

No. 33033-8-III

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

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STATE OF WASHINGTON,

Respondent,

v.

BRENT DOUGLAS REEDY,

Appellant.

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FILED  
AUG 03, 2015  
Court of Appeals  
Division III  
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Judges Michael McCarthy and Blaine Gibson

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

City of Union Gap Police Officer Ryan Bensen was alerted to an alleged methamphetamine sale. Brent Reedy was not involved in this alleged sale. Officer Bensen drove around looking for the suspect vehicle, but was unable to find it. He then saw an unrelated car driving in the general area, and after noting that the vehicle had an aftermarket exhaust, he contacted the car. The driver was Mr. Reedy. After further investigation, Officer Bensen obtained search warrants for Mr. Reedy's car, home, and a shop on his property. Based upon evidence found during the execution of these search warrants, Mr. Reedy was charged with one count of possession of methamphetamine with intent to deliver and seven counts of first degree unlawful possession of a firearm. The trial court denied Mr. Reedy's motion to suppress the evidence seized during the execution of the search warrants, and a jury found Mr. Reedy guilty of the lesser included offense of possession of methamphetamine, and the seven charged counts of first degree unlawful possession of a firearm. Mr. Reedy now appeals, arguing the trial court erred in denying his motion to suppress, and challenging the sufficiency of the evidence for his conviction of possession of methamphetamine.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court should have suppressed the evidence seized as result of Officer Bensen's contact with Mr. Reedy's car, because the contact was a pretextual traffic stop.
2. The trial court should have suppressed the evidence seized from Mr. Reedy's shop pursuant to the search warrant, because the affidavit does not provide probable cause to issue the search warrant for the home and the shop.
3. There is insufficient evidence to affirm Mr. Reedy's conviction for possession of a controlled substance, because Mr. Reedy did not have constructive possession of the methamphetamine.

## **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the trial court should have suppressed the evidence seized as a result of a pretextual traffic stop.

Issue 2: Whether the trial court should have suppressed the evidence seized from Mr. Reedy's shop pursuant to the search warrant, because the affidavit does not provide probable cause to issue the search warrant for the home and the shop.

Issue 3: Whether there is insufficient evidence to affirm Mr. Reedy's conviction for possession of a controlled substance, because Mr. Reedy did not have constructive possession of the methamphetamine.

## **D. STATEMENT OF THE CASE**

While on patrol, City of Union Gap Police Officer Ryan Bensen encountered an individual he recognized from previous contacts, Benjamin Templeman, standing on a residential street corner at approximately 4:30 am. (RP 366-367, 384-389). Officer Bensen parked his car and contacted Mr. Templeman. (RP 388-390). Mr. Templeman told Officer Bensen he was waiting for a ride from Mike White, who went

to sell some gas in order to obtain methamphetamine. (RP 367-368). Mr. White dropped Mr. Templeman off, then drove about a half of a block and turned left onto 4th Avenue. (RP 367-369, 392).

Officer Bensen began a narcotics investigation. (RP 391). He drove around the neighborhood looking for Mr. White's tan and brown pick-up truck, but he did not locate it. (RP 391-393).

Brent Reedy's home is located on 4th Avenue in the area Officer Bensen was searching. (RP 393-394). Officer Bensen did not have any information for his investigation regarding Mr. Reedy. (RP 393). As he drove by Mr. Reedy's home, he noticed a red Camaro parked in the street and a red Jeep Cherokee parked in the driveway. (RP 393-394). Mr. Reedy is the registered owner of the red Camaro. (RP 406-407; State's Ex. 2).

Officer Bensen returned to the street corner where Mr. Templeman was located. (RP 369, 394). As he talked to Mr. Templeman, he heard the red Camaro start up within the distance of a city block. (RP 394-395). According to Officer Bensen, the red Camaro was loud because it had an aftermarket performance exhaust installed. (RP 395). The red Camaro and the red Jeep Cherokee then approached. (RP 369-370, 394-396).

When the red Camaro stopped at a stop sign, Officer Bensen contacted the car. (RP 396-397). He shined his flashlight at the passenger

window and made a motion, and the front passenger rolled the window down. (RP 396). Officer Bonsen identified Mr. Reedy as the driver, Mr. White as the front passenger, and a third person in the back seat. (RP 397). The red Jeep Cherokee stopped behind the red Camaro. (RP 397). After all three passengers were removed from the red Camaro, Officer Bonsen observed a sweatshirt on the passenger floorboard. (RP 402, 409-410; State's Ex. 3).

Officer Bonsen applied for and obtained a search warrant for the red Camaro. (CP 20-24; RP 407-408). The affidavit for the search warrant stated the following facts in support of probable cause to search the car:

On 08/15/12 at approximately 0428 hours, while patrolling the city of Union Gap, I contacted Benjamin Templeman standing at the corner of 3<sup>rd</sup> Avenue and Whatcom Street. I contacted him socially. During conversation, he initially told me he was waiting for a friend who had dropped him off while he went down the street to purchase gasoline. He then changed his story to indicate he was dropped off by Michael White, who went down the street to purchase methamphetamine. [Mr. Templeman] said [Mr. White] told him directly that he was going to purchase between \$50 and \$100 worth of methamphetamine, and he would share it with him.

I attempted to locate [Mr. White] and his vehicle, but was not successful. While I was standing at the corner of 3<sup>rd</sup> Avenue and Whatcom Street, a vehicle I recognized as belonging to Brent Reedy approached the stop sign. The vehicle has an aftermarket exhaust that is louder than provided with a stock vehicle. I contacted [Mr. Reedy] and observed he had two passengers. One of which I recognized as [Mr.] White. They stated they were going to

the store. All denied any illegal activity. A rear passenger was not wearing a seatbelt, and he stated his name was Jerry Reedy. This showed as a [sic] AKA for Jerry Dauenhauer, who had a felony warrant through Kittitas County for VIO NCO. He was detained, and refused to provide any ID or identifying documentation.

During the contact, [Mr. White] and [Mr. Dauenhauer] were both reaching under their legs and around the floor of the vehicle furtively, and it appeared [Mr. White] had rolled something in his jacket. [Mr. Reedy] refused consent to search the vehicle, and [Mr. White] refused consent to search his jacket.

[Mr.] White, [Mr.] Reedy and [Mr.] Dauenhauer all have history of narcotics involvements, and [Mr.] Reedy and [Mr.] White both have methamphetamine history. In a previous contact, Mr. White admitted to me to being a methamphetamine user.

(CP 22).

Officer Bensen impounded and searched the red Camaro. (RP 409). He looked at the sweatshirt on the passenger floorboard. (RP 409-410; State's Ex. 3). Officer Bensen found a glass pipe containing burned and unburned methamphetamine residue inside a pocket of the sweatshirt. (RP 410-411; State's Ex. 5).

Officer Bensen also found methamphetamine under the front passenger seat, in the left corner by the bracket that holds the seat to the floor. (RP 413-415, 421-425, 428-429; State's Ex. 9, 15).

After his search of the red Camero, Officer Bensen applied for and obtained a search warrant for Mr. Reedy's home, including a shop located behind the home, to search for "[n]arcotics to include Methamphetamine,

as well as paraphernalia for ingestion, manufacture and packaging, currency and Documents of Dominion and Control.” (CP 26-32; RP 459).

The affidavit for the search warrant stated the following facts, in relevant part, in support of probable cause to search home and shop:

[Mr. Templeman] said he did not know exactly which house [Mr. White] was going to, but he indicated that he had turned southbound on 4<sup>th</sup> Avenue.

....

[Mr. Templeman] waited with Officer Thompson while I check the area for the vehicle. I did not locate [Mr. White’s] tan and brown pickup truck, which I am familiar with. I returned to the scene. While returning to the scene, I passed [Mr.] Reedy’s residence . . . . I know from my work experience in Union Gap that [Mr. Reedy] has been involved in or suspected of possession of stolen vehicles. I have also witnessed numerous different vehicles that are at the residence at infrequent, changing hours. On this date, I observed a red Jeep Cherokee parking in the driveway, and I also noticed that [Mr. Reedy’s] vehicle, a Red 1994 Camaro . . . parked on the street. I noticed the vehicles parked at the residence throughout my shift, and they were both present when I checked the neighborhood for [Mr.] White.

....

As I spoke to [Mr. Templeman], I heard a vehicle start in the 2000 block of 4<sup>th</sup> Avenue, and I saw headlights northbound. When the vehicle turned the corner, I observed it was [Mr.] Reedy’s red Camaro, followed by the Red Jeep.

....

At that time, I did not know that [Mr. Reedy] was possibly involved in the matter at hand.

....

As I contacted the vehicle, I immediately recognized the front seat passenger from previous contacts as [Mr.] White. His presence in [Mr.] Reedy’s vehicle corroborated [Mr. Templeman’s] information that [Mr. White] was in the area possibly involved in a drug deal because I know that [Mr.

Reedy] lives within a short distance, and has also been suspected of methamphetamine related crimes.

....

As I spoke with [Mr. Reedy], he told me that he, [Mr. White], and [Mr. Dauenhauer] had just left his house at 2017 E. 4th Avenue, and were going to the store. [Mr. Reedy] said they had not stopped anywhere else before me contacting them.

....

Based on the fact that [Mr. White] was in possession of a dealer level amount of methamphetamine after being reported to be in the area to purchase methamphetamine, and he was located with [Mr.] Reedy, who is unemployed and was in possession of \$5215, and also has a history of arrests with DEA and Cass County Sheriff's Office in Minnesota for Possession and Distribution of Methamphetamine, as well as the fact that I observed the red Camaro they were located in several times during the night, and it had not left the residence until I heard it start and drive to our location. Based on the fact that [Mr. Templeman] said [Mr. White] went around the corner to purchase methamphetamine, and returned a short time later with someone suspected of dealing methamphetamine who was in possession of \$5215 of undocumented, unexplained cash, it is reasonable to believe the methamphetamine was purchased from [Mr. Reedy] at his residence.

(CP 29-31).

While searching Mr. Reedy's shop, Officer Bonsen found seven firearms inside of a safe. (RP 466-474; State's Ex. 35, 36, 37, 38, 39, 40, 41, 42). According to Officer Bonsen, Mr. Reedy stated he owned all of these firearms. (RP 478-479). Mr. Reedy had previously been convicted of distribution of methamphetamine. (CP 307-310; RP 754-755). Officer Bonsen sought and obtained an amended search warrant for Mr. Reedy's

home and shop, to search for firearms, ammunition, and body armor. (CP 34-36; RP 45).

The State charged Mr. Reedy with one count of possession of a controlled substance, methamphetamine, with intent to deliver, and seven counts of first degree unlawful possession of a firearm.<sup>1</sup> (CP 232-234).

Mr. Reedy moved to suppress the evidence seized during the execution of all three search warrants. (CP 16-98; RP 8-46). At the hearing held on the motion to suppress, Mr. Reedy did not present any testimony, but rather, asked the trial court to make its decision based upon the affidavits for the search warrants. (RP 9-14, 22-23). For his argument that the stop of the red Camaro was a pretextual traffic stop, Mr. Reedy relied upon the affidavit for the search warrant for the red Camaro. (CP 100; RP 12-15, 26, 30).

The trial court denied Mr. Reedy's motion to suppress. (CP 99-102; RP 45). The trial court did not enter oral or written findings of fact and conclusions of law, but instead, issued a letter ruling. (CP 99-102). The trial court concluded the stop of the red Camaro was not a pretextual traffic stop and that there was probable cause to issue the search warrants. (CP 100-101).

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<sup>1</sup> The State also alleged that the possession of a controlled substance, methamphetamine, with intent to deliver count occurred in a protected zone. (CP 232). The jury declined to make this finding. (CP 299; RP 892).

The case proceeded to a jury trial. (RP 357-881). Officer Bonsen testified consistent with the facts stated above. (RP 384-415, 425-443, 455-497, 515-520, 537-550, 796-821). In addition, he testified after he contacted the red Camaro, he walked behind it to where the Jeep Cherokee had stopped and told the driver of the Jeep Cherokee to leave. (RP 399). Officer Bonsen testified “[w]hile I was back talking to the driver the headlight - - - the bright lights are shining right into the back of the car in front and I could see that the driver leaned over to the right and reached down with his hand out of sight.” (RP 399). Officer Bonsen described Mr. Reedy’s movements as shifting left and right, and “reach[ing] down towards his hip area on his right side.” (RP 400).

Officer Bonsen further testified he saw Mr. White “reached hard from the left side down towards the floor and while I was standing there the backseat guy put his hands down a little ways.” (RP 399).

Officer Bonsen testified the sweatshirt he observed on the passenger floorboard area, between Mr. White’s feet, belonged to Mr. White. (RP 402, 407, 409-410).

Mr. Reedy took the stand in his own defense. (RP 730-767, 828-829). He testified on the morning in question, Mr. White pulled up to his home and got in the red Camaro with him to ride to the store. (RP 732, 761). Mr. Reedy testified that after his car was stopped, he told Officer

Bonsen he was not aware of any drugs in the car. (RP 741). He did not think Mr. White had any drugs on him. (RP 738). Mr. Reedy denied selling methamphetamine to Mr. White that morning. (RP 760).

The trial court instructed the jury on the lesser-included offense of possession of a controlled substance, methamphetamine. (CP 275-276; RP 839-840). The trial court instructed the jury that in order to find Mr. Reedy guilty of possession of a controlled substance, methamphetamine, it had to find:

- (1) That on or about August 15, 2012, the defendant possessed a controlled substance, methamphetamine;
- (2) That this act occurred in the State of Washington.

(CP 276; RP 839-840).

The trial court instructed the jury on the definition of “possession” and “dominion and control.” (CP 273; RP 838). The jury was also instructed on the defense of unwitting possession. (CP 277; RP 840).

The trial court found Mr. Reedy guilty of the lesser-included offense of possession of a controlled substance, methamphetamine, and seven counts of first degree unlawful possession of a firearm. (CP 290-298; RP 891-892).

Mr. Reedy timely appealed. (CP 325-326).

## **E. ARGUMENT**

### **Issue 1: Whether the trial court should have suppressed the evidence seized as a result of a pretextual traffic stop.**

Conclusions of law in an order pertaining to the suppression of evidence are reviewed de novo. *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). Written findings of fact and conclusions of law following a suppression hearing are only required if an evidentiary hearing is conducted. CrR 3.6(b); *see also State v. Powell*, 181 Wn. App. 716, 722-23, 326 P.3d 859 (2014) (written findings of fact and conclusions of law were not required where the suppression hearing was limited to argument).

As a general rule, warrantless searches and seizures are per se unreasonable under the Fourth Amendment and article I, section 7 of the Washington State Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The general 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. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). The State bears the heavy burden of showing the search falls under the exception to the warrant requirement. *Garvin*, 166 Wn.2d at 250. It must establish an exception to the warrant requirement by clear and convincing evidence. *Id.*

No matter how brief, a traffic stop is a seizure for the purpose of constitutional analysis. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). “Warrantless traffic stops are constitutional under article I, section 7 as [*Terry*] investigative stops, but only if based upon at least a reasonable articulable suspicion of either criminal activity or a traffic infraction, and only if reasonably limited in scope.” *Arreola*, 176 Wn.2d at 292-93.

Here, Officer Bensen did not have reasonable articulable suspicion that Mr. Reedy was engaged in criminal activity. (CP 22). At the time he contacted Mr. Reedy’s vehicle, Officer Bensen only had suspicion of criminal activity in relation to Mr. Templeman and Mr. White. (CP 22). When Officer Bensen saw Mr. Reedy’s car, he did not know Mr. White was a passenger. (CP 22). Officer Bensen was unable to locate Mr. White in the area. (CP 22). His knowledge of Mr. Reedy’s “methamphetamine history” did not provide sufficient grounds for believing Mr. Reedy was engaging in criminal activity. (CP 22); *see also State v. Hobart*, 94 Wn.2d 437, 446-47, 617 P.2d 429 (1980) (prior convictions or arrests are not a basis for believing an individual is engaging in criminal activity). In addition, Mr. Reedy’s presence in an area where a methamphetamine sale allegedly occurred does not provide a sufficient basis to contact Mr. Reedy. *See State v. Martinez*, 135 Wn.

App. 174, 180-82, 143 P.3d 855 (2006) (where the officer had no information linking the defendant to a crime, there was not particularized suspicion required to justify the officer's warrantless stop of the defendant). Therefore, in order for Officer Bonsen's warrantless traffic stop of Mr. Reedy to be constitutional, the only possible basis is reasonable articulable suspicion of a traffic infraction by Mr. Reedy. *See Arreola*, 176 Wn.2d at 292-93 (setting forth the two circumstances under which warrantless traffic stops are constitutional under article I, section 7).

Pretextual traffic stops violate article I, section 7. *Ladson*, 138 Wn.2d at 358. The essence of a pretextual traffic stop "is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving." *Id.* at 349. Thus, under these circumstances, "the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation." *Id.* "Article I, section 7, forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one." *Id.* at 353.

The test for determining whether a traffic stop is pretextual requires this Court to consider the totality of the circumstances, including

the subjective intent of the officer and the objective reasonableness of the officer's behavior. *Id.* at 358-59. “[T]he State must show that the officer, both subjectively and objectively, is actually motivated by a perceived need to make a community caretaking stop aimed at enforcing the traffic code.” *State v. Montes-Malindas*, 144 Wn. App. 254, 260, 182 P.3d 999 (2008) (citing *Ladson*, 138 Wn.2d at 359). The State must do more than merely show there was a traffic violation: “[t]he question is whether the traffic violation was the real reason for the stop.” *Id.* (quoting *State v. Meckelson*, 133 Wn. App. 431, 437, 135 P.3d 991 (2006)). The failure to issue a citation for the traffic violation is a factor to be considered when assessing the officer's subjective intent for making the traffic stop. *See State v. Hoang*, 101 Wn. App. 732, 742, 6 P.3d 602 (2000).

Our Supreme Court has upheld a mixed-motive traffic stop against an article I, section 7 challenge. *See Arreola*, 176 Wn.2d at 297-301. A mixed-motive traffic stop is “a traffic stop based on both legitimate and illegitimate grounds.” *Id.* at 297.

In *Arreola*, the police officer responded to a report of possible driving under the influence, and located a vehicle matching the reported description. *Id.* at 288. The officer followed the vehicle, but he did not observe any signs of driving under the influence. *Id.* at 288-89. Instead, the officer observed the vehicle had an altered exhaust, a traffic infraction.

*Id.* at 289. The officer pulled the vehicle over. *Id.* The driver was cited for the altered exhaust. *Id.* at 290.

Our Supreme Court stated “Washington courts will continue to review challenged traffic stops for pretext.” *Id.* at 297. The Court held “a traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction (or multiple infractions), for which the officer has a reasonable, articulable suspicion, is an actual, conscious, and independent cause of the traffic stop.” *Id.* The Court further explained its holding:

[D]espite other motivations or reasons for the stop, a traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.

*Id.* at 297-98.

The Court upheld the trial court’s determination that the officer’s traffic stop was not pretextual “[b]ecause the suspected traffic infraction was an actual, conscious, and independent cause of the traffic stop[.]” *Id.* at 300. The Court reasoned that an unchallenged findings of fact from the trial court was that the traffic infraction was an actual reason for the stop. *Id.* The Court stated that “[t]he fact that [the officer] was also interested in

and motivated by a related investigation is irrelevant, even if that investigation could not provide a legal basis for the traffic stop.” *Id.*

Here, Officer Bensen’s contact with Mr. Reedy’s car was not a mixed-motive stop. His stop was not based on both legitimate and illegitimate grounds. *See Arreola*, 176 Wn.2d at 284. Officer Bensen did not have any basis to believe Mr. Reedy was engaged in criminal activity; the only possible basis for the stop was a single motive, the aftermarket exhaust. (CP 22).

Should this Court disagree and find a mixed-motive stop occurred here, then Officer Bensen’s traffic stop was still a pretextual stop. The alleged traffic infraction, the aftermarket exhaust, was not “an actual, conscious, and independent cause of the traffic stop[.]” *Arreola*, 176 Wn.2d at 300. Instead, after speaking with Mr. Templeman and unable to locate Mr. White in the area, Officer Bensen continued his criminal investigation of the alleged methamphetamine sale by contacting Mr. Reedy’s car as it drove through the area. (CP 22).

The subjective intent of the Officer Bensen and the objective reasonableness of his behavior establish that his contact with Mr. Reedy’s car was a pretextual traffic stop. *See Ladson*, 138 Wn.2d at 358-59 (stating the test for a pretextual traffic stop). The State cannot show that Officer Bensen was “actually motivated by a perceived need to make a

community caretaking stop aimed at enforcing the traffic code.” *Montes-Malindas*, 144 Wn. App. at 260. The traffic stop was not the real reason for Officer Bonsen’s stop of Mr. Reedy’s car. *See Montes-Malindas*, 144 Wn. App. at 260 (quoting *Meckelson*, 133 Wn. App. at 437); *see also Arreola*, 176 Wn.2d at 300. Officer Bonsen contacted Mr. Reedy, not to enforce the traffic code, but to conduct a criminal investigation, an alleged sale of methamphetamine, unrelated to Mr. Reedy’s driving. *See Ladson*, 138 Wn.2d at 349 (acknowledging this scenario as the essence of a pretextual traffic stop).

Officer Bonsen’s search warrant affidavit does not expressly state his reason for contacting Mr. Reedy’s car was its aftermarket exhaust. (CP 22); *cf. Arreola*, 176 Wn.2d at 300 (in determining that the traffic stop was not pretextual, our Supreme Court noted the officer testified he made a conscious decision to pull over the vehicle for the identified traffic infraction). Rather, the search warrant affidavit addresses the alleged traffic infraction in one sentence: “[t]he vehicle has an aftermarket exhaust that is louder than provided with a stock vehicle.” (CP 22). The search warrant affidavit does not state this is the reason Mr. Reedy was contacted. (CP 22). Instead, the search warrant affidavit indicates Officer Bonsen asked questions unrelated to a routine traffic stop: “[t]hey stated they were going to the store. All denied any illegal activity.” (CP 22); *cf. Hoang*,

101 Wn. App. at 741 (in rejecting the defendant's argument that a traffic stop was pretextual, the court noted the officer making the stop asked only questions typical of a routine traffic stop). The facts show the subjective intent of Officer Bensen was to investigate the alleged methamphetamine sale that Mr. Templeman had alerted him to in the area, and that he was unable to confirm. (CP 22). In addition, Officer Bensen did not write Mr. Reedy a citation for the aftermarket exhaust, nor did he list the statute making this a traffic infraction in his affidavit. (CP 22); *see Hoang*, 101 Wn. App. at 742 (the failure to issue a citation for the traffic violation is a factor to be considered when assessing the officer's subjective intent for making the traffic stop); *see also Arreola*, 176 Wn.2d at 290 (concluding the stop was not pretextual; the driver was cited for the traffic infraction).

“Pretext is, by definition, a false reason used to disguise a real motive.” *Ladson*, 138 Wn.2d at 359 n.11. Officer Bensen used a false reason, the alleged aftermarket exhaust on Mr. Reedy's car, to disguise his real motive, a general criminal investigation of an alleged methamphetamine sale in the general area. Officer Bensen's contact with Mr. Reedy's car was a pretextual traffic stop.

When the initial seizure is unconstitutional, all subsequently discovered evidence becomes fruit of the poisonous tree and must be suppressed. *Ladson*, 138 Wn.2d at 359. Because Officer Bensen's

contact with Mr. Reedy's car was a pretextual traffic stop in violation of article I, section 7, the trial court should have suppressed all subsequently discovered evidence.

**Issue 2: Whether the trial court should have suppressed the evidence seized from Mr. Reedy's shop pursuant to the search warrant, because the affidavit does not provide probable cause to issue the search warrant for the home and the shop.**

Should this Court decline to find Officer Bonsen's contact with Mr. Reedy's car was a pretextual traffic stop and suppress all subsequently discovered evidence, as argued above, then this Court should find the trial court should have suppressed the evidence seized from Mr. Reedy's shop pursuant to the search warrant, for want of probable cause.

The Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington Constitution protect citizens from unreasonable searches and seizures, and provide that a search warrant may only be issued upon a showing of probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). A search warrant "must be supported by an affidavit that particularly identifies the place to be searched and items to be seized." *Id.* at 359.

While the courts must evaluate an affidavit in a commonsense, rather than a hypertechnical, manner, "the [reviewing] court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Id.* at 360 (citations

omitted) (internal quotation marks omitted) (alteration in original). The existence of probable cause is a legal question which the reviewing court considers *de novo*. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). Review of the issuing judge's decision to issue a search warrant is limited to the four corners of the affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

In order for an affidavit to establish probable cause, it “must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched.” *Lyons*, 174 Wn.2d at 360 (citing *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)). “[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

This second nexus “cannot be met merely by showing that a drug dealer lives at a particular residence and that drug dealers commonly cache drugs where they live.” *State v. McGovern*, 111 Wn. App. 495, 499, 45 P.3d 624 (2002) (citing *Thein*, 138 Wn.2d at 151). “It can be met by showing *not only* that a drug dealer lives at a particular residence and that

drug dealers commonly cache drugs where they live, *but also* ‘additional facts’ from which to reasonably infer that *this* drug dealer probably keeps drugs at *his or her* residence.” *Id.* at 499-500 (*quoting* Wayne R. LaFave, *Search and Seizure*, § 3.7(d), at 378-79 (3d. ed. 1996)).

Here, the affidavit submitted in support of the search warrant for Mr. Reedy’s home and shop does not establish the second nexus required to establish probable cause, a nexus between the item to be seized (“[n]arcotics to include Methamphetamine, as well as paraphernalia for ingestion, manufacture and packaging, currency and Documents of Dominion and Control[ ]”) and the place to be searched (Mr. Reedy’s home and shop). (CP 28-32); *see also Thein*, 138 Wn.2d at 140 (*quoting Goble*, 88 Wn. App. at 509).

The affidavit states that “[Mr. Templeman] said [Mr. White] went around the corner to purchase methamphetamine, and returned a short time later with someone suspected of dealing methamphetamine who was in possession of \$5215 of undocumented, unexplained cash . . . [.]” Mr. Reedy. (CP 31). The affidavit states that Mr. Reedy’s residence is located in the area between where Officer Bensen looked for Mr. White’s vehicle and the area where Mr. Templeman was standing. (CP 28-29). Mr. Reedy’s red Camaro was parked on the street. (CP 29). Officer Bensen heard the red Camaro start, and discovered Mr. White was a passenger in

the car. (CP 29). Mr. Reedy told Officer Bensen he and Mr. White had just left his home to go to the store. (CP 30).

The fact that Mr. White, whom Mr. Templeman stated went to purchase methamphetamine, returned to where Mr. Templeman was standing along with Mr. Reedy is insufficient to establish a nexus between narcotics evidence and Mr. Reedy's home and shop. (CP 29-31). Officer Bensen did not observe Mr. Reedy enter or leave his home or shop, and he did not observe Mr. Reedy participate in a controlled buy or any drug sales. (CP 28-31); *cf. State v. G.M.V.*, 135 Wn. App. 366, 369, 372, 144 P.3d 358 (2006) (rejecting a challenge to a search warrant for a home officers saw the suspect leave from and return to before and after selling drugs in controlled buys); *State v. Maddox*, 116 Wn. App. 796, 804, 67 P.2d 1135 (2003) (stating that "a magistrate can reasonably infer, from the fact that a person is dealing drugs *from* his or her home, the additional fact that the person probably had drugs or evidence of drug dealing *in* his or her home.")

The fact that Mr. Reedy told Officer Bensen he and Mr. White had just left Mr. Reedy's home is insufficient to infer that Mr. Reedy has narcotics evidence in his home. (CP 30). To make this inference, there must be evidence of a connection between drug sales and the home. *See G.M.V.*, 135 Wn. App. at 369, 372; *Maddox*, 116 Wn. App. at 804;

*McGovern*, 111 Wn. App. at 499-500 (quoting Wayne R. LaFave, *Search and Seizure*, § 3.7(d), at 378-79 (3d. ed. 1996)). The affidavit does not state that Mr. White went to purchase methamphetamine from Mr. Reedy's home; it states that "[Mr. Templeman] said he did not know exactly which house [Mr. White] was going to," and "[Mr. Templeman] said [Mr. White] went around the corner to purchase methamphetamine." (CP 29, 31).

Assuming, for the sake of argument only, that Mr. Reedy sold Mr. White the methamphetamine found in Mr. Reedy's car, it is just as likely that Mr. Reedy could have stored the methamphetamine in his car, rather than in his home or his shop. Our Supreme Court in *Thein* was concerned with this problem – police officers requesting a search warrant without gathering sufficient “independent evidence” linking the drug dealing to the residence for which they seek a search warrant. *See Thein*, 138 Wn.2d at 150.

The affidavit does not contain facts from which to reasonably infer that Mr. Reedy probably keeps narcotics at his residence. *See McGovern*, at 499-500 (quoting Wayne R. LaFave, *Search and Seizure*, § 3.7(d), at 378-79 (3d. ed. 1996)). The facts in the search warrant affidavit fail to establish a nexus between Mr. Reedy's home and shop and narcotics

evidence. *Thein*, 138 Wn.2d at 140 (quoting *Goble*, 88 Wn. App. at 509).

The evidence found in Mr. Reedy's shop should have been suppressed.

**Issue 3: Whether there is insufficient evidence to affirm Mr. Reedy's conviction for possession of a controlled substance, because Mr. Reedy did not have constructive possession of the methamphetamine.**

Should this Court decline to find Officer Bonsen's contact with Mr. Reedy's car was a pretextual traffic stop and suppress all subsequently discovered evidence, as argued above, then this Court should find there is insufficient evidence to affirm Mr. Reedy's conviction for possession of a controlled substance.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of

the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

In order to find Mr. Reedy guilty of unlawful possession of a controlled substance, the jury had to find that he possessed methamphetamine. (CP 276; RP 839-840); *see also* RCW 69.50.4013(1) (defining unlawful possession of a controlled substance). Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Mr. Reedy did not have actual possession of the methamphetamine. *See State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969) ("[a]ctual possession means that the goods are in the personal custody of the person charged with possession"). Therefore, the issue for the jury was whether Mr. Reedy had constructive possession of the methamphetamine.

Constructive possession of a controlled substance is established by looking at the totality of the circumstances to determine if there is

substantial evidence from which the fact finder can reasonably infer that the defendant had dominion and control of the drugs. *State v. Porter*, 58 Wn. App. 57, 60, 791 P.2d 905 (1990) (quoting *Partin*, 88 Wn.2d at 906). “[D]ominion and control over premises in which police discover drugs is but one factor in determining whether the defendant had dominion and control, *i.e.*, constructive possession, over the drugs themselves.” *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). “A vehicle is considered a premises.” *State v. Potts*, 93 Wn. App. 82, 89 n.2, 969 P.2d 494, 497 (1998) (citing *State v. Huff*, 64 Wn. App. 641, 654, 826 P.2d 698 (1992)).

“The ability to reduce an object to actual possession is an aspect of dominion and control.” *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999) (quoting *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). Mere proximity to a controlled substance is not sufficient to support a conviction for constructive possession. *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990). Another factor in determining dominion and control over drugs is the ability to exclude others. *State v. Edwards*, 9 Wn. App. 688, 690, 514 P.2d 192 (1973).

Mr. Reedy was the registered owner of the red Camaro. (RP 406-407; State’s Ex. 2). However, Mr. Reedy was not able to immediately reduce the methamphetamine to actual possession, because the drugs were

located under Mr. White's seat. (RP 413-415, 421-425, 428-429).

Although Officer Bonsen testified he saw Mr. Reedy shifting in his seat, he further testified he saw Mr. White "reached hard from the left side down towards the floor. . . ." (RP 399). Officer Bonsen also observed the backseat passenger put his hands down. (RP 399).

In addition, Mr. Reedy could not exclude others from possession of the methamphetamine, given that there were two other passengers in his car. *See Edwards*, 9 Wn. App. at 690. As acknowledgment above, the methamphetamine was located in close proximity to Mr. White, and the backseat passenger had been observed putting his hands down towards the area. (RP 399, 413-415, 421-425, 428-429).

The facts presented at trial only established Mr. Reedy's mere proximity to the methamphetamine. *See Spruell*, 57 Wn. App. at 388. There was no evidence that Mr. Reedy owned the drugs, or used drugs that day. *Cf. State v. Mathews*, 4 Wn. App. 653, 656-657, 484 P.2d 942 (1971) (finding constructive possession of heroin, where the defendant was a known heroin user, had purchased heroin, and had used some that day). To the contrary, there was evidence that it was Mr. White who used drugs that day; Officer Bonsen found a glass pipe contained burned and unburned methamphetamine residue inside of a pocket of Mr. White's sweatshirt. (RP 402, 407, 409-411, State's Ex. 3, 5). Mr. Reedy testified

he did not think Mr. White had any drugs on him, and that he told Officer Bensen he was not aware of any drugs in the car. (RP 738, 741).

Evaluating the totality of the circumstances shows that Mr. Reedy did not have dominion and control over the methamphetamine. A rational jury could not have found Mr. Reedy guilty, beyond a reasonable doubt, of unlawful possession of a controlled substance. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). The evidence presented at trial was insufficient to support Mr. Reedy's conviction, and the conviction should be reversed and the charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505 (setting forth this remedy).

#### **F. CONCLUSION**

Officer Bensen's contact with Mr. Reedy's car was a pretextual traffic stop. The trial court should have suppressed all subsequently discovered evidence resulting from this warrantless seizure. Mr. Reedy's convictions should be reversed and the charges dismissed with prejudice.

In the alternative, Mr. Reedy's convictions for first degree unlawful possession of a firearm should be reversed and the charges dismissed with prejudice because the trial court should have suppressed the evidence seized from Mr. Reedy's shop pursuant to the search warrant.

Mr. Reedy's conviction for possession of a controlled substance, methamphetamine, should also be reversed and the charge dismissed with

prejudice because the evidence presented at trial was insufficient to find

Mr. Reedy guilty.

Respectfully submitted this 3rd day of August, 2015.

  
Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols  
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Attorney for Appellant

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 33033-8-III  
vs. )  
BRENT DOUGLAS REEDY )  
Defendant/Appellant )  
PROOF OF SERVICE )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 3, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Brent Douglas Reedy  
2017 S. 4th Avenue  
Union Gap, WA 98903

Having obtained prior permission from Yakima County Prosecutor's Office, I also served the Respondent State of Washington at [appeals@co.yakima.wa.us](mailto:appeals@co.yakima.wa.us) using Division III's e-service feature.

Dated this 3rd day of August, 2015.



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