional under article I, section 7. State v. Ladson, 138 Wn.2d 343, 349, 351, 979 P.2d 833 (1999). A pretextual stop occurs when an officer stops a vehicle to conduct a speculative criminal investigation unrelated to the driving, and not for the purpose of enforcing the traffic code. Id. “Pretext is, by definition, a false reason used to disguise a real motive.” Id. at 359 n. 11 (quoting Patricia Leary & Stephanie Rae Williams, Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures, 69 TEMP. L.REV. 1007, 1038 (1996)).

A warrantless traffic stop based on mere pretext is unconstitutional because it does not fall within any exception to the warrant requirement and therefore lacks the authority of law required for an intrusion into a citizen's privacy interest. Ladson, 138 Wn.2d at 349. The reasonable articulable suspicion that a traffic infraction has occurred, which justifies an ordinary

warrantless traffic stop, does not justify a stop for criminal investigation. Id. at 358.

Pretextual stops by police officers represent an attempt to circumvent the important constitutional limits placed on police discretion in such cases. State v. Arreola, 176 Wn. 2d 284, 295, 290 P.3d 983, 990 (2012). Warrantless traffic stops based on a reasonable suspicion of a traffic infraction are allowed only because such stops are reasonably necessary to enforce the traffic regulations suspected of being violated. Id.

In a pretextual traffic stop, a police officer has not properly determined that the stop is reasonably necessary in order to address the traffic infraction for which the officer has a reasonable articulable suspicion. Id. Instead, the traffic stop is desired because of some other (constitutionally infirm) reason — such as a mere hunch regarding other criminal activity or furthering a general criminal investigation being conducted by police. Ladson, 138 Wn.2d at 346. A pretextual stop thus disturbs private affairs without valid justification and is unconstitutional. Id. at 358.

To determine whether a stop was pretextual, courts must “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.” Id., at 359. This inquiry is not toothless. See, Arreola, 176 Wn. 2d at 296-97 (citing numerous cases where a pretextual stop has been found).

Even where the officer may have mixed motives to stop a car (some constitutionally legitimate and others not), the stop is still unconstitutional if police have not exercised their discretion to conduct a traffic stop legitimately. Id. at 299–300. Therefore, in mixed-motive cases, the court's inquiry must still focus on whether investigation of a traffic infraction was “an actual, conscious, and independent cause of the traffic stop.” Id. The presence of illegitimate reasons for the stop are relevant to that inquiry. Id.

In this case, the record establishes that the actual cause of the traffic stop was to further Detective Ripp’s narcotics investigation, and it was not for the purpose of enforcing the traffic code. Detective Ripp and the Neighborhood Response Team were conducting an investigation, and Detective Ripp believed his target was riding in Mr. Piland’s car. RP 8-9, 43, 370. Detective Ripp asked an officer to conduct a traffic stop to further that investigation.

Officer Kelly knew Detective Ripp was conducting an investigation in the area. He understood the detective wanted him

to initiate a traffic stop to make contact with the target of that investigation. RP 43, 370. Officer Kelly saw Mr. Piland's car, looked for a traffic violation, and then used that to justify stopping the car for Detective Ripp. RP 43, RP 370-72. Hence, this was a quintessential pretext stop. The cause of the stop was not to enforce the traffic code, but to enable police to further the NRT's general criminal investigation.

Other factors also strongly suggest that the purpose of the stop was to further Detective Ripp's narcotics investigation rather than cite Mr. Piland for his altered trip permit. First, two detectives working on the NRT drug investigation quickly responded to the traffic stop and took custody of Mr. Piland. RP 45, 57. Such a response is rather excessive for a minor traffic violation for an altered trip permit.

Second, Mr. Piland was removed from the car, handcuffed, and searched even though this was supposed to be a routine traffic stop for an altered trip permit. RP 44. The record offers no explanation for why such actions were necessary.

Third, although no drugs or weapons were found on Mr. Piland, a K9 unit was called to sniff his car. CP 2; RP 45. Again,

this suggests that the purpose of the stop was not just to enforce a traffic infraction but instead to further the narcotics investigation.

Fourth, in less than two hours after the traffic stop, Detective Ripp wrote and the NRT was executing a search warrant for Mr. Piland's residence – the focal point of NRT's surveillance before the stop. RP 9, 103, 171, 174. This again supports the notion that the traffic stop was conducted as a means of furthering Detective Ripp's narcotics investigation, and the actual cause was not merely to cite Mr. Piland for the traffic infraction.

Taken all together, the circumstances in this case demonstrate the very essence of a pretextual stop. The police misused their ordinary discretion to a conduct traffic stop to investigate a traffic code violation, and instead initiated the traffic stop as a means of furthering a separate narcotics investigation.

Indeed, there is no substantive difference between the circumstances here and those in Ladson. There, officers were investigating gang related narcotics trafficking. Ladson, 138 Wn.2d at 346. They followed a suspected car for several blocks looking for a legal justification to stop it, so they could further investigate whether the occupants were involved in narcotics trafficking. Id. The officers eventually pulled the vehicle over because it had

expired license tabs. Id. The Washington Supreme Court concluded the traffic stop in Ladson was unconstitutional because the actual cause of the stop was to investigate a narcotics violation, not to address the traffic infraction. Id. at 358.

The facts of this case are also similar to those in State v. DeSantiago, 97 Wn. App. 446, 983 P.2d 1173 (1999), where police engaged in an illegal, pretextual stop. There, the officer saw the defendant exit an apartment complex that was a narcotics hot spot. Id. at 452. The officer followed the defendant as he left in his car. Id. The officer was looking for a reason to stop the car, so he could investigate whether the defendant had drugs. Id. After following the car for several blocks, the officer saw the defendant make an improper left turn and stopped him. Id. The Court of Appeals held the stop was a pretextual stop because the traffic infraction was not the actual reason for the stop. Id. at 452.

The circumstances here are essentially the same as those in Ladson and DeSantiago. The actual cause of the stop was to investigate a narcotics violation, and the traffic violation was just a pretext. Hence, just as in Ladson and DeSantiago, the record here shows the stop was unconstitutional.

Given that the record shows a pretextual stop, it was objectively unreasonable for counsel to fail to move to suppress the evidence on the basis that the stop was invalid. It was defense counsel's job to represent Mr. Piland's interests, and that included moving to suppress the evidence under Ladson. She did not do so here. Thus, the first prong of Strickland is established.

Not only was counsel's performance deficient, but it was also prejudicial. Under Strickland, prejudice is established if there is a reasonable probability that the outcome would have been different but for the attorney's conduct. Strickland, 466 U.S. at 693. Importantly, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id. at 693. A reasonable probability exists if counsel's deficient performance merely undermines confidence in the outcome. Id. at 634.

Here, there is a reasonable probability based on the circumstances surrounding the stop that the outcome would have been different. As discussed above, the circumstances of the stop establish it was pretextual. If a traffic stop is pretextual, all subsequently obtained evidence flowing from the stop must be suppressed as derivative of the unconstitutional seizure. Ladson,

at 359. In this case, the stop led to the discovery of the drugs and the gun, which could and would have been suppressed as fruit of an illegal search but for counsel's failing. This is sufficient to undermine confidence in the outcome. Hence, the prejudice prong of Strickland is also satisfied. See, Meckelson, 133 Wn. App. at 431 (holding the Strickland prejudice prong was met where evidence flowed from an unchallenged pretextual stop).

In sum, Mr. Piland was denied effective assistance of counsel when counsel failed to move to suppress evidence on ground that the stop was constitutionally invalid. As such, remand is required for a 3.6 hearing. Id. at 438.

2. THE TRIAL COURT ERRED WHEN IT MISTAKENLY INCLUDED DISCRETIONARY LFOS IN THE JUDGMENT AND SENTENCE AFTER HAVING RULED MR. PILAND WOULD ONLY BE LIABLE FOR MANDATORY FEES DUE TO HIS INDIGENCE.

Before the trial court may order a defendant pay discretionary costs pursuant to RCW 10.01.160, the record must reflect the court considered the defendant's personal financial circumstances and made an individualized inquiry into his or her ability to pay. State v. Blazina, 182 Wn.2d 827, 837–38, 344 P.3d 680 (2015). The trial court “shall not” order a defendant to pay

discretionary LFOs unless it first finds the defendant is or will be able to pay these. Id.; RCW 10.01.160(3).

At sentencing, the trial court found Mr. Piland was indigent. RP 663; CP 99. Considering this, the trial court ruled it would waive all discretionary costs. RP 663. There is nothing in the record indicating the trial court ever reconsidered this ruling before signing the judgment and sentence. RP 663-65.

In the Judgment and Sentence, the trial court specifically crossed out the filing fee, the fee for the court appointed attorney, and the VUCSA fine, indicating these were waived. CP 101-02. Unfortunately, however, the Judgment and Sentence still mistakenly includes preprinted language imposing a jury demand fee of \$250 and a crime lab fee of \$100 – both discretionary fees. CP 101-02. The trial court also left blank the space for it to write its total fee, thus leaving it unclear as to whether total fees include these two discretionary fees. CP 102.

Since the trial court had already ruled it would impose only mandatory LFOs, the inclusion of those two discretionary fees in the Judgment and Sentence was likely due to one of two circumstances: (1) the trial court failed to recognize the discretionary LFOs as such, or (2) scrivener's error. Given the

plethora of cases issued since Blazina discussing the distinction between discretionary and mandatory LFOs, it is highly unlikely the trial court did not understand which fees were mandatory and which were discretionary. Instead, it is likely that the inclusion of the discretionary LFOs in the written judgment was the result of scrivener's error.

The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. E.g., State v. Makekau, 194 Wn. App. 407, 421, 378 P.3d 577 (2016). Consequently, this Court should remand for the trial court to correct the judgment and sentence.

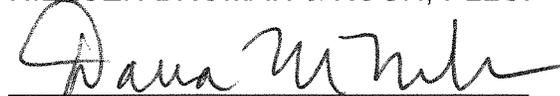
D. CONCLUSION

For reasons stated above, this Court should remand for a CrR 3.6 hearing. Alternatively, it should remand for correction of the LFOs in the Judgment and Sentence.

DATED this 31ST day of October, 2018.

Respectfully submitted,

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