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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK FRANCIS SALAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00140-4

BRIEF OF RESPONDENT

CHAD M. ENRIGHT
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 328-1577

SERVICE

Peter B. Tiller
Po Box 58
Centralia, WA 98531-0058
Email: ptiller@tillerlaw.com

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED May 22, 2019, Port Orchard, WA

Elizabeth Allen
Original e-filed at the Court of Appeals; Copy to counsel listed at left.
Office ID #91103 kcpa@co.kitsap.wa.us

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Officer Forbragd properly stopped the vehicle believing it was driven by Eric Salas, whom the police had probable cause to arrest, and properly expanded the scope of the stop when he learned that the driver was actually Derrick Salas, who did not appear to have a valid license?

2. Whether Derrick's claim of pretext is frivolous where the only reason for the stop was that explicitly given: to arrest Eric on felony charges for which there was probable cause?

3. Whether Derrick fails to show counsel was ineffective with regard to alleged his pretext claim where that claim would have been frivolous?

4. Whether Derrick fails to show that his obstructing or DWLS convictions should be reversed even if the stop was improper?

5. Whether the condition in the supervision schedule requiring the payment of a monthly supervision assessment should be stricken from the judgment and sentence? [CONCESSION OF ERROR]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Derrick Francis Salas¹ was charged by information filed in Kitsap County Superior Court with possession of methamphetamine, obstructing a law enforcement officer, and third-degree driving while license suspended or revoked. CP 99.

Before trial, Derrick filed a “Motion to Dismiss” citing CrR 3.6 and arguing that police stop of Derrick was unlawful. CP 54. At a subsequent hearing, the trial court heard the following facts.

Bremerton Patrol Officer Steven Forbragd was dispatched to the area of Ninth and Park to assist detectives in the serving of a search warrant on a house. RP (2/15) 17. They had briefed him on the probable cause to arrest an individual associated with the house, Eric Salas. RP (2/15) 17, 18. Forbragd had been provided with both a verbal description and a photo of Eric. RP (2/15) 18.

Forbragd observed a truck driven by a male who matched Eric’s description. RP (2/15) 17. He also received a radio report regarding the same truck from Sergeant Renfro, who asked Forbragd to stop the vehicle. RP (2/15) 17. Photos of Eric and Derrick Salas were admitted as Exhibit 1.

¹ The primary issue on appeal stems from the police confusing Derrick Salas with his cousin Eric Salas. To avoid further confusion, the cousins will be referred to herein by

RP (2/15) 19; CP 205. On the day of the arrest, Forbragd only had the photo of Eric. Believing the driver to be Eric, Forbragd pulled the vehicle over. RP (2/15) 19.

Forbragd approached the vehicle and stated, “Eric, place your hands on the dash or the steering wheel.” RP (2/15) 19. The driver responded that he was Derrick, not Eric. RP (2/15) 19. Forbragd then asked him for his license, but Derrick produced a Washington State ID card. RP (2/15) 20. Forbragd asked him if he had a license, and Derrick responded that he did not. RP (2/15) 20.

Forbragd explained that he asked for the license the first time to verify whether or not the driver was not Eric. RP (2/15) 20. He was not sure at the time whether he was talking to Eric or Derrick. RP (2/15) 20.

He asked for a license the second time because based on the production of the ID card he suspected that Derrick was driving without a license. RP (2/15) 20. After Derrick stated he did not have a license, Forbragd ran his name through the Department of Licensing database, which indicated that Derrick’s license was suspended. RP (2/15) 21.

He then placed Derrick under arrest for driving with a suspended license. RP (2/15) 21. A search of his person incident to arrest produced a

their first names. No disrespect is intended.

baggie of suspected illegal substances. RP (2/15) 21. His actual identity was not confirmed until he was booked. RP (2/15) 22.

Detective Sergeant Billy Renfro also testified. He recalled seeing the truck go by as they were about to execute the warrant at the house. RP (2/15) 40. He did not recall radioing the information to Forbragd, but had no reason to doubt Forbragd's account. RP (2/15) 40. After hearing argument from the parties, the court denied the motion to suppress. RP (2/15) 49.

The case proceeded to jury trial. The jury found Derrick guilty as charged. CP 164.

B. FACTS

Forbragd explained that he was assisting the Special Operations group in serving a search warrant. 2RP 261. His primary duty was to be on the perimeter and to stop anyone leaving the area that detectives needed to contact. 2RP 261. They had probable cause to arrest an individual from the house. 2RP 261. When the truck Derrick was driving went by, the detectives believed it was the suspect they were looking for. 2RP 262. The lead detective asked him to stop the truck because he believed the probable cause suspect was in it. 2RP 272. Forbragd also believed it was the suspect. 2RP 272.

Forbragd stopped the vehicle. 2RP 262. He approached and

instructed the driver to show his hands. 2RP 262. Forbragd asked him for his license, and he gave him an ID card. 2RP 262. He stated that he did not have a license. 2RP 262. Forbragd ran a records check and learned his license was suspended, and arrested him for driving with a suspended license. 2RP 262. At trial a DOL official testified that the license was suspended on the date in question. 2RP 316.

Derrick did not take kindly to being arrested. 2RP 263. He argued with Forbragd and Hall and tried to pull away when they attempted to handcuff him. 2RP 263.

Derrick also was uncooperative as they attempted to perform a search incident to arrest. 2RP 264. He kept pulling away and would not let them search him. 2RP 264. He attempted kick Forbragd a couple of times. 2RP 264. Eventually they were able to complete the search, and found piece of foil in his pants pocket that had what appeared to be methamphetamine in it. 2RP 265-66. Lab testing later confirmed that it was. 2RP 310.

After the officer allegedly touched Derrick's testicle during the search he became more vocal, but he had been uncooperative since the beginning of the arrest. 2RP 287. Derrick claimed that they planted the meth on him, and also that the pants were not his. 2RP 302.

Hall explained that after Forbragd determined that Derrick was not

their suspect, but that his license was suspended, Hall assisted with the arrest. 2RP 320. Derrick was “resistive” during the handcuffing and became more so during the subsequent search. 2RP 320. He was cussing, kicking at Forbragd, and calling them derogatory names. 2RP 321. During the search they found what appeared to be methamphetamine wrapped in foil. 2RP 322.

Hall did not recall Derrick saying anything about his testicles being hit. 2RP 329. He saw the foil come out of the pocket. 2RP 329. He did not hear him claim it was planted. 2RP 330. Dog. 2RP 331.

Derrick testified and admitted that the house being searched was his cousin Eric’s. 2RP 349. The officer used his PA to say “Eric Salas, get out of the car.” 2RP 350. He claimed that his resistance was because Forbragd “hit [him] in [his] balls” intentionally. 2RP 350. He also claimed that he did not have meth in his pocket. 2RP 352.

III. ARGUMENT

A. FORBRAGD PROPERLY STOPPED THE VEHICLE BELIEVING IT WAS DRIVEN BY ERIC SALAS, WHOM THE POLICE HAD PROBABLE CAUSE TO ARREST, AND PROPERLY EXPANDED THE SCOPE OF THE STOP WHEN HE LEARNED THAT THE DRIVER WAS ACTUALLY DERRICK SALAS, WHO DID NOT APPEAR TO HAVE A VALID LICENSE.

Derrick argues that that once it was determined the driver of the truck was not Eric, Officer Forbragd had no justification to further detain him. This claim is without merit because it is well settled that new facts may expand the basis for a *Terry* stop. Here, when the officer asked for a license, Derrick instead produced an ID card, leading to a reasonable suspicion that he was driving without a license. The officer acted properly in briefly further detaining Derrick to confirm or dispel that suspicion.

1. *Standard of review.*

This Court reviews the decision to deny a motion to suppress to determine whether the findings are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal. *Id.* The trial court's conclusions of law are reviewed de

novo. *Id.*

Article I, section 7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” An individual’s right to privacy includes automobiles and their contents. *O’Neill*, 148 Wn.2d at 584. Subject to certain exceptions, a warrantless search violates article I, section 7. *State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563 (1996). The Supreme Court has recognized a few exceptions to the warrant requirement, including consent, plain view, search incident to arrest, and an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); *State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009). The burden is on the State to show that a warrantless search or seizure falls within one of the exceptions. *Hendrickson*, 129 Wn.2d at 70.

Under *Terry*, police may detain an individual when there exists a reasonable suspicion that criminal activity is afoot. The initial detention must be justified at its inception and reasonable in scope.

The permissible scope of the *Terry* stop is determined by (1) purpose of the stop (2) amount of intrusion, and (3) length of time of detention. *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987); *State v. Lund*, 70 Wn.

App. 437 (1993). Individualized suspicion of criminal conduct, focusing on a specific suspect, is a general requirement for a valid detention or stop. *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). The scope and degree of detention may be enlarged or prolonged on the basis of information obtained during the detention. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 332, 734 P.2d 966, *review denied*, 108 Wn.2d 1027 (1987).

Furthermore, the officer's experience and knowledge of criminal behavior is a factor to be considered in determining if an investigative stop was reasonable and justified under the circumstances. *State v. Thierry*, 60 Wn. App. 445, 448, 803 P.2d 844 (1991). Thus, in evaluating the reasonableness of a stop, courts consider the totality of the circumstances, including the officer's training and experience, the location of the stop and the conduct of the person detained. *State v. Villarreal*, 97 Wn. App. 636, 984 P.2d 1064 (1999), *review denied*, 140 Wn.2d 1008, 999 P.2d 1261 (2000).

2. *The trial court's factual findings are supported by substantial evidence.*

Here, Derrick challenges two of the trial court's findings of fact:²

III.

That Officers Forbragd and Renfro believed the car's driver was Eric Salas who had a warrant for his arrest.

IV.

² As noted above, the remaining findings, which are unchallenged, are verities.

That Officer Forbragd recognized Eric Salas because he previously looked at Eric Salas' booking photographs.

Brief of Appellant at 1; CP 70-71.

A review of the photos of Derrick and Eric admitted into evidence show that the cousins looked very similar. CP 206-210. Derrick primarily bases his challenge to the court's finding on Eric's neck tattoo. Brief of Appellant at 17, 24. Forbragd testified, however, that he was unable to see whether the driver had a neck tattoo because he was wearing a jacket.³ RP (2/15) 35. This testimony was uncontradicted. As such the finding is supported by substantial evidence and is binding on appeal.

3. *Forbragd properly expanded the scope of the Terry stop when confronted with information reasonably suggesting that Derrick was driving without a license.*

Derrick primarily relies on an *State v. Penfield*, 106 Wn. App. 157, 22 P.3d 293 (2001). In that case a vehicle was stopped because the owner, a male, had a suspended license. However, after stopping the vehicle, the officer saw that the driver was female. The Court found that at that point the officer's reasonable suspicion evaporated and he had no basis to request the driver's license. *Penfield*, 106 Wn. App. at 162.

Here, however, as already discussed, the two cousins looked very similar and Forbragd did not observe Eric's neck tattoo. As such, he had a

³ The stop occurred in January. RP (2/15) 16.

reasonable basis for requesting the driver's license in order to verify Derrick's claim that he was not Eric.

Next, as the Court in *Penfield* noted, an "officer could continue to detain the driver ... if some other fact gave rise to an articulable suspicion of criminal activity." *Penfield*, 106 Wn. App. at 162. Here, the officer requested a license and Derrick produced an ID card instead. He had obviously seen Derrick driving. At that point he had reasonable suspicion that Derrick might be driving without a license, potentially a criminal offense. *See State v. Davison*, 3 Wn. App.2d 1068, 2018 WL 2447247, at *2 (2018)⁴ (driver's presentation of an ID card gave officer reasonable suspicion to investigate driver's license status). Forbragd's DOL inquiry to determine the status of Derrick's driving privileges was good police work. The trial court's ruling should be affirmed.

B. DERRICK'S CLAIM OF PRETEXT IS FRIVOLOUS WHERE THE ONLY REASON FOR THE STOP WAS THAT EXPLICITLY GIVEN: TO ARREST ERIC ON FELONY CHARGES FOR WHICH THERE WAS PROBABLE CAUSE.

Derrick asserts for the first time on appeal that the stop that led to his arrest and search of his person was pretextual. In addition to not being preserved, this claim is frivolous because the police stopped Derrick based

⁴ Unpublished, *see* GR 14.1(a).

on reasonable suspicion that he was Eric, who they had probable cause to believe had committed criminal offenses. There is no evidence whatsoever that the police stopped the truck for any other reason.

Citing *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), Salas argues that the initial stop of his car was unlawful pretext stop. This contention is incorrect because *Ladson* only applies to stops for traffic infractions. Derrick was initially detained based on probable cause to believe he had committed felony offenses.

In Washington, an arrest may not be used as a pretext to conduct a warrantless search for evidence. *Ladson*, 138 Wn.2d at 353. However, *Ladson* concerned the use by police of narrow exceptions to the warrant requirement as a pretext to search for evidence of other crimes. *Ladson*, 138 Wn.2d at 356. As the Court explained:

[T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (*i.e.*, *speculative criminal investigation*), but only for some other reason (*i.e.*, to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason.

Ladson, 138 Wn.2d at 351 (emphasis added). Thus, *Ladson* does not apply to any stop that can be constitutionally justified for its true reason. *See*,

e.g., *State v. Lansden*, 144 Wn.2d 654, 662, 30 P.3d 483 (2001) (*Ladson* categorically inapplicable to any case in which a valid warrant has issued). The distinction was explained in *State v. Arreola*, 176 Wn.2d 284, 295-96, 290 P.3d 983 (2012):

[I]n a pretextual traffic stop, ... the traffic stop is desired because of some other (constitutionally infirm) reason—such as a mere hunch regarding other criminal activity or another traffic infraction—or due to bias against the suspect, whether explicit or implicit. A pretextual stop thus disturbs private affairs without valid justification.

Here, the police were not engaging in a “speculative criminal investigation” or seeking to detain Eric based on a “mere hunch.” To the contrary, they were seeking to detain Eric based on probable cause to believe that he committed the felony crime of delivery of controlled substance.

In *Arreola*, the Supreme Court held that a traffic stop motivated primarily by an uncorroborated tip “is not pretextual so long as the desire to address a suspected traffic infraction (or criminal activity) for which the officer has a reasonable articulable suspicion is an actual, conscious, and independent cause of the traffic stop.” *Arreola*, 176 Wn.2d at 288. In *Arreola*, the officer’s primary motivation in pulling the defendant’s car over was to investigate a reported DUI. *Arreola*, 176 Wn.2d at 289. But, because his secondary motivation, the car’s altered exhaust in violation of RCW 46.37.390, was an actual reason to stop the defendant, the stop was

not pretextual. *Arreola*, 176 Wn.2d at 299-300.

Here, a valid reason for the stop existed: that Eric had made unlawful drug deliveries. This was the sole reason the vehicle was pulled over. There was thus no pretext.

Finally, when police have probable cause to arrest a suspect on a felony charge, they may lawfully stop the suspect while he is driving. *State v. Quezadas-Gomez*, 165 Wn. App. 593, 603, 267 P.3d 1036 (2011), *review denied*, 173 Wn.2d 1034 (2012). Derrick does not now and did not below challenge the assertion that the police had probable cause to arrest Eric. As such, the stop was “constitutionally justified for its true reason,” *Ladson*, 138 Wn.2d at 356, and was therefore not an improper pretextual stop.

Derrick appears to rely primarily on the contention that Sergeant Renfro’s testimony at the suppression hearing was contradicted by the trial testimony of Officers Hall and Forbragd. This contention is not supported by the record.

As they did at the suppression hearing, Forbragd and Hall testified at trial that they stopped Derrick’s car based on the belief that the Eric was the driver. Forbragd testified that he stopped the vehicle because the detectives believed it was Eric:

We had probable cause to arrest an individual from the

house. And as our narcotics division was walking up to the house to serve the warrant, a vehicle drove by, being driven by Mr. Salas, and it was a vehicle associated with the house. And they believed that he was the probable cause person they were looking for.

2RP 261-62. On cross, Forbragd elaborated on what occurred:

I remember looking down the street that they were heading to. They were walking up to the house when the truck drove by driven by Mr. Salas. The sergeant detective in charge asked that I stop the vehicle because he believed it was a probable cause suspect. I also observed it and thought he was the probable cause subject; that he matched the description, at which point I stopped the vehicle.

2RP 272. Hall's testimony was consistent with Forbragd's:

One of the detectives recognized a gentleman that drove by in a vehicle, a small pickup, and asked the two marked units, myself and Officer Forbragd, to stop and identify that person because they believed he was associated with the search warrant they were serving.

2RP 319-20. Renfro did not testify at trial.

At the suppression hearing, Renfro testified on direct examination had little recollection of his part in Derrick's arrest:

Q. Now, on January 25, 2017, do you recall telling an officer -- well, let me back up.

Do you know a Bremerton officer, Steven Forbragd?

A. I do, yep.

Q. Okay. And on January 25, 2017, do you recall telling Officer Forbragd to do anything in particular?

A. I do not recall that related to this matter.

Q. Do you remember speaking with him?

A. I know we had contact that day. I don't

recall exactly what it was about though.

Q. Do you recall anything about a vehicle that you saw while you were working that day --

A. Yes.

Q. -- in Bremerton?

A. I do.

Q. And what do you recall about that?

A. A pick-up truck related to the house, I remember seeing it go by while we were serving the warrant at the location. And I -- I know it was related to the house and believed it could have had our suspect in there.

I've learned that I had mentioned to Officer Forbragd over the radio -- [Objection and withdrawal omitted]

I recalled the suspect was associated with the truck. And I've learned that apparently I said something to Officer Forbragd it may have had in him the vehicle. I don't recall doing that though.

RP (2/15) 37-39; *see also* RP (2/15) 40 ("I don't recall if I said anything over the radio about the vehicle."). Derrick's cross examination of Renfro was extremely limited:

Q. You don't remember saying anything to Officer Forbragd?

A. Not over the radio, no.

Q. Yeah. Okay. And so would the vehicle -- the vehicle is in the area? Is that the point? It was driving by the house?

A. I recall it going by the head of the driveway. Eastbound on 9th Street.

Q. Okay.

A. Right as we were serving the warrant.

RP (2/15) 40.

Renfro thus candidly testified that was unsure of exactly what he had communicated to Forbragd. He went on to explain that it had been over a year since the events occurred. RP (2/15) 39. He also explained that he did not include the facts of Derrick's arrest in his report because it did not pertain to the case he was investigating against Eric. *Id.*

Renfro's testimony was thus not contradicted by the other officers. He merely stated that he did not recall what he said to them. Moreover, he explicitly noted that he had "no reason to doubt" the accuracy of Forbragd's report, which was consistent with Forbragd's testimony. RP (2/15) 40. This manufactured inconsistency does not indicate any pretext. This claim should be denied.

C. DERRICK FAILS TO SHOW COUNSEL WAS INEFFECTIVE WITH REGARD TO ALLEGED HIS PRETEXT CLAIM WHERE THAT CLAIM WOULD HAVE BEEN FRIVOLOUS.

Derrick next claims that counsel was ineffective for failing to raise the pretext issue. This contention is without merit because as discussed above, such claim would have been frivolous.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v.*

McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

In the context of the failure to bring a motion to suppress, counsel can only have been ineffective if it can be shown that the motion likely would have been granted. *State v. D.E.D.*, 200 Wn. App. 484, 490, 402

P.3d 851 (2017) (*citing McFarland*, 127 Wn.2d at 334); *State v. G.M.V.*, 135 Wn. App. 366, 372, 144 P.3d 358 (2006), *review denied*, 160 Wn.2d 1024 (2007). As discussed above, the pretext claim is frivolous. Derrick therefore fails to show either deficient performance or prejudice. This claim should be rejected.

D. DERRICK FAILS TO SHOW THAT HIS OBSTRUCTING OR DWLS CONVICTIONS SHOULD BE REVERSED EVEN IF THE STOP WAS IMPROPER.

In his conclusion, Derrick asks this Court to reverse the trial court's suppression ruling and to remand for dismissal of all charges. The State agrees that if the Court were to find his suppression claim had merit, remand to dismiss the drug charge would be appropriate. However, Derrick offers no authority for dismissing the remaining charges, which did not rely on any suppressible evidence.

1. Obstructing

It has long been the rule that a defendant's criminal behavior in response to a police illegality is not subject to suppression. In *State v. Hoffman*, 116 Wn.2d 51, 99-100, 804 P.2d 577 (1991), a defendant argued that an officer was not performing his official duties because the officer had (allegedly) illegally attempted to arrest the defendant without a search warrant. The Supreme Court disagreed, ruling that as long as the officer

was not engaged in a “frolic of his or her own,” the officer was still performing his official duties even if the arrest was improper or had lacked probable cause. *Hoffman*, 116 Wn.2d at 100.

State v. Mierz, 127 Wn.2d 460, 474-75, 901 P.2d 286 (1995), involved a similar claim by a defendant who argued that he was not guilty of assault because the officers he attacked were trespassing on his property in violation of the constitution. The Supreme Court again disagreed, holding that officers were still performing official duties even if they were acting outside the strictures of the constitution. *Mierz*, 127 Wn.2d at 473-76.

In *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997), the Supreme Court held that a person cannot respond to police illegality by performing a criminal act in return. In *State v. Holeman*, 103 Wn.2d 426, 429-31, 693 P.2d 89 (1985), a defendant was guilty of obstructing a public servant for attempting to assist another in resisting what was believed to be an unlawful arrest of his father. The illegality of that arrest did not justify the defendant hindering the officers.

Based on this authority it is clear that even if the methamphetamine should have been suppressed, there was no basis to suppress the evidence supporting Derrick’s obstructing conviction. That conviction should be affirmed regardless of whether this Court finds that

the stop or arrest was unlawful.

2. *DWLS*

Likewise, under the ‘*Ker–Frisbie*’ rule, the State’s power to prosecute a person is unaffected by the illegality of the means used to procure that person’s attendance at trial. *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952) (affirming murder conviction where, without lawful authority, police kidnapped defendant in Illinois and transported him to Michigan for trial); *Ker v. Illinois*, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886) (federal agent went to Peru, abducted the defendant, and forcibly brought him to Illinois to stand trial); see also *Mahon v. Justice*, 127 U.S. 700, 8 S. Ct. 1204, 32 L. Ed. 283 (1888) (affirming murder conviction where, without lawful authority, police kidnapped defendant in West Virginia and transported him to Kentucky for trial).

The *Ker–Frisbie* rule predates the exclusionary rule, but survives it. *United States v. Crews*, 445 U.S. 463, 474, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980) (exclusionary rule does not prevent prosecution where a defendant’s presence at trial resulted from unlawful arrest). The exclusionary rule requires suppression of evidence obtained as a result of an unlawful seizure. *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). But the body or identity of a person is not

subject to suppression. *Immigration & Naturalization Serv. v. Lopez–Mendoza*, 468 U.S. 1032, 1039, 104 S. Ct. 3479, 82 L. Ed. 2d 778, (1984) (rejecting the defendant’s attempt to suppress his compelled presence at a deportation hearing).

Washington follows the *Ker–Frisbie* rule. *State v. Bonds*, 98 Wn.2d 1, 14, 653 P.2d 1024 (1982) (unlawful warrantless arrest in Oregon did not invalidate later conviction of murder, rape and other charges), *cert. denied*, 464 U.S. 831 (1983); *Davis v. Rhay*, 68 Wn.2d 496, 500, 413 P.2d 654 (1966) (unlawful extradition from New York to Seattle did not impair the State from prosecuting a defendant on outstanding charges).

Derrick has not shown that the State relied on any excludable evidence to convict him for driving with a suspended license. Because the suspension of Derrick’s license was presumably valid and existed independently of the allegedly illegal seizure, it is not tainted by that seizure. Likewise, Derrick was observed driving before the stop. Thus, even if the suppression motion should have been granted, the trial court’s error would not require reversal of Derrick’s conviction of driving while license suspended or revoked.

E. THE CONDITION IN THE SUPERVISION SCHEDULE REQUIRING THE PAYMENT OF A MONTHLY SUPERVISION ASSESSMENT SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

Derrick finally claims, citing *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), that it was improper in light of his indigency to impose the discretionary condition of supervision that he pay a monthly supervision assessment. For the reasons set forth in his brief, the State concurs and concedes this issue.

IV. CONCLUSION

For the foregoing reasons, Derrick Salas's conviction and sentence should be affirmed and the matter remanded to strike supervision assessment from the judgment and sentence.

DATED May 22, 2019.

Respectfully submitted,

CHAD M. ENRIGHT
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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