

FILED
Court of Appeals
Division II
State of Washington
11/18/2019 11:30 AM

No. 53093-7-II

IN THE COURT OF APPEALS, DIVISION II

THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JESSE D. BRITAIN,
Appellant.

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

Cause No. 18-1-01177-2

The Honorable James J. Dixon

OPENING BRIEF OF APPELLANT

JOHN M. SHEERAN
Attorney for Appellant
WSBA #26050

705 South Ninth Street, Suite 202
Tacoma, Washington 98405
(253) 468-9794

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR3

III. STATEMENT OF THE CASE4

 A. Procedural History.....4

 B. Facts of the Case.....7

IV. ARGUMENT AND AUTHORITIES9

 A. EVEN IF THE STOP AND ARREST OF
 MR. BRITAIN WAS LEGAL, THE SEARCH
 INCIDENT TO ARREST OF THE BAG
 CONTAINING EVIDENCE USED TO
 CONVICT HIM, WAS ILLEGAL AND
 COUNSEL WAS INEFFECTIVE FOR NOT
 RAISINIG THIS ARGUMENT BELOW.9

 i. Ineffective Assistance of Counsel.9

 ii. Article I, section 7 Protects a Person’s
 Private Affairs Without Regard to the
 Reasonableness of the Intrusion.11

 iii. The Search of the Crown Royal Bag
 Was Outside the Scope of a Search
 Incident to Arrest.12

 B. THE COURT ERRED WHEN IT
 CONCLUDED OFFICER DAVIS ACTED
 LEGALLY WHEN HE STOPPED THE
 MOTORCYCLE DRIVEN BY MR. BRITAIN
 FOR AN OBSCURED LICENSE PLATE WHEN
 IT WAS A TRIP PERMIT THAT WAS
 COVERING THE LICENSE PLATE.....18

C. THE COURT ERRED WHEN IT CONCLUDED OFFICER DAVIS STOPPED THE MOTORCYCLE DRIVEN BY MR. BRITAIN FOR A TRAFFIC INFRACTION AND THAT THE STOP WAS NOT PRETEXTUAL.....24

i. Pretextual seizures violate the Washington Constitution.24

ii. A review of the totality of the circumstances demonstrates the traffic stop was pretextual.28

V. CONCLUSION33

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>In re Pers. Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004)	9
<i>Seattle v. Mesiani</i> , 110 Wn.2d 454, 755 P.2d 775 (1988)	11
<i>State v. Arreola</i> , 176 Wn.2d 284, 290 P.3d 983 (2012) ...	24, 25, 26, 27, 28
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995)	9
<i>State v. Brock</i> , 184 Wn.2d 148, 355 P.3d 1118 (2015).....	12, 15
<i>State v. Byrd</i> , 176 Wn.2d 611, 310 P.3d 793 (2013)	12, 14, 15
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969)	15
<i>State v. Doughty</i> , 170 Wn. 2d 57, 239 P.3d 573 (2010)	23, 27
<i>State v. Fuentes</i> , 183 Wn.2d 149, 352 P.3d 152 (2015)	18, 19, 23
<i>State v. Garvin</i> , 166 Wn.2d 242, 207 P.3d 1266 (2009)	18, 27
<i>State v. Glover</i> , 116 Wn.2d 509, 806 P.2d 760 (1991)	19
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	9, 10
<i>State v. Jones</i> , 146 Wn.2d 328, 45 P.3d 1062 (2002)	15
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	10
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	11, 25, 26, 28, 30
<i>State v. Linville</i> , 191 Wn.2d 513, 423 P.3d 842 (2018)	10
<i>State v. Loewen</i> , 97 Wn.2d 562, 647 P.2d 489 (1982)	24
<i>State v. MacDicken</i> , 179 Wn.2d 936, 319 P.3d 31 (2014)	16
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	10
<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007)	31
<i>State v. Smith</i> , 115 Wn.2d 775, 801 P.2d 975 (1990)	18

<i>State v. Snapp</i> , 174 Wn.2d 177, 275 P.3d 289 (2012)	11
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009)	9
<i>State v. Valdez</i> , 167 Wn.2d 761, 224 P.3d 751 (2009)	11, 12
<i>State v. Weyand</i> , 188 Wn.2d 804, 399 P.3d 530 (2017)	19
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982)	17
<i>York v. Wahkiakum Sch. Dist. No. 200</i> , 163 Wn.2d 297, 178 P.3d 995 (2008)	11

Washington State Court of Appeals Decisions

<i>State v. Alexander</i> , No. 77513-8-I, 449 P.3d 1070 (2019)	14
<i>State v. Byrd</i> , 110 Wn. App. 259, 39 P.3d 1010 (2002)	18, 22
<i>State v. Lennon</i> , 94 Wn. App. 573, 976 P.2d 121 (1999)	24
<i>State v. Martinez</i> , 135 Wn. App. 174, 179, 143 P.3d 855 (2006)	27
<i>State v. Montes-Malindas</i> , 144 Wn. App. 254, 182 P.3d 999 (2008)	28, 30, 31
<i>State v. Moreno</i> , 173 Wn. App. 479, 294 P.3d 812, 819 (2013)	23

Constitutional Provisions

<i>Wash. Const. Art. 1 Sect. 22</i>	9
<i>Wash. Const. art. 1, Sect. 7</i>	11, 17, 18, 24, 25, 28
<i>U.S. Const. Amend. VI</i>	9
<i>U.S. Const. Amend. IV</i>	18, 24

United States Supreme Court Decisions

<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)	13
---	----

Chimel v. California, 395 U.S. 752,
89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)12, 13

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)9, 10

Terry v. Ohio, 392 U.S. 1,
88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)19

Statutes

RCW 46.16A.20021, 22

RCW 46.16A.32018, 21, 22

RCW 46.37.39027

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it found Officer Davis initiated the traffic stop solely due to the obstructed license plate on the motorcycle and that there was no other reason the officer pulled Mr. Britain over. Finding of Fact 7, CP 34.

2. The trial court erred when it found Officer Davis did not make the stop for a pretextual reason. Finding of Fact 7, CP 34.

3. The trial court erred in its conclusion of law when it found Mr. Britain was lawfully stopped for a violation of the license plate statute, RCW 46.16A.200, and not for a trip permit violation. Conclusion of Law 2, CP 35.

4. The trial court erred when it concluded as a matter of law the initial traffic stop was supported by reasonable articulable suspicion. Conclusions of Law 3, CP 35.

5. The trial court erred when it concluded as a matter of law there was no pretext Ladson/Arreola violation. Conclusion of Law 4, CP 35.

6. The trial court erred when it concluded as a matter of law there the length and scope of the detention of Mr. Britain was justified, and the seizure of the Crown Royal bag was lawful. Conclusion of Law 6, CP 36.

7. The trial court erred when it concluded as a matter of law the arrest of Mr. Britain was lawful, and the search of the Crown Royal bag was a lawful search incident to arrest. Conclusion of Law 7, CP 36.

8. Defense counsel's failure to challenge the search and seizure of the evidence that led to Mr. Britain's conviction deprived Mr. Britain of his Sixth Amendment right to effective assistance of counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Was trial counsel constitutionally deficient when he did not challenge the search of the Crown Royal bag as an unlawful search incident to arrest, when Mr. Britain had been detained in the patrol car prior to his arrest, and the bag was not on his person nor in the area of his immediate control?

B. Did the trial court err when it concluded that the officer legally stopped Mr. Britain when there was a valid trip permit on Mr. Britain's motorcycle and the officer's explanation failed to meet the Terry Stop reasonable articulable standard?

C. Did the trial court err when it failed to conclude the stop of Mr. Britain was pretextual?

III. STATEMENT OF THE CASE

A. Procedural History

On July 16, 2018 Jesse Dean Britain was charged by Information with Possession of a Controlled Substance, Methamphetamine, with Intent to Deliver, contrary to RCW 69.50.401(2)(b), Operating a Motor Vehicle Without an Ignition Interlock Device, contrary to RCW 46.20.740, and Driving While License Suspended or Revoked in the Third Degree, contrary to RCW 46.20.342. CP 4-5.

On November 21, 2018 Mr. Britain filed a motion to suppress the evidence found search incident to his July 11th arrest. CP 13-18. On January 7, 2019 the trial court, the Honorable James J. Dixon, presided over Mr. Britain's motion to suppress evidence, and after hearing from several witness, denied the motion. RP 1, 109-19; CP 33-37.

The trial court concluded the search of the Crown Royal bag was a lawful search incident to arrest. CP 37. This was the only reason the court provided regarding the lawfulness of the warrantless search.

On January 23, 2019 Mr. Britain and the State agreed to a stipulated bench trial and the court conducted that trial. CP 75. After the bench trial, Mr. Britain was convicted of Unlawful Possession of a Controlled Substance and Operating a Motor Vehicle Without an Ignition

Interlock Device, and sentenced to 90 months in the Department of Corrections. CP 98. Count three of the information was dismissed.

B. Facts of the Case

On July 11, 2018 Yelm Police Department Officer Christopher Davis was working as a patrol officer, driving his marked patrol vehicle. RP 8, 10. While on patrol Officer Davis makes it a point to patrol high crime areas, making sure his presence is known. RP 9-10. When Officer Davis first saw Mr. Britain he was patrolling a high crime residential area. RP 10-11. Officer Davis saw a motorcycle in front of him pull into Green Acres Lane, a high crime area and this raised his curiosity. RP 12, 14. Officer Davis believed that there was at least one, possibly two drug houses on Green Acres Lane. RP 41. Office Davis told the court that if a vehicle pulls into Green Acres Lane, he would follow it in and get the license plate. RP 56.

Officer Davis turned around and saw the motorcycle again. RP 14. The motorcycle did not commit any infractions. RP 44-45. Officer Davis noticed a piece of paper covering the license plate. RP 15. Officer Davis testified that when a trip permit is used on a motorcycle it is common for it to take the place of the license plate. RP 45.

Officer Davis did not pull the motorcycle over right away but waited. RP 17. Officer Davis testified that the trip permit covering the license plate was the only probable cause he had for the stop. RP 58. While at the stop sign at the intersection of Middle Road and Railway Road Southeast, the officer was directly behind the motorcycle. RP 46. The motorcycle driven by Mr. Britain continued down the road and stopped at another stop sign, with the officer directly behind him. RP 51. The officer could see that the trip permit had the date July 11, 2018 written on it. RP 51.

The officer agreed that there are no special motorcycle trip permits, they are the same as those used for cars. RP 46. At the time of the stop, Officer Davis was not sure the trip permit was in fact a trip permit. RP 59. Officer Davis removed the trip permit in order to see the license plate. RP 61.

At the suppression hearing Officer Davis could not identify the reason he waited to pull the motorcycle over, and speculated on a few possibilities, one of which was he wanted more officers to respond to his location. RP 17. When Officer Davis pulled Mr. Britain over, at 9:25 p.m., it was getting dark, but the area was lit by streetlights. RP 17-19.

Mr. Britain immediately pulled over, and Officer Davis parked about 20 feet behind him. RP 19. Officer Davis could see that the

temporary permit was attached to the motorcycle. RP 20. Because Officer Davis thought the trip permit was laminated, he believed it may not be a trip permit. RP 21. Officer Davis approached Mr. Britain and told him to stay on the motorcycle. Id. He then asked Mr. Britain for his license, registration and insurance. Id. Mr. Britain had none of these items and but provided his name. RP 22. Officer Davis then took the trip permit off the license plate. RP 24. The trip permit was not retained as evidence and the officer did not know what happened to it. RP 47. While Officer Davis did have a camera with him, he did not photograph the trip permit. RP 48.

Officer Davis intended to return to his vehicle and to get back in his patrol car, run a records check of the license plate , the trip permit and of Mr. Britain. RP 25. Before he could do that Mr. Britain threw something against the fence that was about fifteen feet from his motorcycle. RP 26. Mr. Britain told the officer that he threw a knife. RP 27. Officer Davis then handcuffed Mr. Britain, took him to his patrol car, and called for back-up. RP 28.

Once three other officers arrived, Officer Davis went to the fence and found a Crown Royal bag that appeared to contain methamphetamine. RP 30, 33. A records check revealed Mr. Britain's driver's status was suspended in the third degree, and he was required to have an ignition

interlock device on any vehicle he operated. RP 31-32. Mr. Britain was then arrested for driving with a suspended license and Officer Davis searched the Crown Royal bag incident to arrest. RP 32. Inside the bag Officer Davis found “just under a pound of methamphetamine” as well as a digital scale and multiple small baggies. RP 32-33.

Defense witness Glenn Ackerson testified that he and Mr. Britain rode motorcycles the day of the arrest. RP 69. He said that Mr. Britain had a trip permit on his vehicle, and it was placed over his license plate. Id. The trip permit on Mr. Britain’s motorcycle expired on July 11. RP 73. It was Mr. Ackerson’s testimony that the trip permit instructions indicate it should be laminated for weatherproofing. RP 70.

Tiffany Voss-Hedrick testified that she lives on Green Acres Lane and Officer Davis frequently drives down the street. RP 77. Officer Davis routinely drove down Green Acres Lane, sometimes up to three times per day, and did so more often than other officers. RP 78, 81. She also testified that there had been criminal activity on Green Acres Lane. RP 85.

IV. ARGUMENT AND AUTHORITIES

A. EVEN IF THE STOP AND ARREST OF MR. BRITAIN WAS LEGAL, THE SEARCH INCIDENT TO ARREST OF THE BAG CONTAINING EVIDENCE USED TO CONVICT HIM, WAS ILLEGAL AND COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ARGUMENT BELOW.

i. Ineffective Assistance of Counsel.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

Appellate courts review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33. If either prong is not satisfied, the defendant's claim fails. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

There is a strong presumption that counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

Representation is deficient if, after considering all the circumstances, the performance falls “ ‘below an objective standard of reasonableness.’ ”

Grier, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 688). “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Reviewing courts do not consider matters outside the trial record. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyлло*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

To show prejudice, a defendant must establish that “there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyлло*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

In the present case, counsel failed to challenge the “incident to arrest” search of the Crown Royal bag in which the drugs and paraphernalia were found. This was deficient in that if counsel had raised the issue, the court would have been forced to suppress the contents of the bag and there would have been no evidence of Mr. Britain possessing an illegal substance.

- ii. Article I, section 7 Protects a Person’s Private Affairs Without Regard to the Reasonableness of the Intrusion.

Article I, section 7 provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Unlike the Fourth Amendment, which bars only “unreasonable” searches, article I, section 7, “provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional.” *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 305–06, 178 P.3d 995 (2008)); see also *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012) (Article I, section 7 “is not grounded in notions of reasonableness.”). This broader privacy protection creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions.” *Valdez*, 167 Wn.2d at 772 (internal quotations omitted).

Thus, the warrant requirement is particularly important under the Washington Constitution “as it is the warrant which provides ‘authority of law’ referenced therein.” *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing *Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)). Any exception to the warrant requirement must be carefully

drawn and “narrowly tailored to the necessities that justify it.” *Valdez*, 167 Wn.2d at 769.

iii. The Search of the Crown Royal Bag Was Outside the Scope of a Search Incident to Arrest.

Among the recognized warrant exceptions is a search incident to a lawful arrest. *State v. Byrd*, 176 Wn.2d 611, 616-17, 310 P.3d 793 (2013).

There are two discrete types of searches incident to arrest: (1) a search of the arrestee’s person (including those personal effects immediately associated with his or her person—such as purses, backpacks, or even luggage) and (2) a search of the area within the arrestee’s immediate control.

State v. Brock, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015). The officer’s search of Mr. Britain’s Crown Royal bag does not fall within either type outlined by the Supreme Court of Washington in *Brock*.

Because Mr. Britain was handcuffed and well away from the Crown Royal bag at the time of the search, the search was not a permissible search of his person, nor was it in the area in his immediate control. The Supreme Court of the United States has limited a search incident to arrest to the arrestee’s person and area within the person’s immediate control. *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). That limited scope “ensures that the scope of a search incident to arrest is commensurate with its purposes of

protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.” *Arizona v. Gant*, 556 U.S. 332, 339, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). To further ensure the scope of such a search does not exceed its constitutional justification, a search of an arrestee’s surroundings to discover weapons or destructible evidence of the crime is permissible “only when the arrestee is unsecured and within reaching distance” of the thing or place to be searched. *Gant*, 556 U.S. at 343 (citing *Chimel*, 395 U.S. 752).

In *Gant*, because the arrestee was handcuffed and seated in the police car, a search of his car could not be justified as an incident to arrest. 556 U.S. at 344. Here, as in *Gant*, Mr. Britain was handcuffed and in the patrol car at the time of the search. RP 29. Mr. Britain was both secured and beyond the reach of the Crown Royal bag at the time of the search, it cannot be justified as a search of his surroundings. *Gant*, 556 U.S. at 344. Thus, the officer’s search may be justified only under the “time of arrest” exception. As set forth below, it is not permitted by that exception.

Because Mr Britain was not in actual possession of the Crown Royal bag, the search does not fall within the “time of arrest exception. The “time of arrest” exception rests on the notion that a search of an arrestee’s person must include more than merely his “literal person” to

include pockets of the clothes she is wearing or a bag she is carrying at the time of arrest. *Byrd*, 178 Wn.2d 621-22. However, it

does not extend to all articles in an arrestee’s constructive possession, but only those personal articles in the arrestee’s actual and exclusive possession at or immediately preceding the time of arrest.

Byrd, 178 Wn.2d at 623. This is necessary to ensure the exception to the warrant requirement remains “jealously guarded.” *Id.*

In *State v. Alexander*, the court concluded that even though the defendant was sitting next to her backpack when arrested, because it was not on her person, nor in her possession at the time of the arrest, the search of the backpack was improper:

Furthermore, as our Supreme Court has explained, the scope of a warrant exception “must track its underlying justification.” To this end, the justification for warrantless searches of an arrestee’s person (which require no justification beyond the validity of the arrest)—as distinct from grab area searches (which require “some articulable concern that the arrestee can access the item in order to draw a weapon or destroy evidence”)—is that “there are presumptive safety and evidence preservation concerns associated with police taking custody of those personal items *immediately associated* with the arrestee, which will *necessarily* travel with the arrestee to jail.” (emphasis added). Here, as discussed, the State failed to establish that Alexander’s backpack was in her actual and exclusive possession at or immediately preceding the time of her arrest.

State v. Alexander, 449 P.3d 1070, 1076 (2019) (citations omitted).

A person actually possesses an item “when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). “Dominion and control,” in turn, “means that the object may be reduced to actual possession immediately.” *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Mr. Britain did not have actual exclusive possession of the Crown Royal bag at the time of his arrest. While the officer testified he believed the Crown Royal bag had been thrown by Mr. Britain, this was before Mr. Britain was detained, and well before he was arrested. It was not until after he was detained, and a records check done, while he was sitting handcuffed in the back of the patrol car, that he was arrested. RP 29-33. It appears from the transcript that the officer seized the bag before Mr. Britain was arrested, and searched it subsequent to that arrest.

The time of arrest rule does not apply whenever someone is touching an item at the time of arrest. Instead it only applies when the person has exclusive actual physical custody of the item. *Byrd*, 178 Wn.2d at 623. The Supreme Court has permitted a search pursuant to the time of arrest exception of: a purse an arrestee was holding at the time of her arrest, *Byrd*; a backpack the arrestee was wearing, *Brock*; and, of a computer bag the arrestee was holding and rolling luggage he was pushing

at the time of arrest, *State v. MacDicken*, 179 Wn.2d 936, 939, 319 P.3d 31 (2014). Unlike the arrestee in each of those cases, Mr. Britain did not actually possess the Crown Royal bag at the time of his arrest. Unlike the defendants in those three cases Mr. Britain was not holding or even within 20 feet of the Crown Royal bag when it was seized. The justification in each of those three cases was that the item was essentially an extension of the defendants' person by virtue of their wearing or holding the bags at the time of arrest. Here, the Crown Royal bag was lying on the ground, not even near Mr. Britain. He was not in possession of the Crown Royal bag, as were the defendants in the three above noted cases.

Importantly, the trial court did not find Mr. Britain "possessed" the Crown Royal bag when it was searched, either actually or even constructively. In fact, the State never argued he actually possessed it when it was searched. The court simply assumed that the search incident to arrest exception to the warrant requirement fit the circumstances. This was error on the court's part and deficient performance on counsel's part.

The time of arrest exception turns on actual possession of the item at the time of arrest. Even if this issue were raised at the suppression hearing, the State could not have proven and the court would not have found that Mr. Britain possessed the Crown Royal bag at the time of arrest. Thus, the search was not permissible.

The State did not prove, and the trial court did not find Mr. Britain actually possessed the Crown Royal bag at the time of his arrest. Therefore, the “time of arrest” exception did not permit a search. The trial court’s conclusion of law that the “search of the Crown Royal bag and the contents was lawful search incident to arrest” was erroneous. CP 37.

If Officer Davis wanted to search the contents of the Crown Royal bag, he needed to get a warrant, and there was nothing stopping him from doing so. His failure to do so made the search of the bag unlawful and the evidence should have been suppressed. Counsel’s failure to raise this issue at the suppression hearing was deficient and clearly prejudicial.

The search incident to arrest exception affords two options and neither was satisfied here. There is no third option.

Article I, section 7 requires exclusion of evidence obtained in violation of its terms. *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). In the course of the illegal search of the Crown Royal bag, the officer discovered methamphetamine, a scale, and baggies. Because that evidence was obtained in violation of the Article I, section 7, the court erred in permitting admission of any evidence found.

Without the fruits of illegal search, Mr. Britain could not have been convicted of unlawful possession of a controlled substance with intent to deliver. The contents of the Crown Royal bag was the only

evidence related to his Unlawful Possession of a Controlled Substance with Intent to Deliver conviction. His conviction must be reversed, and the case remanded.

B. THE COURT ERRED WHEN IT CONCLUDED OFFICER DAVIS ACTED LEGALLY WHEN HE STOPPED THE MOTORCYCLE DRIVEN BY MR. BRITAIN FOR AN OBSCURED LICENSE PLATE WHEN IT WAS A TRIP PERMIT THAT WAS COVERING THE LICENSE PLATE.

A vehicle stop by police merely to check the validity of a trip permit, which permit is legal in state, violates provision of State Constitution governing searches and seizures. *State v. Byrd*, 110 Wn. App. 259, 39 P.3d 1010 (2002); Wash. Const. Art. 1, § 7; RCW 46.16A.320.

Generally, warrantless searches and seizures are per se unconstitutional under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). But a few carefully drawn exceptions exist, which include exigent circumstances, inventory searches, searches incident to arrest, plain view searches, and Terry stops. *Garvin*, 166 Wn.2d at 249; *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015). The State bears the burden of proving the exception to the warrant requirement by clear and convincing evidence. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

As noted, a brief investigatory seizure, commonly referred to as a Terry stop, is one exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Under this exception, a police officer may, without a warrant, briefly detain an individual for questioning if the officer has reasonable and articulable suspicion that the person is or is about to be engaged in criminal activity. *State v. Fuentes*, 183 Wn.2d at 158 (2015). This court looks at the totality of the circumstances known to the officer at the time of the stop when evaluating the reasonableness of the officer's suspicion. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The totality of the circumstances includes the location of the stop, the officer's training and experience, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion into the person's liberty. *State v. Weyand*, 188 Wn.2d 804, 811-12, 399 P.3d 530 (2017). The suspicion must be individualized to the person being stopped. *State v. Weyand*, 188 Wn.2d at 812. In the absence of reasonable suspicion, the evidence uncovered from the stop must be suppressed. *State v. Fuentes*, 183 Wn.2d at 158.

Officer Davis's testimony made clear he did not have a reasonable suspicion of criminal activity. He stated the motorcycle's license plate was covered by a piece of paper (RP 15) and that he may have waited to pull over the motorcycle because he wanted to see if it was a trip permit.

(RP 17) In the police report Officer Davis authored, he stated he stopped the motorcycle because “the vehicle’s license plate was either a temporary permit or a piece of paper covering up the license plate.” CP 47, line 4. Once he stopped the motorcycle he saw that it was a trip permit. RP 20. Officer Davis observed no traffic infractions. During cross examination, the following exchange took place:

Q. Okay. And you note in your report that you saw a date of July 11th, 2018, written on the trip permit?

A. Correct.

Q. Okay. And that would have been in the middle of the permit where the person who buys it is supposed to write the date that the permit is in effect?

A. Yes.

Q. And did you say -- I think your testimony earlier was that you actually removed the permit from the back of the bike?

A. I did.

Q. And then in your report you say it appeared to be laminated; is that correct?

A. Yes.

Q. And when you say "numbers were not visible, "what numbers are you referring to there?

A. I believe either on the top right or on the top left there's some printed numbers that are on the trip permit by the DOL.

Q. And is it your understanding that those numbers must be visible?

A. I don't think that's a requirement.

Q. But you note in your report that it was folded in such a way that the numbers were not visible.

A. Correct.

Q. So I assume, then, that that was an important fact to you?

A. It was.

Q. And is it your testimony, then, that after you removed the trip permit from the bike, someone else took custody of it?

A. Yes.

RP 51-52.

The officer's own testimony indicated he knew it might be a trip permit before he pulled over Mr. Britain, and that he knew the smaller numbers on the trip permit need not be displayed if the trip permit is folded back. The officer had a hunch it was not valid trip permit, and a hunch is not reasonable articulable suspicion. In fact, once he stopped the motorcycle, and approached it, he saw that it was indeed a trip permit.

If the vehicle had a valid trip permit, as Mr. Ackerson testified it did, then the obstructed license plate is a non-issue. If a person can drive without a license plate at all with a trip permit, (RCW 46.16A.320) the statute that the license plate not be obstructed (RCW 46.16A.200) is inapplicable under those circumstances.

RCW 46.16A.200 requires a vehicle to have a license plate, and states that it is unlawful to

(c) Use holders, frames, or other materials that change, alter, or make a license plate or plates illegible. License plate frames may be used on license plates only if the frames do not obscure license tabs or identifying letters or numbers on the plates and the license plates can be plainly seen and read at all times;

(d) Operate a vehicle unless a valid license plate or plates are attached as required under this section;

RCW 46.16A.200(7)(c) and (d).

However, RCW 46.16A.320, provides the exception to this rule, in that it allows vehicles on the road without a license at all.

(1)(a) A vehicle owner may operate an unregistered vehicle on public highways under the authority of a trip permit issued by this state. For purposes of trip permits, a vehicle is considered unregistered if:

- (i) Under reciprocal relations with another jurisdiction, the owner would be required to register the vehicle in this state;
- (ii) Not registered when registration is required under this chapter;**
- (iii) The license tabs have expired;

RCW 46.16A.320(1)(a). If a vehicle that is not registered (therefore it does not have a license plate) when registration is required can be operated on the public roadways via a trip permit, a trip permit is the exception to the requirement of having to display a license.

This eviscerates the officer's justification for the stop – that the license plate was obstructed. He was clearly aware that the thing obstructing it was a trip permit. He had a hunch that it was not a legal trip permit. It is not permissible to stop every vehicle with a trip permit. *State v. Byrd*, 110 Wn. App. 259, 39 P.3d 1010 (2002).

Because it is legal to drive with a trip permit instead of a license plate, the officer did not have reasonable articulable suspicion that a crime was being committed. The only testimony at the hearing that the trip permit was valid or invalid came from Mr. Ackerson, who testified he was with Mr. Britain that day and observed the trip permit on his motorcycle. RP 73. He knew the trip permit expired on July 11, because he took note that Mr. Britain had to get a new one. RP 74.¹

“A hunch alone does not warrant police intrusion into people's everyday lives.” *State v. Moreno*, 173 Wn. App. 479, 492, 294 P.3d 812, 819 (2013) (citing *State v. Doughty*, 170 Wn. 2d 57, 63, 239 P.3d 573 (2010)).

“An officer's hunch does not justify a stop.” *State v. Fuentes*, 183 Wn.2d at 158. If officers do not have reasonable suspicion of criminal activity under the totality of circumstances to support the stop of a suspect, the evidence uncovered from the stop must be suppressed. *Id.* Without the fruits of illegal seizure, the State would not have the evidence it used to convict Mr. Britain of unlawful possession of a controlled substance with

¹ It should not be lost on this court that the primary piece of evidence that lead to a man being sentenced to 90 months in prison, the trip permit, was not retained by law enforcement. While this does not rise to the level of government misconduct worthy of dismissal, it does raise concerns regarding the officer's training and experience, upon which the State argued justified the stop of the motorcycle in the first place.

intent to deliver. His conviction must be reversed and the case remanded to the trial court.

C. THE COURT ERRED WHEN IT CONCLUDED OFFICER DAVIS STOPPED THE MOTORCYCLE DRIVEN BY MR. BRITAIN FOR A TRAFFIC INFRACTION AND THAT THE STOP WAS NOT PRETEXTUAL.

i. Pretextual seizures violate the Washington Constitution.

Under both the federal and state constitutions, warrantless searches and seizures are unreasonable per se unless an exception applies. *State v. Loewen*, 97 Wn.2d 562, 565, 647 P.2d 489 (1982); *State v. Lennon*, 94 Wn. App. 573, 579, 976 P.2d 121 (1999). However, article I, section 7 of the Washington Constitution more broadly protects the "private affairs" of each person than does the Fourth Amendment. Const. art. I, § 7; U.S. Const. amend. IV; *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). "Under article I, section 7, the right to privacy is broad, and the circumstances under which that right may be disturbed are limited." *Arreola*, 176 Wn.2d at 291. Thus, "[w]arrantless disturbances of private affairs are subject to a high degree of scrutiny." *Id.* at 292.

A traffic stop made without a warrant is constitutional only if based upon at least a reasonable articulable suspicion of criminal activity or a traffic infraction, and only if reasonably limited in scope. *Arreola*,

176 Wn.2d at 292-93 (citing *State v. Ladson*, 138 Wn.2d 343, 350, 351-52, 979 P.2d 833 (1999) (other citations omitted)

"The use of traffic stops must remain limited and must not encroach upon the right to privacy except as is reasonably necessary to promote traffic safety and to protect the general welfare through the enforcement of traffic regulations." *Id.* at 293. A traffic stop must be justified at its inception and reasonably limited in scope " based on whatever reasonable suspicions legally justified the stop in the first place." *Id.* at 294.

Article I, section 7 prohibits law enforcement from conducting a traffic stop based on pretext. E.g., *Ladson*, 138 Wn.2d at 358. "Pretext is, by definition , a false reason used to disguise a real motive." *Id.* at 359 (citations omitted). "A pretextual traffic stop occurs when a police officer relies on some legal authorization as ' a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirements.'" *Arreola*, 176 Wn.2d at 294 (quoting *Ladson*, 138 Wn.2d at 358). In short, the "police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving." *Ladson*, 138 Wn.2d at 349. This State's "constitution requires we look beyond the formal justification for the stop to the actual one." *Id.* at 353.

The traffic code is extensive and complicated, and it is commonly accepted that it is both impossible and undesirable to fully enforce it. *Arreola*, 176 Wn.2d at 294; *Ladson*, 138 Wn.2d at 358 & n.10. " Virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter." *Ladson*, 138 Wn.2d at 358 n.10. Thus, traffic stops are ripe for being abused as the " legitimate" basis for a pretextual, warrantless seizure. The courts must ensure that the police exercise - but not abuse - discretion in determining which traffic infractions require police attention and enforcement efforts. See *Arreola*, 176 Wn.2d at 294-95.

Washington courts look to a totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his or her behavior to determine whether a traffic stop was pretextual. *Arreola*, 176 Wn.2d at 296-97; *Ladson*, 138 Wn.2d at 359. The objective review is aimed at rooting out cases where "police officers ... simply misrepresent their reasons and motives for conducting traffic stops." *Arreola*, 176 Wn.2d at 297 (citations omitted).

The Washington Supreme Court's decision in *Arreola* supplemented this test in the case of mixed-motive traffic stops. A mixed-motive traffic stop is one "based on both legitimate and illegitimate grounds." *Arreola*, 176 Wn.2d at 297-98. In that case, the officer admitted

he followed a vehicle that matched the description of a possible driving under the influence (DUI) in progress, did not observe any signs of DUI, but observed the vehicle had an altered exhaust in violation of RCW 46.37.390. *Id.* at 288-89. At that point the officer pulled over the vehicle and seized the driver, observed signs of alcohol use, and discovered the driver had outstanding warrants, on which basis he arrested the driver. *Id.* The Supreme Court held that such a mixed- motive traffic stop is not unconstitutionally pretextual so long as the lawfully-based motive for the stop was actual, independent and conscious. *Id.* at 298-300. Both subjective intent and objective circumstances must be considered in determining whether there was an actual, independent and conscious legal basis for the stop in addition to the unconstitutional, pretextual basis. *Id.* at 300.

The State bears the heavy burden of proving the legality of a warrantless seizure by clear and convincing evidence. *State v. Doughty*, 170 Wn.2d 57, 62,239 P.3d 573 (2010); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). An appellate court reviews the constitutionality of a warrantless stop de novo. *Arreola*, 176 Wn.2d at 291; *State v. Martinez*, 135 Wn. App. 174, 179, 143 P.3d 855 (2006).

Findings of fact are reviewed for substantial evidence, which is "evidence sufficient to persuade a fair-minded, rational person of the truth

of the finding." *State v. Montes-Malindas*, 144 Wn. App. 254, 259, 182 P.3d 999 (2008). In the event of a pretextual stop, all subsequently obtained evidence from the stop must be suppressed. *Ladson*, 138 Wn.2d at 357.

- ii. A review of the totality of the circumstances demonstrates the traffic stop was pretextual.

Arguably, this case does not present the type of mixed-motive stop subject to *Arreola's* actual, conscious and independent analysis. In *Arreola*, the officer admitted two bases for his traffic stop of the defendant: a constitutional basis and a non-constitutional motive. 176 Wn.2d at 289. Here on the other hand, Officer Davis admitted only a constitutional basis but the objective and subjective circumstances call into question whether that basis was the officer's actual motive for initiating the stop. However, the Court need not determine the reach of *Arreola* here because an analysis of the totality of the circumstances demonstrates the traffic stop here was pretextual in violation of article I, section 7 either because the officer's proffered basis was not actual, conscious and independent from the unlawful motive or because a general review of the objective and subjective reasons for the stop demonstrate pretext was the actual motive.

The following is an excerpt from the cross examination of Officer

Davis:

Q. And you are aware that there are no reports, other than yours, in this particular case?

A. Yes, I am.

Q. And it is true, is it not, that you make it a habit to observe and/or drive near Green Acres Road on an almost daily basis?

A. Yes.

Q. And that, again, is because you believe it's a high crime or drug activity area; correct?

A. Yes.

Q. And you are familiar with — I asked you this in our interview before — Ms. Tiffany Voss-Hedrick?

A. Yes, I am.

Q. And you have frequently set up your vehicle or parked in Beth Court before to observe Green Acres Lane; correct?

A. Yes. And Harold Court.

Q. And Harold Court?

A. Mm-hmm --

Q. And both of --

A. -- yes.

Q. -- those are -- thank you. Both of those areas are basically adjacent to Green Acres Lane; is that correct?

A. Yes, they are.

Q. And it is true that you asked Mr. Britain whether he was picking up or dropping off on Green Acres Lane; correct?

A. I probably did.

Q. And you asked him, as well, if he was visiting Mark or Chris; correct?

A. Possibly.

Q. Yeah. And you believe that both of those people may have been involved in drug trafficking in that area; correct?

A. Correct.

Q. And in talking about picking up or dropping off, you were also referring to drug activity; correct?

A. Yes.

RP 52-54.

Although Officer Davis testified he decided to stop the vehicle for the license plate infraction, this Court must look beyond the reason proffered by the officer to determine whether it was the actual basis for the stop. *Ladson*, 138 Wn.2d at 353; *Montes-Malindas*, 144 Wn. App. at 260. “Pretext is no substitute for reason.” *Ladson*, 138 Wn.2d at 356.

In looking beyond the proffered basis for the stop, this Court's review must include both an objective and subjective review of the totality of the circumstances. Here, a review of the totality of the circumstances demonstrates the State did not prove the seizure was based upon suspected violation of the traffic code.

First, Officer Davis spends his time patrolling high crime areas, and knows there is a couple of drug houses on Green Acres Lane. He has conducted numerous narcotics investigations. RP 8. He told the court that when Mr. Britain pulled into Green Acres Lane, it made him curious. RP 14. He collects the license plate numbers of cars that go into Green Acres Lane, because he knows it has two drug houses.

He turned around almost immediately and saw Mr. Britain leaving Green Acres Lane. He followed the motorcycle and observed the trip permit on the license plate. The officer followed the motorcycle for a mile

from Green Acres Lane, up Middle Road, down Railway road, then up Canal Road until he crossed Northern Pacific Road. RP 17. Officer Davis could not articulate a reason for the lengthy delay in stopping the motorcycle but speculated that one reason may have been that he was waiting for other officers to back him up. RP 17. There is no reason, other than the belief that Mr. Britain was involved in more serious criminal activity than a covered license plate for Officer Davis to feel the need for back-up officers.

This delay strongly indicates that the covered license plate not the "actual" basis for the stop, but that the officer was looking to discover other criminal activity. See *State v. Nichols*, 161 Wn.2d 1, 10-11, 12, 162 P.3d 1122 (2007) (finding relevant to lack of pretext that upon viewing traffic violation officer " immediately pursued the vehicle and activated his lights").

Once Officer Davis gets out of his patrol vehicle, he took the trip permit off the motorcycle and did not investigate it, but rather he went to identify the person he saw leaving Green Acres Lane. Again, this circumstance indicates the officer was searching for possible criminal activity beyond the suspected reporting violation. See *Montes-Malindas*, 144 Wn. App. at 257-58 (finding pretext where officer later explained he

approached vehicle from passenger side because the occupants would not expect it and it would allow him to better see into the passenger area).

And then there is the exchange between Officer Davis and Mr. Britain he admits to on cross-examination. Officer Davis engaged Mr. Britain in a discussion regarding drug sales, and the Green Acres neighborhood.

When looking at the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of his behavior it is clear that the traffic stop was pretextual. The officer may not have even appreciated how much his desire to investigate narcotics activity on Green Acres Lane influenced his decision to pull over the motorcycle, but it certainly played a significant role and that made it pretextual.

Because all subsequently obtained evidence from the pretextual stop must be suppressed, Mr. Britain's convictions must be reversed, and the case remanded to the trial court.

V. CONCLUSION

For the reasons stated above, Mr. Britain requests this court reverse the convictions and remand this case to the trial court.

Dated: November 18, 2019

John M. Sheeran

John M. Sheeran, WSBA # 26050
Attorney for Jesse D. Britain

CERTIFICATE OF MAILING

I certify that on 11/12/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: **Jesse D. Britain**, DOC# 722767, CRCC, Post Office Box 769, Connell, WA 99326.

John M. Sheeran

John M. Sheeran, WSBA # 26050

LAW OFFICES OF JOHN SHEERAN

November 18, 2019 - 11:30 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53093-7
Appellate Court Case Title: State of Washington, Respondent v. Jessie D. Britain, Appellant
Superior Court Case Number: 18-1-01177-2

The following documents have been uploaded:

- 530937_Briefs_20191118112707D2591707_6067.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Britain COA Opening Brief.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- jacksoj@co.thurston.wa.us

Comments:

Sender Name: John Sheeran - Email: john.sheeran327@gmail.com

Address:

705 S 9TH ST STE 202

TACOMA, WA, 98405-4622

Phone: 253-468-9794

Note: The Filing Id is 20191118112707D2591707