

FILED
Apr 30, 2012
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 BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

A. ASSIGNMENTS OF ERROR1

B. ISSUES3

C. STATEMENT OF THE CASE.....3

D. ARGUMENT4

 1. DENIAL OF DEFENDANT’S SUPPRESSION
 HEARING BASED ON EVIDENCE ADDUCED
 AT A HEARING AT WHICH NEITHER THE
 DEFENDANT NOR HIS COUNSEL WAS
 PRESENT VIOLATED DEFENDANT’S
 CONSTITUTIONAL RIGHT TO BE PRESENT4

 2. THE COURT’S FINDINGS OF FACT ARE
 NOT SUPPORTED BY EVIDENCE IN THIS
 CASE7

 3. THE COURT’S FINDINGS DO NOT SUPPORT
 THE CONCLUSION THAT THE EVIDENCE
 DERIVED FROM THE DEPUTY’S SEIZURE
 OF THE DEFENDANT WAS ADMISSIBLE.....7

E. CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE LORD, 123 Wn.2d 296, 868 P.2d 835, <i>clarified by</i> 123 Wn.2d 737, 870 P.2d 964 (1994).....	5
STATE V. AFANA, 147 Wn. App. 843, 196 P.3d 770 (2008).....	9
STATE V. BROWN, 154 Wn.2d 787, 117 P.3d 336 (2005).....	9
STATE V. CORBIN, 79 Wn. App. 466, 903 P.2d 999 (1995).....	5
STATE V. DOUGHTY, 148 Wn. App. 585, 201 P.3d 342 (2009).....	9
STATE V. DUNCAN, 146 Wn.2d 166, 43 P.3d 513 (2002).....	8
STATE V. IRBY, 170 Wn.2d 874, 246 P.3d 796 (2011).....	6
STATE V. JOHNSON, 128 Wn.2d 431, 909 P.2d 293 (1996).....	7
STATE V. LADSON, 138 Wn.2d 343, 979 P.2d 833 (1999).....	9
STATE V. O'NEILL, 148 Wn.2d 564, 62 P.3d 489 (2003).....	7
STATE V. RANKIN, 151 Wn.2d 689, 92 P.3d 202 (2004).....	9
STATE V. RIFE, 133 Wn.2d 140, 943 P.2d 266 (1997).....	8

STATE V. SARGENT, 111 Wn.2d 641, 762 P.2d 1127 (1988).....	6
STATE V. THOMSON, 123 Wn.2d 877, 872 P.2d 1097 (1994).....	6
STATE V. VILLARREAL, 97 Wn. App. 636, 984 P.2d 1064 (1999).....	9

SUPREME COURT CASES

ILLINOIS V. ALLEN, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).....	5
JOHNSON V. ZERBST, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).....	6
TERRY V. OHIO, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	9
UNITED STATES V. GAGNON, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).....	5

FEDERAL CASES

CAMPBELL V. WOOD, 18 F.3d 662 (9th Cir.1994).....	6
UNITED STATE V. GORDON, 829 F.2d 119 (D.C.Cir.1987).....	6

CONSTITUTIONAL PROVISIONS

ARTICLE I, § 7	8
FOURTH AMENDMENT.....	8

A. ASSIGNMENTS OF ERROR

1. The court erred in entering each and every one of the facts relied upon in denying defendant's motion to suppress evidence:

1. On Sunday, August 14, 2011, at approximately 1:10 a.m., Deputy Risdon was traveling southbound on US 97 A just north of Wenatchee.
2. Deputy Risdon observed a vehicle's brake lights illuminate in the area of 405 Ohme Road near Countryside Veterinary and the Ohme Road Storage. There were no residences in the area and the businesses were closed.
3. Deputy Risdon turned his patrol car around and drove to the area to investigate the activity. When Deputy Risdon arrived, he observed a dark-colored Ford Explorer parked facing westbound on the edge of the eastbound lane of travel near the fog line.
4. Deputy Risdon stopped his marked patrol vehicle in the westbound lane of travel some distance from the vehicle and activated his spotlight onto the vehicle.
5. Deputy Risdon observed the front passenger door partially open and a Hispanic male starting to get out. He then observed the brake lights of the vehicle illuminate.
6. As the male started to exit the vehicle, he looked back at Deputy Risdon. That it seemed suspicious to Deputy Risdon who then placed his vehicle in reverse and backed away in case the male exiting the vehicle had a weapon.
7. As soon as Deputy Risdon started to back his patrol vehicle up, the male passenger quickly got back inside the vehicle and shut the door.
8. The vehicle then quickly accelerated, "put the hammer down," and abruptly swerved up onto the pavement heading westbound crossing the eastbound lane of Ohme Road.

9. Deputy Risdon immediately accelerated behind the vehicle and activated his emergency lights.
10. 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.
11. The vehicle continued west on Ohme Road for a short distance and then came to an immediate stop, the driving having “dynamited” the brakes. The vehicle was stopped in the middle of the roadway, the doors opened, engine running, and keys in the ignition. Three individuals fled from the vehicle, two from the driver's side and one from the front passenger's door. The passenger ran northwest across the road.
12. Deputy Risdon observed a Hispanic male flee from the driver’s door of the vehicle who appeared to be in his twenties wearing a flannel shirt and blue jeans. The other occupant appeared to be in his twenties and fled from the driver’s rear passenger door.
13. After the three men fled the vehicle, Deputy Risdon pursued the driver and driver side passenger on foot from his patrol car. Deputy Risdon did not have other units in the area at that time to assist. Deputy Risdon caught the driver’s side passenger after a few hundred feet and placed him into handcuffs. He was later identified as Angel A. Fregoso-Guerrero and Deputy Risdon placed him into his patrol vehicle.

(Findings of Fact, CP 27-29)

2. The court erred in denying the motion to suppress evidence.

(CP 31)

B. ISSUES

1. Does the court's entry of findings of fact based on evidence presented at a codefendant's hearing, at which neither defendant nor his counsel was present, violate defendant's constitutional right to be present at all critical stages of the proceedings?
2. When the evidence on which the court's findings are based is not made a part of the trial court record, is the evidence sufficient to support the findings?
3. The court found that a deputy sheriff stopped a vehicle because he suspected the driver was intoxicated and the defendant, who was a passenger in the vehicle, attempted to flee and was seized by the deputy. The court concluded the stopping of the vehicle and detention of the driver were supported by reasonable suspicion. Do these findings and conclusions support denial of the passenger's motion to suppress evidence derived from his seizure?

C. STATEMENT OF THE CASE

Mr. Fregoso-Guerrero was arrested after he fled from a vehicle in which he was a passenger after a deputy sheriff stopped the vehicle on

suspicion that the driver was intoxicated. (CP 4) A stolen outboard boat motor was found in the vehicle, and the State charged Mr. Fregoso-Guerrero with burglary and theft. (CP 1-2, 4-5)

He moved to suppress evidence discovered following his arrest. (CP 11) Although the two cases were never joined, Mr. Fregoso-Guerrero's counsel agreed to the findings entered at the conclusion of the hearing held in the driver's case. (RP 2) Thus the record in this case does not contain the evidence upon which the court relied in entering the findings. The court denied Mr. Fregoso-Guerrero's motion to suppress, and following a trial and conviction on stipulated facts Mr. Fregoso-Guerrero brought this appeal. (RP 3-5, CP 47-58, 61)

D. ARGUMENT

1. DENIAL OF DEFENDANT'S SUPPRESSION HEARING BASED ON EVIDENCE ADDUCED AT A HEARING AT WHICH NEITHER THE DEFENDANT NOR HIS COUNSEL WAS PRESENT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO BE PRESENT.

The court's findings clearly disclose that Mr. Fregoso-Guerrero was not present at the hearing on the admissibility of the evidence to be used at trial, nor is there any suggestion that he was represented by counsel at the hearing:

Cause Number 11-1-00324-9 involving defendant Enrique Retana Gonzalez came before the court on the 18th day of October, 2011; Retana Gonzalez having been personally present and represented by his attorney, Bradley J. Drury, Counsel for the Defense of Chelan County; the State having been represented by Gary A. Riesen, Chelan County Prosecuting Attorney; the court having heard the testimony of Deputy Lee Risdon of the Chelan County Sheriff's Office, and having been otherwise fully advised in the premises.

(CP 26) Mr. Fregoso-Guerrero was represented by Brandon Redal.

(RP 1)

A criminal defendant has a constitutional right to be present at all critical stages of the proceedings. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The core of the constitutional right to be present is the right to be present when evidence is being presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (per curiam). Critical stages include when evidence is being presented or whenever a defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (quotations omitted), clarified by 123 Wn.2d 737, 870 P.2d 964 (1994); *accord State v. Corbin*, 79 Wn. App. 466, 449, 903 P.2d 999 (1995).

Mr. Fregoso-Guerrero had no opportunity whatsoever to be present or to defend himself at the 3.6 hearing. Since the very purpose of the

hearing was to resolve disputed facts, his right to be present is beyond cavil.

A defendant may waive his rights under the Constitution, provided such waiver is “voluntary, knowing, and intelligent.” *Campbell v. Wood*, 18 F.3d 662, 671 (9th Cir.1994) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)); *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). But, in order to knowingly and intelligently waive a constitutional right, the defendant must be aware of the right at issue. *State v. Sargent*, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988); see also *United States v. Gordon*, 829 F.2d 119, 125 (D.C.Cir.1987) (holding that if a defendant wants to waive his constitutional right to be present he must be advised of the right and then permitted to make an on-the-record waiver in open court). The record here is devoid of any showing that Mr. Fregoso-Guerrero made a voluntary, knowing, and intelligent waiver of his constitutional right to be present during this critical stage of the trial proceedings

“A violation of the due process right to be present is subject to harmless error analysis.” *State v. Irby*, 170 Wn.2d 874, 885, 246 P.3d 796 (2011). The State bears the burden of proving beyond a reasonable doubt that the error is harmless. *Id.* at 886. The record in this case fails to disclose any basis for a determination that this error was harmless.

2. THE COURT'S FINDINGS OF FACT ARE NOT SUPPORTED BY EVIDENCE IN THIS CASE.

An appellate court reviews findings of fact after a suppression hearing to determine whether they are supported by substantial evidence in the record. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Unchallenged findings are verities on appeal. *O'Neill*, 148 Wn.2d at 571. Conclusions of law are reviewed *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Mr. Fregoso-Guerrero assigns error to each of the court's findings as to the admissibility of evidence derived from his detention and arrest. No evidence was presented in response to Mr. Fregoso-Guerrero's motion for suppression; thus no record exists to support any of these findings. Since the findings were not supported by substantial evidence, there was no basis for the court's legal conclusions, including the conclusion that the challenged evidence was admissible.

3. THE COURT'S FINDINGS DO NOT SUPPORT THE CONCLUSION THAT THE EVIDENCE DERIVED FROM THE DEPUTY'S SEIZURE OF THE DEFENDANT WAS ADMISSIBLE.

Assuming for the sake of argument that the State had presented evidence upon which the trial court's findings and conclusions were based, the findings do not support the court's conclusions.

The court found that Deputy Ridsen saw a car parked facing the wrong way in a commercial area late at night, when no businesses were open. When he shone a spotlight on the vehicle, the front passenger started to get out of the car, and when the deputy began backing up his car, the passenger got back in and the car drove away suddenly and erratically. Suspecting that the driver was intoxicated, the deputy activated his emergency lights and pursued the vehicle. The vehicle stopped after a short distance, and the three occupants of the vehicle fled. Deputy Ridsen caught the driver's side passenger, later identified as Mr. Fregoso-Guerrero, within a few hundred feet, handcuffed him and placed him in the back of his patrol car.

As a general rule, warrantless searches and seizures are *per se* unreasonable, in violation of the Fourth Amendment and article I, § 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The rule is subject to a few jealously and carefully drawn exceptions including consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997).

“The stop is reasonable if the State can point to ‘specific and articulable facts giving rise to a reasonable suspicion that the person

stopped is, or is about to be, engaged in criminal activity.”
State v. Doughty, 148 Wn. App. 585, 589, 201 P.3d 342 (2009) quoting
State v. Villarreal, 97 Wn. App. 636, 640, 984 P.2d 1064 (1999). A traffic
stop is generally valid when a law enforcement officer has a reasonable
suspicion of unlawful conduct on the part of the driver. *State v. Ladson*,
138 Wn.2d 343, 349-350, 979 P.2d 833 (1999); *Terry v. Ohio*, 392 U.S. 1,
21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

A law enforcement officer may not seize passengers in a vehicle
for investigatory purposes in the course of a traffic stop “without an
independent basis.” *State v. Afana*, 147 Wn. App. 843, 847, 196 P.3d 770
(2008), quoting *State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004);
State v. Brown, 154 Wn.2d 787, 117 P.3d 336 (2005).

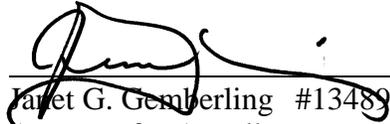
The trial court found that the officer stopped the vehicle because
he suspected the driver was intoxicated and concluded that, in the totality
of the circumstances, detaining the driver was supported by reasonable
suspicion. (CP 31) The court’s conclusions refer to “the conduct of the
suspect which included 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 court did not identify
any independent basis for seizing Mr. Fregoso-Guerrero.

E. CONCLUSION

Mr. Fregoso-Guerrero should be granted a new trial, to include a hearing on his motion to suppress the evidence obtained following his detention.

Dated this 30th day of April, 2012.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

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 April 30, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Gary Riesen
prosecuting.attorney@co.chelan.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on April 30, 2012, I mailed a copy of the Appellant's Brief in this matter to:

Antemio Angel Fregoso-Guerrero
12006 Road P SW
Royal City, WA 99357

Signed at Spokane, Washington on April 30, 2012.


Janet G. Gemberling
Attorney at Law