

**FILED**

**JUN 18 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 302377-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

TONY CANTU, Appellant,

---

BRIEF OF APPELLANT

---

Mitch Harrison

Attorney for Appellant

The Crowley Law Firm, P.L.L.C.

Smith Tower

Suite 1015

506 Second Avenue

Seattle, Washington 98104

Tel (206) 625-7500 ♦ Fax (206) 625-1223

**FILED**

JUN 18 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 302377-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

TONY CANTU, Appellant,

---

BRIEF OF APPELLANT

---

Mitch Harrison

Attorney for Appellant

The Crowley Law Firm, P.L.L.C.

Smith Tower

Suite 1015

506 Second Avenue

Seattle, Washington 98104

Tel (206) 625-7500 ♦ Fax (206) 625-1223

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR .....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....1

III. STATEMENT OF THE CASE..... 1-4

IV. ARGUMENTS .....

A. The trial court erred by denying the appellant’s motion to suppress because State failed to meet its burden of showing that Mr. Cantu’s arrest was not pretextual when the facts presented to the trial court at the suppression hearing show that the arresting officer’s subjective intent was to arrest Mr. Cantu in order to search him and his vehicle for evidence of another crime..... 4-8

V. CONCLUSION.....9

TABLE OF AUTHORITIES

**Washington Supreme Court Cases**

*State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999) .....4, 5

*State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962) .....4, 5

**Washington Appellate Court Cases**

*State v. Montes-Malindas*, 144 Wn. App 254, 182 P.3d 999 (2008) ..... 4-6

I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the appellant's motion to suppress because State failed to meet its burden of showing that Mr. Cantu's arrest was not pretextual when the facts presented to the trial court at the suppression hearing show that the arresting officer's subjective intent was to arrest Mr. Cantu in order to search him and his vehicle for evidence of another crime.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

2. Whether the trial court erred by denying the appellant's motion to suppress because State failed to meet its burden of showing that Mr. Cantu's arrest was not pretextual when the facts presented to the trial court at the suppression hearing show that the arresting officer's subjective intent was to arrest Mr. Cantu in order to search him and his vehicle for evidence of another crime.

I. STATEMENT OF THE CASE

**Charges.** On October 7, 2010, Mr. Cantu was charged with Possession of Methamphetamine. CP 1. On April 19, 2011, the State filed an amended information that also charged Mr. Cantu with Use of Drug Paraphernalia, a simple misdemeanor. CP 38-39.

**Motion to Suppress.** On April 7, 2011, Mr. Cantu filed a motion to suppress all evidence obtained from his arrest, including the methamphetamine, arguing that his arrest for reckless driving was merely a pretext to search for evidence of other crimes. CP 10. The arresting officer who conducted the initial traffic stop and ultimately arrested Mr. Cantu was Adams County Deputy Jason Erickson. CP 67. At the

suppression hearing, Deputy Erickson was the only witness called to testify. CP 67. Deputy Erickson was on patrol duty early morning of October 7, 2010. RP 29. At around 1:00 A.M., Deputy Erickson observed Mr. Cantu driving his vehicle 72 miles per hour in a 25 mile per hour zone. RP 29-30. The speed limit on that road had abruptly decreased from 50 miles per hour to 25 miles per hour. RP 33. Deputy Erickson then initiated a traffic stop of Mr. Cantu's vehicle. RP 41.

Deputy Erickson approached the vehicle, but did not immediately arrest Mr. Cantu for reckless driving. RP 51. In one previous stop for reckless driving not involving Mr. Cantu, Deputy Erickson had issued a ticket for reckless rather than arresting that person. RP 52. When defense counsel asked whether or not Deputy Erickson would have arrested a 50 year old woman under the exact "same circumstances," Deputy Erickson refused to answer the hypothetical. RP 54.

In addition, before determining whether or not to arrest a person, Deputy Erickson would "typically contact [the driver], get their information, go back, determine if they're clear, and then make [his] determination" as to whether or not he should arrest that person. RP 53. In this case, it appears that he did just that. Deputy Erickson did not arrest Mr. Cantu upon contact. Rather, he retrieved his information and went back to his patrol vehicle to run a warrant check for Mr. Cantu, which

came back clear. RP 57. However, when he ran a records check on Mr. Cantu, it likely reminded him of his previous contacts with Mr. Cantu, which included prior burglary investigations, theft investigations, and drug investigations. RP 56.

In fact, Deputy Erickson admitted that he was interested in investigating crimes that were consistent with his criminal history other than reckless driving, including property in Mr. Cantu's vehicle which he thought might be stolen,

"I saw property in the back of the car. That also piqued my curiosity, noticing, you know, large electronic equipment. You know, there [were] bags in the backseat, and that's part of my job. Whenever I contact a car and I see stuff like that, sure it piques my interest."

RP 56. Once his interest was piqued, Deputy Erickson went back to his patrol car hoping to find outstanding warrants. When none appeared, he returned to the vehicle and told Mr. Cantu that he was under arrest for reckless driving and impounded Mr. Cantu's vehicle. RP 57. Deputy Erickson searched Mr. Cantu incident to his arrest and found a scale and a crystal substance than later tested positive for methamphetamine. RP 45.

After Deputy Erickson's testimony and a brief argument by the State, the court issued its ruling on the motion and denied the defendant's motion to suppress. CP 67-69; RP 66-72. The court

issued written findings of fact and conclusions of law. CP 67-69.

In that document, the court found that Mr. Cantu's vehicle was speeding, going 72 miles per hour when the posted speed limit was 25. CP 68. Thus, the arresting Deputy had probable cause to arrest Mr. Cantu. CP 69.

**Trial.** On the day of trial, Mr. Cantu pleaded guilty to the Use of Drug Paraphernalia charge but proceeded to trial on the UCSA charge. CP 60-64. After a brief jury trial, Mr. Cantu was convicted of Unlawful Possession of Methamphetamine. RP 243, Ultimately, Mr. Cantu was allowed to withdraw his guilty plea on the Use of Drug Paraphernalia charge and the court dismissed that count with prejudice. CP 81.

## II. ARGUMENTS

**B. The trial court erred by denying the appellant's motion to suppress because State failed to meet its burden of showing that Mr. Cantu's arrest was not pretextual when the facts presented to the trial court at the suppression hearing show that the arresting officer's subjective intent was to arrest Mr. Cantu in order to search him and his vehicle for evidence of another crime.**

An appellate court reviews findings of fact related to a motion to suppress under the substantial evidence standard. *State v. Montes-Malindas*, 144 Wn. App 254, 259-60, 182 P.3d 999 (2008). Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person

of the truth of the finding.” *Id.* Review of conclusions of law pertaining to suppression of evidence is de novo. *Id.*

In *State v. Michaels*, Washington adopted a strict no-pretext. 60 Wn.2d 638, 374 P.2d 989 (1962). A pretextual stop or arrest occurs when an officer stops a vehicle or arrests a person 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.' " *State v. Ladson*, 138 Wn.2d 343, 349, 359 fn 11, 979 P.2d 833 (1999). To determine whether a stop or an arrest is pretextual, the totality of the circumstances must be considered, including the subjective intent of the officer and the objective reasonableness of the officer's behavior. *Id.* at 358-59.

A search is pretextual unless the State meets its burden to “show that the officer's motivation in making the stop was to enforce the traffic code and not to discover evidence of crimes.” *Montes-Malindas*, 144 Wn. App at 259-60. If the court finds the seizure is pretextual, all subsequently obtained evidence flowing from the stop must be suppressed as derivative of the unconstitutional seizure. *Ladson*, 138 Wn.2d at 359.

In all cases in Washington that have found a stop or an arrest to be pretextual, one common factor exists that also occurred in this case. In

*Montes-Malindas*, for instance, an officer witnessed some suspicious activity in the parking lot of a Walgreens. The suspects got into a van and drove away. *Montes-Malindas*, 144 Wn. App at 259-60. The officer followed the van and pulled it over for driving briefly without headlights, although it was dark. The court held that Although the officer in *Montes-Malindas* said that his only reason for pulling over the van was the delayed engagement of the headlights, he “also stated that he was suspicious of the activity that he saw in the parking lot, and that those suspicions probably were on his mind when he decided to pull over the van” *Id.*

Here, just as in *Montes-Malindas*, the State failed to meet its burden by showing that Mr. Cantu’s arrest was not pretextual because the facts presented to the trial court at the suppression hearing show that the arresting officer’s subjective intent was to arrest Mr. Cantu in order to search him and his vehicle for evidence of another crime.

The State may argue that “because the trial court found that [the officer] was credible in his testimony that he did not” arrest Mr. Cantu so that he may investigate other possible crimes, “his subjective intent was to” arrest him simply for reckless driving. This exact argument was rejected in *Montes-Malindas*, however. *See id.* at 260. The court in *Montes-Malindas* pointed out that the officer’s objective intent is not

controlling when determining whether a stop was pretextual. Thus, here the court must look at other factors that suggest that Deputy Erickson's motive was not simply to arrest Mr. Cantu for reckless driving, but instead to search him or his vehicle for evidence of other crimes.

Deputy Erickson did not arrest Mr. Cantu upon contact, just as in *Montes-Malindas*. Rather, he retrieved his information and went back to his patrol vehicle to run a warrant check for Mr. Cantu, which came back clear. RP 57. However, when he ran a records check on Mr. Cantu, it likely reminded him of his previous contacts with Mr. Cantu, which included prior burglary investigations, theft investigations, and drug investigations. RP 56.

In fact, like the officer in *Montes-Malindas*, Deputy Erickson admitted that he was interested in investigating crimes that were consistent with his criminal history other than reckless driving, including property in Mr. Cantu's vehicle which he thought might be stolen,

"I saw property in the back of the car. That also piqued my curiosity, noticing, you know, large electronic equipment. You know, there [were] bags in the backseat, and that's part of my job. Whenever I contact a car and I see stuff like that, sure it piques my interest."

RP 56. Once his interest was piqued, Deputy Erickson went back to his patrol car hoping to find outstanding warrants. When none appeared, he returned to the vehicle and told Mr. Cantu that he was

under arrest for reckless driving and impounded Mr. Cantu's vehicle. RP 57. Deputy Erickson searched Mr. Cantu incident to his arrest and found a scale and a crystal substance than later tested positive for methamphetamine. RP 45.

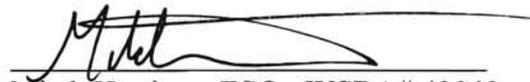
Finally, Deputy Erickson admitted that he had never arrested another person for reckless driving before and could not provide a specific reason why Mr. Cantu should be arrested rather than cited and released. In one previous stop for reckless driving not involving Mr. Cantu, Deputy Erickson had issued a ticket for reckless rather than arresting that person. RP 52. When defense counsel asked whether or not Deputy Erickson would have arrested a 50 year old woman under the exact "same circumstances," Deputy Erickson refused to answer the hypothetical. RP 54.

These facts, when analyzed as a whole, show that Deputy Erickson's subjective intent when arresting Mr. Cantu was not simply to book him for reckless driving; instead, he wanted to investigate other crimes. Because the arrest was pretextual, all evidence obtained from the search incident to arrest should have been suppressed.

III. CONCLUSION

For the reasons stated above, Mr. Cantu respectfully requests that the court grant the relief as designated above in his opening brief.

DATED this 14<sup>th</sup> day of June, 2012.

A handwritten signature in black ink, appearing to read "Mitch Harrison", is written over a horizontal line.

Mitch Harrison, ESQ., WSBA# 43040  
Attorney for Appellant Tony Cantu

**PROOF OF SERVICE**

On June 14, 2012 I filed with the Court of Appeals, Division III via the United States Postal Service to be delivered to their office at **500 N Cedar St, Spokane, WA 99201-1905** one original and one copy of the attached Appellant's Brief and proof of service. On this same date, I deposited into the United States Postal service a copy of this Appellant's Brief and proof of service to the Adams County Prosecuting Attorney's Office, Appellate Unit at 210 W. Broadway, Ritzville, WA 99169. The defendant on this case, Mr. Cantu DOC#762542, was sent a copy of this Statement and this proof of service via the United States Postal Service at Airway Corrections Center, 11919 W. Sprague Avenue, P.O. Box 1899, Airway Heights, WA 99001-1899.

Dated this 14<sup>th</sup> day of June, 2012,



Kaitlyn Jackson. Paralegal

The Crowley Law Firm, PLLC

Smith Tower

506 2<sup>nd</sup> Ave, ste 1015

Seattle, WA 98104

Phone: (206) 623-1569

Fax: (206) 625-1223

**Kaitlyn@Johncrowleylawyer.com**