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Court of Appeals
Division II
State of Washington
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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

REPLY BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

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

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A. ARGUMENT IN REPLY

THE RECORD ESTABLISHES A BASIS FOR DETERMINING THE STOP WAS PRETEXTUAL.

In his opening brief, appellant William Piland asserts defense counsel was ineffective for failing to move to suppress the evidence on the ground that the underlying traffic stop was invalid. Brief of Appellant (BOA) at 6-15. He explained that the record establishes a basis for finding the stop was pretextual, and thus the case should be remanded for an evidentiary hearing. In response, the State argues there is no basis upon which the trial court could have found the stop was pretextual, and therefore counsel was not ineffective for not challenging it. Brief of Respond (BOR) at 4-9. Specifically, it claims this is a legitimate mixed-motive case. BOR at 11. However, neither the law nor facts support this claim.

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 in order 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 (citation omitted).

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. Pretextual stops by police officers represent an attempt to circumvent the important constitutional limits placed on police discretion in such cases, even when an officer has mixed motives. State v. Arreola, 176 Wn.2d 284, 295, 290 P.3d 983, 990 (2012).

The State argues that Officer James Kelly – the officer who conducted the traffic stop – had “a mixed motive,” but he was actually motivated by the desire to stop the car to issue a citation for the altered trip permit. BOR at 11 (citing Arreola, 176 Wn.2d at 299-300). The record does not support this.

Unlike in Arreola, Officer Kelly’s testimony did not establish conclusively that the altered trip permit was the actual, conscious, and independent cause for the stop. In Arreola, the officer was responding to a report of a possible DUI. The officer followed the car and saw no signs of drunkenness, but he noted a muffler violation. Id. at 289. He stopped the car for two reasons: (1) a muffler violation; and (2) to further investigate whether the driver was drunk. 176 Wn.2d at 288-89.

The officer testified he would have made the traffic stop to cite the driver for a muffler violation even if he had not also been motivated to stop the car to investigate the DUI. Id. He explained that on numerous occasions he commenced traffic stops for an altered muffler because he appreciates community concerns about the noise these mufflers make. Id. The officer also testified that he made a conscious decision to make the traffic stop based on the muffler violation. Id. Based on this testimony, the trial court's unchallenged finding was that the muffler infraction was "an actual reason for the stop," and that the officer "would have stopped the vehicle ... even if he wasn't suspicious of a DUI, and even though his primary purpose for stopping the vehicle was to further investigate a possible DUI." Id. at 300.

On appeal, the Washington Supreme Court explained that given the trial court's finding that the officer's actual reason for the stop was the muffler infraction, "the fact that [the officer] was also interested in and motivated by a related investigation is irrelevant, even if that investigation could not provide a legal basis for the traffic stop." Id. This is because while the officer's motives might have been mixed, the record established without question that the

officer in fact initiated the stop for the legitimate purpose of investigating the muffler infraction. Id.

Here, Officer Kelly never testified he would have pulled over the car Mr. Piland was riding in for the trip permit alteration even if Detective Ripp did not ask him to stop Mr. Piland's vehicle. He never testified that he regularly stops cars for altered trip permits. And, he certainly never testified he made a conscious decision to make the stop because of the altered trip permit. Based on this record, Arreola does not apply. Instead, as discussed in detail in Mr. Piland's opening brief, the record plainly shows that competent counsel would have challenged the stop as pretextual. See, BOA at 10-12.

While Officer Kelly testified that he had stopped Mr. Piland's car because he saw an altered trip permit, this testimony does not establish conclusively the altered trip permit was his actual motive of the stop. RP 43, 370-72. Thus, the State is essentially asking this Court – for the first time – to make a factual determination as to Kelly's actual motive in stopping the car. However, it is not this Court's function to consider credibility and make factual determinations anew. This is why remand for an evidentiary hearing is the appropriate remedy so that the trial court may

consider credibility and make this factual determination. See, State v. Meckelson, 133 Wn. App. 431, 436-38, 135 P.3d 991, 994 (2006) (remanding for an evidentiary hearing where counsel was ineffective in failing to challenge a pretext stop).

To sum up, this Court should reject the State's argument that the record does not provide some basis for finding there was an illegal pretext stop. Moreover, this Court should also reject the State's claim that Mr. Piland received effective assistance of counsel since it rests on the faulty premise that the record conclusively shows the stop was legitimate. As explained in detail in appellant's opening brief, Mr. Piland was denied effective assistance of counsel when defense counsel failed to move to exclude the evidence as the product of a pretextual stop. Hence, reversal and remand for an evidentiary hearing is proper.

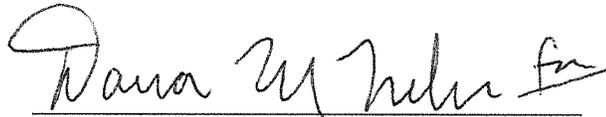
B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court reverse and remand.

DATED this 13th day of March, 2019.

Respectfully submitted,

NIELSEN BROMAN & KOCH, PLLC.

A handwritten signature in cursive script, appearing to read "Dana M. Nelson for".

JENNIFER L. DOBSON, WSBA 30487
DANA M. NELSON, WSBA No. 28239
Office ID No. 91051

Attorneys for Appellant

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

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