

FILED

DEC 21 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30978-9- III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

AARON BRIDEN, Appellant,

BRIEF OF APPELLANT

Mitch Harrison

Attorney for Appellant

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I. ASSIGNMENTS OF ERROR

1. **The trial court erred when it admitted evidence stemming from Mr. Briden's unlawful arrest when was not supported y an "articulable suspicion" that Mr. Briden was involved in the Homicide or any other criminal activity.**
2. **Even if the initial stop of Mr. Briden was lawful, the trial court erred by not suppressing Mr. Briden's subsequent confession because the evidence should have been suppressed under CrR 3.1(c)(2).**

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Whether the trial court erred when it admitted evidence stemming from Mr. Briden's unlawful arrest when was not supported y an "articulable suspicion" that Mr. Briden was involved in the homicide or any other criminal activity.**
2. **Whether the trial court erred by not suppressing Mr. Briden's subsequent confession because the evidence should have been suppressed under CrR 3.1(c)(2).**

III. STATEMENT OF THE CASE

1. **Procedural Facts**

Charges. In the original information, the state charged Mr. Briden with First Degree Murder for the death of Shelly Kinter. CP 1. On April 5, 2012, the State filed an amended information, charging Mr. Briden with Aggravated First Degree Murder (in the alternative to First Degree Murder), and First Degree Kidnapping. CP 2-4. The victim in each of these charges was also Shelly Kinter. The State also added two additional charges of First Degree Assault and First Degree Robbery, which were

allegedly committed against a second victim, a Cereilia Sinclair. CP 2-4. The Defendant moved to dismiss the assault charge pursuant to *State v. Knapstad*. CP 32-35. The State conceded and dismissed the Assault charge but proceeded on the remaining counts. RP at 3. On April 11, 2012, the State filed the Second Amended Information, which added two additional charges of Rape in the First Degree and Kidnapping in the First Degree. RP at 3; CP 62-64.

3.5 Hearing. Pre-trial, the State moved to admit Mr. Briden's confession that followed his arrest the morning after the victim was killed. Ultimately, the court held that Mr. Briden's statements to the detectives were admissible. According to the court, although Mr. Briden made an unequivocal request for an attorney, detectives properly stopped asking Mr. Briden questions until he re-initiated the contact with police. CP 161-65. The record contains no evidence that Detectives ever made an attempt to put Mr. Briden in contact with an attorney, although it was clear that Mr. Briden made such a request.

Waiver of Jury Trial. The court denied Mr. Briden's CrR 3.6 Motion to Suppress and granted the State's 3.5 Motion to admit several incriminating statements. After the court made these rulings, for strategic reasons, Mr. Briden waived his right to a jury trial, proceeding to a bench

trial in front of Honorable Judge Reucauf. RP 270-73. The trial court accepted Mr. Briden's waiver. RP 282.

2. Defense Theory at Trial.

The defense admitted that Mr. Briden caused the death of Ms. Kinter, but argued that Mr. Briden accidentally caused her death. RP 953. As the court accurately noted in its final ruling, Mr. Briden's defense to the murder charge addressed the element of intent, with defense counsel arguing that he was only guilty of Manslaughter, but not Premeditated Murder. RP 953.

3. Substantive Facts

On October 20, 2009, at around 5:00 A.M., Yakima Police responded to a report of a homicide in Yakima, Washington. RP 292. The body of Shelly Kinter had been found in an alleyway. RP 292. Some detectives had speculated that the body had been run over by a vehicle. RP 322. After locating and identifying the body, detectives continued to investigate the crime and eventually arrived at the victim's apartment in Yakima. RP 296.

At around 9:20 A.M., detectives visited several local businesses that surrounded the area of the homicide, including a business called Neighborhood Health; detectives were searching for any video evidence that may have been captured by these business's private surveillance

cameras. RP 298. Neighborhood Health had a video camera that video tapped a parking lot and a parking lot that was close to the alley where the victim's body was found. RP 299. The video showed a "black vehicle driving north in the alley" at around 3:50 A.M. RP 301. Detective Jesse Rangel testified that the car in the video looked like a "black, smaller compact car." RP 201. The black car drove north in the alley in between the Les Schwab building and the Neighborhood health building. RP 302.

At some point, Detective Rangel printed up a still photo from the video of the black car in the alley. RP 307. Detectives compared the black car from the video to a black car that they saw in the parking lot of the victim's apartment building and felt that they were the "same make, model of the car" on the video. RP 308. The car in the parking lot was a black dodge avenger. RP 309. The owner of the vehicle lived in the apartment complex. Detectives tracked down the owner and obtained his consent to search the car. RP 310. Although there was fresh paint damage on the front of the vehicle, there was no other evidence that this vehicle was involved in Ms. Kinter's death. RP 310-11. Nevertheless, detectives had planned on impounding the vehicle. RP 311.

Just before they could impound the vehicle, Detectives observed another Black Dodge Avenger driving by the victim's residence. RP 312. Two detectives immediately pulled the vehicle over. RP 313. Mr. Briden

was driving the vehicle. RP 390. The vehicle was impounded and Mr. Briden was taken into custody. RP 391. Once in custody, Mr. Briden made several incriminating statements to police about his involvement in the death of the victim. CP 150-58.

4. Court's Findings and Verdict. RP 952.

The trial court found Mr. Briden guilty of first degree premeditated murder and second degree rape, but it acquitted him of the kidnapping charge (Count II). RP 952-960. In addition, the court found that Mr. Briden did not commit the rape with deliberate cruelty. RP 961. Finally, the court found Mr. Briden guilty of First Degree Robbery of the victim Sinclair, for taking her car by force. In finding Mr. Briden guilty of Premeditated Murder rather than Manslaughter, the court found it most compelling that the evidence suggested that Mr. Briden drove over the victim twice. RP 953. In addition, the court found that Mr. Briden essentially admitted to the premeditation element in his confession, in which he conceded that he drove over the victim a second time "to make sure she was dead." RP 954.

5. Sentencing.

Because he was convicted of Aggravated First Degree Murder, the court was compelled to sentence him to a mandatory term of life in prison without the possibility of parole. RP 977. On the other two counts, the

court imposed standard range sentence to run concurrently to the life without sentence. RP 977-78.

I. ARGUMENTS

A. The trial court erred when it admitted evidence stemming from Mr. Briden's unlawful arrest when was not supported by an "articulable suspicion" that Mr. Briden was involved in the Homicide or any other criminal activity.

Although probable cause is lacking, a reasonable suspicion of criminal activity makes it lawful to temporarily detain an individual for both limited questioning and to obtain identification. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). Such temporary detention satisfies the Fourth Amendment if police have a well-founded and reasonable suspicion based on objective facts that he is connected to actual or potential criminal activity. *State v. Seiler*, 95 Wn. 2d 43, 621 P.2d 1272 (1980) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

For a suspicion to be reasonable, the circumstances at the time of the stop must be more consistent with criminal activity than innocent conduct. *State v. Mercer*, 45 Wn. App. 769, 774, 727 P.2d 676 (1986). Washington law gives officers the authority to stop a suspected person as long as the officer's "well-founded suspicion" meets the *Terry* rational. *State v. White*, 97 Wn. App. 92, 105, 640 P.2d 1061 (1982).

The officer must have an “articulable suspicion,” meaning “a *substantial possibility* that criminal conduct has occurred or is about to occur,” and that the persons being detained are the suspects who were engaged in such conduct. *State v. Kennedy*, 107 Wn. 2d 1, 6, 726 P.2d 445 (1986) (emphasis added). The officer must be able to identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Mendez*, 137 Wn. 2d 208, 223, 270 P.2d 722 (1999) (citing *Terry*, 392 U.S. at 21). In determining whether the officer’s suspicion was reasonable, courts look to the totality of the circumstances. *State v. Randall*, 73 Wn. App. 225, 229, 868 P.2d 207 (1994).

Here, Mr. Briden does not challenge the trial court’s findings of fact, but he does challenge the trial court’s conclusions of law and the application of that law to the undisputed facts. This court, therefore, must review de novo the superior court’s conclusions of law and its application of law to the facts. *State v. Meneese*, 174 Wn.2d 937, 942, 282 P.3d 83 (2012).

Specifically, although the car Mr. Briden was driving fit the very general description of the car in the video, this fact did not give rise to a *substantial possibility* that Mr. Briden was involved in the homicide of Ms. Kinter. In other words, based on the color of the car and the area in

which the car was driving, Detectives Andrews and Hampton did not have an articulable suspicion that created a “substantial possibility” that Mr. Briden or the vehicle he was driving was involved in the death of the victim here.

1. Under Washington case law, much more than a general description of the suspect vehicle is required to support a *Terry* stop to investigate criminal activity.

Washington Appellate courts have upheld investigatory stops of cars only where several of the following factors were present: (1) the occupants of the car matched the description of the suspects, (2) the car was followed from the scene of the crime, (3) the vehicle was only a few blocks from the scene of the crime, (4) the vehicle was being driving at a high rate of speed, and/or (4) the vehicle met a more specific description of the suspect vehicle.

In *State v. Thorton*, the officers had a reasonable suspicion to stop a vehicle in connection with a crime when the car was only 11 blocks from the scene at the nearest on-ramp to the freeway, the car was travelling with excessive speed through traffic, and the two men in the car matched the descriptions of the suspects in the crime. 41 Wn. App. 506, 511-12, 705 P.2d 271 (1985). Likewise, in *State v. Washington*, the defendant was pulled over in an area where several suspects had fled from a car leaving the scene of the assault and robbery occurred. 4 Wn. App. 856, 859, 484

P.2d 415 (1971). Finally, in *State v. Knutson*, police stopped a car after a robbery was reported and both the car and the occupants matched the description of the robbers. 3 Wn. App. 500, 507, 476 P.2d 124 (1970).

Here, in stark contrast to the above cases, the officers stopped a black two door vehicle based upon a hunch. Although they had a general description of the vehicle, a “dark colored 2-door sedan”, they lacked several of the additional facts elevated the above cases to a reasonable suspicion. In particular, unlike in all three cases above, Mr. Briden was not found driving near the scene of the crime. Moreover, the crime had occurred several hours before, making it much less likely that the suspects would be in the area. In addition, the detectives lacked any description of the suspect in this case, as they had in both *Knutson* and *Thorton*.

In this case, the detectives were simply rolling the dice by searching every “dark colored 2-door sedan” in the area, as shown by the initial search and threatened impounding of a “dark colored 2-door sedan” that was in no way associated with the homicide investigation. Certainly, viewing the facts known to the officers prior to pulling over Mr. Briden, the vehicle and its driver’s activities were far more consistent with innocent behavior than criminal activity. Nothing, in fact, connected the driver, Mr. Briden to any criminal activity, except a very general description of the vehicle, which was dark in color.

2. Federal case law supports the conclusion that the officers here did not have an articulable reasonable suspicion to pull over any “dark colored 2-door sedan”, or even any black dodge avenger in Yakima.

a. United States v. Jaquez

In *United States v. Jaquez*, a case with facts similar to those here, the Fifth Circuit held that there was not reasonable suspicion to conduct a warrantless stop where an officer received a report that “a red vehicle” had been involved in a shooting. 421 F.3d 338, 340 (5th Cir. 2005). Approximately fifteen minutes after receiving the report, the officer stopped a red car traveling away from the vicinity of the shooting, an area known for its high crime rate. *Id.* A consent search revealed that the car’s driver, a convicted felon, was carrying a loaded firearm.

The Fifth Circuit reversed the district court’s denial of the defendant’s motion to suppress the firearm, noting that the officer had no information tying the stopped vehicle to the reported shooting other than the car’s color and general location. Such “sparse and broadly generic information,” the court concluded, was insufficient to provide the officer with the reasonable suspicion necessary to justify the initial stop of the defendant’s vehicle. *Id.* at 341.

b. United States v. Rias

In *United States v. Rias*, the Fifth Circuit found that officers lacked sufficient reasonable suspicion under less tenuous facts than those in *Jaquez*. In that case, while performing his regular patrol, a police officer with the Miami Public Safety Department was observing traffic from a marked car when he noticed the defendant and a passenger—both black males—drive past in a black Chevrolet. 524 F.2d 118 (5th Cir. 1975). The officer knew that two black males in a black or blue Chevrolet were suspects in a series of recent robberies in the area. After following him for some time, during which the driver committed no traffic infractions, the officers pulled the vehicle over. *Id.* 119-20. The *Rias* court held the facts known to the officers here when they pulled *Rias* over “clearly did not rise to the required level, and in reality were so tenuous as to provide virtually no grounds whatsoever for suspicion.” *Id.*

Those facts that officers knew at the time they pulled *Rias* over *did not* amount to a reasonable suspicion and included:

- [1] that several robberies had occurred in the area recently
- [2] that the reported robbers were also black males;
- [3] the car used in the robberies was a Chevrolet;
- [4] that Chevrolet was black or blue;
- [5] it was midday; and

[6] when followed, the suspects made no attempt to flee. *Id.* at 120-121. All of these facts, without additional reliable evidence sufficient to warrant the conclusion that either or both of the men had been or were involved in criminal activity, did not constitute cause to stop the vehicle. *Id.*

c. Jaquez and Rias are factually similar.

Not only is *Jaquez* and *Rias* factually similar to this case, at the very least, the facts here fall somewhere in between both cases, in which both courts found that there was insufficient factual basis to pull over the vehicle.

First, based on the video and photo, the detectives here knew that the vehicle was a two door vehicle of dark color, just as the officers in *Rias* knew that the Chevrolet was “black or blue” and the officers in *Jaquez* knew that he was looking for a “red car.” Admittedly, the detectives here had one more piece of information than did the officer’s in *Jaquez*: a video and still picture of the suspect vehicle. But, although police reports here claim that they thought that the suspect car was the same make and model as the one Mr. Briden was driving—a dodge avenger—the video and still photos that the officers relied upon to make such a determination was not clear enough for the officer’s conclusions to be reasonably certain. Moreover, police did not conclude that the car was

a black dodge avenger until after one officer said that he saw a “black two door vehicle” parked at the victim’s residence. However, it was not until after police conducted a full blown, fruitless search of that first car until police witnessed Mr. Briden driving his car. The fruitless search of the first car should have made a reasonable officer seriously doubt the conclusion that the car was a dodge avenger and not any other 2-door sports car.

Second, the location in which Mr. Briden was driving did not establish a reasonable suspicion either, just as the court noted in *Rias*. Although the detectives here saw the vehicle drive by the victim’s home, this fact did not arise to a reasonable suspicion to pull the vehicle over. Here, just as the court noted in *Rias*, the fact that a recent crime had occurred in the area was also insufficient. In fact, when they saw Mr. Briden’s vehicle, the detectives they were not near the scene of the crime.

Third, nothing about Mr. Briden’s behavior or driving gave police a reasonable, independent belief that he was either the suspect in the homicide or otherwise engaged in illegal activity, just as the defendants in *Rias*. It was mid-day when police pulled over Mr. Briden, like it was when police pulled over Mr. Rias. In addition, when the officers here began to follow Mr. Briden, he made no attempt to flee. When the detectives did pull him over, the sole reason was to investigate the homicide, just as in

Rias in which the officers pulled *Rias* over solely to investigate the robberies. *See id.* Thus, in both cases, the officers could not claim any other justification for the stop.

Fourth, unlike here, the arresting officers in *Rias* actually had *some kind* of a description of the suspects, albeit an improper one by itself: that they were black males. Here, by contrast, the detectives had absolutely no physical description of the suspect that could elevate these facts to a reasonable suspicion to justify an investigatory stop. These facts make the stop of Mr. Briden even more suspect than the one in *Rias* and as such, it was not justified by a “reasonable suspicion.” At the very least, this case falls somewhere in between the quantum of evidence that was *insufficient* in both *Rias* and *Jaquez* to establish a reasonable suspicion.

Finally, even though the video revealed a “dark colored 2-door sedan” near the scene of the homicide on that night, it did not establish that the vehicle was involve in that homicide in any way. As such, in desperately searching for any “dark colored 2-door sedan” in Yakima, the risk was that even if the officers did identify the car exactly, i.e. with a license plate and driver, the driver and owner of the car may have been in no way associated with the crime: he simply could have driven by just before or after the homicide occurred.

3. The physical evidence obtained from the stop, as well as any statements made by the defendant after the stop, must be suppressed.

“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion” violating the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). Here, police stopped Mr. Briden’s car without a reasonable suspicion that he was involved in any illegal activity. Because Mr. Briden’s confession was “obtained either during or as a direct result of [this] unlawful invasion” of his Fourth Amendment rights, all evidence obtained as a direct result of Mr. Briden’s arrest, including the confession given to police immediately following his arrest, should have been suppressed. *See id.*

B. Even if the initial stop of Mr. Briden was lawful, the trial court erred by not suppressing Mr. Briden’s subsequent confession because the evidence should have been suppressed under CrR 3.1(c)(2).

Under CrR 3.1(c)(2), "At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, and the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer." "Although the rule does not require the officers to actually connect the accused with an attorney, it does require

reasonable efforts to do so." *State v. Kirkpatrick*, 89 Wn. App. 407, 414, 948 P.2d 882 (1997).

"Reasonable efforts" were discussed in *City of Tacoma v. Myhre*, 32 Wn. App. 661, 664, 648 P.2d 912 (1982), where police made insufficient efforts to put Myhre in contact with an attorney. The police gave Myhre access to a telephone to call his attorney, but when his attorney did not answer, the police refused Myhre's request to let him call his mother, who had the attorney's home number. 32 Wn. App. at 662. The court held that the police violated former JCrR 2.11(c)(2) (1973), which had language virtually identical to CrR 3.1(c)(2), because "[a]n additional call would not have burdened the police and obviously was necessary if defendant was to contact his attorney." 32 Wn. App. at 664.

Likewise, in a recent Division II case, *State v. Pierce*, the court overturned the defendant's numerous felony convictions when the arresting officer's failed to provide the defendant with access to an attorney after he made an unequivocal request for an attorney. 169 Wn. App. 533, 280 P.3d 1158 (2012). Pierce was arrested upon suspicion of Murder and several other crimes, including theft of the victim's debit card. Detectives interrogated Pierce about the theft, and Pierce denied stealing the debit card belonging to the Murder victims. The interrogating detectives then accused Pierce of murdering the victims, at which point

Pierce said, "If you're . . . trying to say I'm doing [sic] it I need a lawyer. I'm gonna need a lawyer because it wasn't me. You're wrong." *Id.* at 545.

The police then escorted Pierce across the street to jail. Although the normal jail procedure is to put a prisoner who has requested an attorney in immediate contact with one, Pierce was not put in contact with an attorney. *Id.* Instead, jailers had Pierce wait in the jail and they never made an active effort to put Pierce in contact with an attorney; essentially, the jails waited for Pierce to ask for an attorney a second time before they would provide him access to an attorney.

In overturning Pierce's convictions, Division II held that these minimal efforts did not meet the requirements of CrR 3.1(c)(2) to provide "any other means necessary to place the person in communication with a lawyer." Although courts have accepted rather minimal efforts as reasonable, no court has accepted the procedure used by the jailers in *Pierce*, i.e. "to put in jail a prisoner who has requested counsel and wait for him to reassert his right to counsel before taking steps to put him in contact with an attorney." *Id.* at 548.

Here, like in *Pierce*, as the trial court found, Mr. Briden made an unequivocal request for an attorney." CP 162. However, the detectives made even less of an effort to put Mr. Briden in connection with an attorney than did the jailers in *Pierce*, who at least allowed Pierce access

to a phone. In fact, the detectives, based upon the record, made no effort to put Mr. Briden in connection with an attorney. Detectives also ignored his request to be placed in a holding cell, leaving Mr. Briden with no information about whether they would ever connect him with an attorney. In response, Mr. Briden naturally panicked and re-initiated contact with the detectives, assuming that the detectives were not going to make “reasonable efforts” to connect him with an attorney.

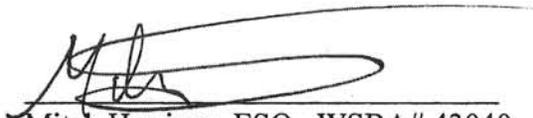
The remedy for a violation of CrR 3.1 is "suppression of evidence tainted by the violation." *State v. Copeland*, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996). But a violation of CrR 3.1 is harmless if there is no reasonable probability that the error materially affected the outcome of the trial. *State v. Templeton*, 148 Wn.2d 193, 220, 59 P.3d 632 (2002) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

Here, Mr. Briden’s statements after the CrR 3.1(c)(2) violation were incredibly incriminating. He admitted to killing the victim and admitted to intimate details about how the killing occurred. Without his confession, most of the evidence against Mr. Briden was circumstantial. Therefore, there was at least a reasonable probability that the outcome of the case was affected by the erroneous admission of Mr. Briden’s confession.

II. CONCLUSION

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

DATED this 10th day of December, 2012.

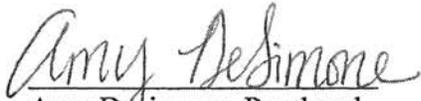


Mitch Harrison, ESQ., WSBA# 43040
Attorney for Appellant

AMENDED PROOF OF SERVICE

On December 11th, 2012, I filed with the Court of Appeals Division III the attached Brief and proof of service via United States Postal Service addressed to the Court of Appeals, Division III at 500 N. Cedar St. Spokane, WA 99201 to be delivered to their office on today's date. On this same date, I emailed a copy of this Brief and Proof of Service to the Yakima County Prosecutor's Office via the U.S. Postal Service to 128 North 2nd Street, Yakima, Washington 98901. The defendant on this case, Mr. Aaron Briden, was sent a copy of the attached document and proof of service via the United States Postal Service at DOC#358254, Monroe Correctional Complex, 16550 – 177th Avenue SE, PO Box 777, Monroe, WA 98272.

Dated this 18th day of December 2012.



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