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Feb 15, 2013
Court of Appeals
Division III
State of Washington

30439-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTEMIO ANGEL FREGOSO-GUERRERO, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF CHELAN COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. NUMEROUS FACTUAL ASSERTIONS IN RESPONDENT'S BRIEF ARE NOT SUPPORTED BY ANY CITATION TO THE RECORD AND SHOULD BE DISREGARDED.

The appellate rules require the brief of respondent to conform to the requirements for the brief of appellant, which include reference to the record for each factual statement in the statement of the case and argument. RAP 10.3(a)(5) and (6); RAP 10.3(b). The first and second paragraphs of Respondent's Brief contain copious factual assertions for which no citation to the record is provided. Rather than further prolonging this appeal by requiring the appellant to file a motion to strike the improper factual statements in the respondent's brief, this court may choose to disregard those statements for which no citation to the record has been provided.

2. ARGUMENT PREDICATED ON FACTUAL ASSERTIONS NOT SUPPORTED BY THE RECORD SHOULD BE DISREGARDED.

An appellate court reviews a trial court's decision to determine whether the court's findings of fact support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Challenges to a trial court's conclusions of law are reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A factual finding that is

incorporated in the court's conclusions of law is reviewed as a finding.

State v. Frazier, 82 Wn. App. 576, 589 n13, 918 P.2d 964 (1996).

The essential conclusion at issue in this matter is as follows:

The court further concludes that based on the totality of the circumstances, the deputy's interference with the suspect's freedom of movement was reasonably related in scope to the circumstances which justified the interference in the first place. The court considered the deputy's training and experience, the deputy being a 5-year veteran of the Chelan County Sheriff's Office, the location of the stop, the time of the stop (1:10 a.m.), the conduct of the suspect which included his attempted flight, and the erratic driving of the vehicle by the suspect/defendant in determining that reasonable suspicion existed for a detention of the driver.

(CP 31)

The State contends that the officer properly seized Mr. Guerrero because this was a necessary precondition to the seizure of the fleeing driver:

The officer was initially going to pursue the driver, but had to run past the passenger in order to get to the direction the driver went, so it was necessary for the officer to detain the passenger for officer safety purposes.

Resp Br. at 7. The parties did not stipulate to such facts and the record provides no basis for such a finding.

3. THE FINDINGS DO NOT SUPPORT THE CONCLUSION THAT MR. FREGOSO-GUERRERO'S DETENTION WAS BASED ON ANY INDIVIDUALIZED SUSPICION.

An investigative stop must be based on individualized suspicion. *State v. Thompson*, 93 Wn.2d 838, 841-42, 613 P.2d 525 (1980). The court's findings, while adequate to support the court's conclusion that the driver was properly detained, do not support the inference that the court could have concluded that the rear passenger was likewise properly seized.

The court found "The deputy suspected the driver might be under the influence of alcohol based on the erratic driving and the location of the vehicle having been parked along the fog line facing the wrong direction on Ohme Road." (CP 28) While the erratic driving coupled with the time and location could support detaining the driver based on a suspicion of drunk driving, the court made no findings regarding the erratic behavior of the driver's side rear seat passenger, Mr. Fregoso-Guerrero.

The only finding that supports individualized suspicion of Mr. Fregoso-Guerrero is that he fled when the officer approached the car. (CP 28) But flight alone is insufficient justification for an investigative stop. *State v. Walker*, 66 Wn. App. 622, 629, 834 P.2d 41 (1992); *See State v. Thompson*, 93 Wn.2d at 841; *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980). In *Thompson*, the court expressly held that

Thompson's proximity to others suspected of criminal activity failed to provide the requisite individualized suspicion. 93 Wn. 2d at 841. "Neither can we find that Thompson's rapid walking toward the shopping center, by itself, made him a proper subject for criminal investigation." 93 Wn. 2d at 841-42.

No individualized suspicion justified the seizure of Mr. Fregoso-Guerrero.

B. CONCLUSION

The record does not support the conclusion that evidence obtained pursuant to the seizure of Mr. Fregoso-Guerrero, including the police reports to which he purportedly stipulated, was admissible at his bench trial. His conviction should be reversed.

Dated this 15th day of February, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)
)
Respondent,) No. 30439-6-III
)
vs.) CERTIFICATE
) OF MAILING
ANTEMIO FREGOSO-GUERRERO,)
)
Appellant.)

I certify under penalty of perjury under the laws of the State of Washington that on February 15, 2013, I served a copy of the Appellant's Reply Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Gary Riesen
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I certify under penalty of perjury under the laws of the State of Washington that on February 15, 2013, I mailed a copy of the Appellant's Reply Brief in this matter to:

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Signed at Spokane, Washington on February 15, 2013.


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