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DECEMBER 31, 2012
Court of Appeals
Division III
State of Washington

No. 30439-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

ANGEL ANTEMIO FREGOSO-GUERRERO,
Defendant/Appellant.

SECOND AMENDED BRIEF OF RESPONDENT

Douglas J. Shae
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I. STATEMENT OF THE CASE

The defendant, Angel Antemio Fregoso-Guerrero, was arrested along with a co-defendant, Enrique Retana Gonzalez, during the early morning hours of August 14, 2011, in Chelan County. Deputy Risdon of the Chelan County Sheriff's Office stopped a vehicle driven by Retana Gonzalez, and containing the defendant Fregoso-Guerrero as a passenger, for driving erratically from the shoulder of the roadway near a business providing boat storage. (CP 3-6). It was approximately 1:00 a.m. on a Sunday night.

Both Retana Gonzalez and Fregoso-Guerrero ran from the vehicle once it stopped in response to Deputy Risdon activating his emergency equipment. Deputy Risdon was by himself and apprehended first the defendant Fregoso-Guerrero, who was placed in handcuffs. Subsequently, Retana Gonzalez was also located and arrested. An examination of their vehicle revealed a stolen outboard motor inside the vehicle. This resulted in charges being filed against both individuals for burglary, theft, and against the driver, Retana Gonzalez, for driving while intoxicated. (CP 1-2).

Subsequently, counsel for Mr. Fregoso-Guerrero filed a motion and memorandum to suppress on October 10, 2011. (CP 11-17). The State filed a response to the motion to suppress on October 14, 2011. (CP 19-23). A threshold hearing on the defendant's motion was set for October 31, 2011, at which time the State stipulated to threshold. (CP 24).

On October 18, 2011, a suppression hearing was held in the companion case of Enrique Retana Gonzalez before the Honorable John E. Bridges. (RP 2:1-3:9). The court held a hearing, considered evidence, and made findings and conclusions.

On November 10, 2011, the defendant Fregoso-Guerrero and his counsel stipulated that the court could adopt the findings and conclusions that the court had entered in the companion case of Retana Gonzalez to provide a basis for the evidence to be admitted in a stipulated facts trial. (CP 26-32).

The court found the defendant Fregoso-Guerrero guilty of the Theft in the Second Degree, and from that conviction the defendant appeals.

II. ISSUES

Issue No. 1. The Defendant Alleges That the Stipulation Entered Into by the Defendant and His Attorney Regarding the Adoption of the Findings of Fact From a Co-Defendant's Hearing Violates the Defendant's Constitutional Right to be Present at a Critical Stage of the Proceeding.

In essence, what occurred in this case is that the defendant waived his right to present evidence in his case on his motion to suppress. In general, a stipulation to facts is a tactical decision. State v. Mierz, 127 Wn.2d 476 (1995); State v. Goodwin, 67 Wn. App. 623 (1992). An attorney and his client for tactical reasons may waive their right to put on evidence during a suppression motion or to even pursue the motion.

"The stipulation is an express waiver . . . conceding for the purposes of the trial the truth of some alleged fact with the effect that one party need offer no evidence to prove it and the other is not allowed to disprove it." State v. Wolf, 134 Wn. App. 196 (2006).

Here, the facts were effectively conceded by the defendant as to what had occurred during the stop. The stipulated facts trial allowed the defendant to preserve his issue for appeal, but the tactical decision by counsel did not deprive the defendant of the right to be present at any stage of the proceedings. The defendant was present during the stipulated facts trial and signed the Findings of Fact and Conclusions of Law, adopting them into his case.

The doctrine of invited error also prevents the defendant from pursuing this issue on appeal. State v. Boyer, 91 Wn.2d 342 (1979); State v. Henderson, 114 Wn.2d 867 (1990). That doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal. State v. Momah, 167 Wn.2d 140 (2009).

The defendant was present during all the critical stages of his trial.

Issue No. 2. Were There Sufficient Findings to Support the Trial Court's Ruling That the Evidence Should Not Be Suppressed?

The Findings of Fact and Conclusions of Law entered by the court regarding the CrR 3.6 hearing refer to the hearing which was

held in the co-defendant Retana Gonzalez' matter on October 18, 2011. That trial court record was available in that file.

Issue No. 3. Do the Court's Findings Support the Conclusions That the Evidence in This Case Was Admissible?

Terry v. Ohio, 392 U.S. 1 (1968), creates an exception to the warrant requirement. A Terry stop is a brief investigative detention when an officer has reasonable suspicion, grounded and specific, articulable fact that the person stopped has been or is about to be involved in a crime. State v. Acery, 148 Wn.2d 738 (2003). The totality of the circumstances must objectively indicate that there has been a substantial possibility the suspect has been or will be engaged in criminal conduct. State v. Garcia, 125 Wn.2d 239 (1994).

In State v. Williams, 102 Wn.2d 733 (1984), the Washington Supreme Court set forth the following two-part inquiry governing investigative stops: First, was the initial interference with the suspect's freedom of movement justified at its inception? Second, was it reasonably related in scope to the circumstances which justified the interference in the first place?

In determining whether reasonable suspicion for a stop exists, relevant considerations include the officers' training and experience, the location of the stop, the conduct of the suspect (such as attempted flight), and any other information known to the officers before the stop. State v. Villarreal, 97 Wn. App. 636 (1999) (flight in the presence of police officers is a circumstance that may be considered); State v. Swaite, 33 Wn. App. 477 (1982) (fact that person matching the description of a possible burglary suspect, upon seeing the police officer jumped into the bushes, justified investigatory detention); U.S. ex rel. Richardson v. Rundle, 461 F.2d 860 (3rd Cir. 1972) (fact that four men observed running from possible robbery then attempted to elude plainly-marked police car a factor to be considered in justifying investigative stop).

Here, the defendant was a passenger in the vehicle driven by Retana Gonzalez. An officer may under Terry detain a vehicle passenger for investigation. State v. Mendez, 137 Wn.2d 208 (1999). The following non-exclusive factors may justify an officer detaining a passenger at a traffic stop: "the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants." Mendez, 137

Wn.2d at 220-21. No one factor automatically justifies an officer detaining a passenger. Mendez, 137 Wn.2d at 220-21. Rather, the inquiry "requires consideration of the circumstances present a the scene of the traffic stop." Mendez, 137 Wn.2d at 220-21.

Here, it was 1:00 in the morning on a Sunday night. (CP 26-32). Businesses in the area were closed. Id. Deputy Risdon was by himself in his patrol car with no backup in the area. Id. The suspect vehicle accelerated quickly onto the roadway shortly after the officer shined his spotlight on the vehicle and the vehicle fishtailed. Id. When the officer hit his emergency lights, the vehicle stopped in the middle of the road and three persons ran from the vehicle. Id. One of those occupants had previously come out of the vehicle and then jumped back in quickly when the spotlight struck the car. The officer felt there may have been a weapon involved. Id. There was no street lighting in the area which was near a storage facility. Id.

The defendant who was the rear seat passenger was caught quickly in a foot pursuit by the officer. Id. 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. Id.

After the officer was able to also detain the driver, he was able to look into the suspect vehicle which was parked in the middle of the road and observe a boat motor in the back of the vehicle with the fuel lines cut. Id.

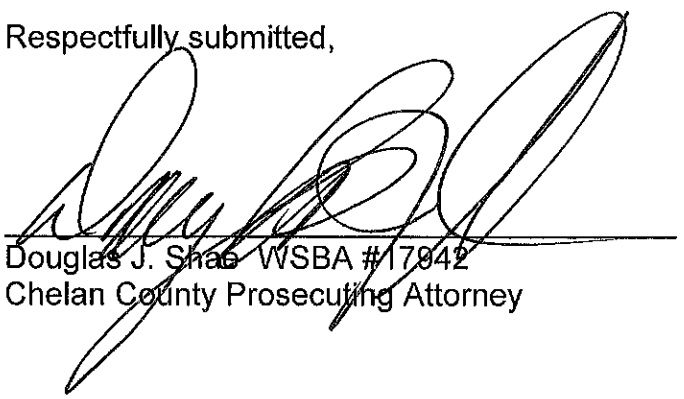
Reasonable suspicion was clearly present to detain both the driver and the defendant here who was a passenger in the vehicle given the circumstances of the stop applied to the factors in Mendez, supra. The court's findings were based upon substantial evidence and are sufficient to allow the detention of the defendant in this case and to support the court's verdict on stipulated facts.

III. CONCLUSION

Mr. Fregoso-Guerrero's conviction for Theft in the Second Degree should be affirmed.

DATED this 31st day of December, 2012.

Respectfully submitted,



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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. ANGEL ANTEMIO FREGOSO-GUERRERO, Defendant/Appellant.	No. 30439-6-III Superior Court No. 11-1-00328-1 DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 31st day of December, 2012, I electronically transmitted to:

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said electronic transmission and envelopes containing true and correct copies of Second Amended Brief of Respondent.

Signed at Wenatchee, Washington, this 31st day of December, 2012.

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