

No. 33048-6-III

FILED  
**Dec 02, 2016**  
Court of Appeals  
Division III  
State of Washington

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

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STATE OF WASHINGTON, Respondent

v.

JONATHAN HAAG, Appellant

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SECOND SUPPLEMENTAL BRIEF OF APPELLANT

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## I. Assignment of Error

### A. The trial court erred when it entered Finding of Fact 5:

Officer Woodyard stopped the vehicle at Maple and Indiana for traffic violations.

### B. The court erred when it entered Conclusion of Law 1:

The court determines that Officer Woodyard, under the totality of circumstances presented to her, was reasonably justified in stopping the motor vehicle driven by the defendant.

### C. The court erred when it entered Conclusion of Law 3:

The vehicle did not have a license plate and the trip permit affixed to the back window was obviously tampered with.

## Issue Pertaining to Assignment of Error

1. Did the trial court err when it found the vehicle was stopped because of traffic violations?
2. Did the trial court err when it concluded the trip permit was obviously tampered with where the finding of fact did not support the conclusion?

3. Did the trial court err when it denied the motion to suppress evidence and found Mr. Haag guilty of possession of a controlled substance?

## II. Statement of the Case

Mr. Haag incorporates the facts previously presented in his opening brief. This supplemental brief is to address the late filed findings of fact and conclusions of law under CrR 6.1.

## III. Argument

A. The Trial Court Erred When It Denied The Motion To Suppress And The Conviction Should Be Reversed And Dismissed With Prejudice.

The appellate Court reviews findings of fact under the substantial evidence standard. Substantial evidence is “a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873,879, 73 P.3d 369 (2003). The Court then determines whether the findings of fact support the conclusions of law. *Landmark Dev. Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Conclusions of law are reviewed de novo. *Sunnyside*, 140 Wn.2d at 880.

Under the *Terry* exception, police may conduct a warrantless investigatory stop of an individual where the officer has a well-founded suspicion of criminal activity based on specific and articulable facts. *State v. O’Cain*, 108 Wn.App. 542, 548, 31 P.3d 733 (2001). An articulable suspicion means a substantial possibility that criminal activity has occurred or is about to occur and requires more than an officer’s hunch. *State v. SantaCruz*, 132 Wn.App. 615, 619, 133 P.3d 484 (2006). A stop must be justified at its inception. *State v. Armenta*, 134 Wn.2d 1, 16, 948 P.2d 1280 (1997).

Here, the officer testified she saw Mr. Haag’s vehicle had stalled in the lane, rolled back a bit, and was somewhat diagonal in the lane. She saw the brake lights light up and go off, then the car started and got back into the lane just as she approached it in her patrol car. CP 53; 11/25/14 RP 16-17. The car’s movement was similar to a car clutch engaging and accelerating up a hill. 11/25/14 RP 25. There was no traffic infraction: rather, there was a car briefly stalled that restarted and entered traffic. The officer specifically testified she did *not* note any traffic violations. 11/25/14 RP25. There was no justification for stopping the vehicle because

there was no traffic violation and no substantial possibility that criminal activity had occurred. *O’Cain*, 108 Wn.App. at 548.

The second reason given for the vehicle stop was that the officer was aware from her “hot sheet” list that a similar type vehicle had been recently reported as stolen. She did not know whether Mr. Haag’s car was the stolen car. 11/25/14 RP 25;27; FF4. In *O’Cain*, the Court held it is the State’s burden to establish the reliability of its dispatches or “hot sheets” regarding stolen vehicles at any subsequent suppression hearing. 108 Wn.App. at 556.

There, the officer saw two cars parked in an area used for drug deals and believed a drug sale was occurring. He learned through a dispatch report that one of the cars had been reported as stolen and stopped the vehicle. Agreeing that officers receiving the dispatch of a stolen vehicle may act on it without further inquiry, the Court found “the good faith of officers executing a seizure does not relieve the State of its burden to prove that there was a factual basis for the stop: probable cause in the event of an arrest, and reasonable suspicion in the event of a Terry stop.” *Id.* at 552-53. Post-seizure verification that the vehicle was a stolen car is insufficient to justify the seizure. *O’Cain*, 108 Wn.App. at 545.

Like O’Cain, the State here did not provide a factual foundation for the dispatch report. There was no evidence about its underlying reliability nor did the court make a finding about it. In the absence of a finding on a factual issue, it is presumed that the party with the burden of proof failed to sustain their burden on the issue. *Armenta*, 134 Wn.2d at 14. The State did not sustain its burden on this issue. Further, the State even dismissed the charge of possession of a stolen vehicle against Mr. Haag. 11/25/14 RP 4.

The third reason given for the stop was the officer “noticed there was a trip permit in the rear window that was horribly forged or altered.” 11/25/14 RP 17. The court found the officer “was able to observe a temporary license in the rear window of the vehicle that, to her, appeared to have been forged and tampered with.” CP 107. The court did not make a finding that the trip permit was forged or tampered with, but only that the officer said it appeared to her to have been tampered with. The State never presented the trip permit as evidence to the court as the fact finder. Nevertheless, the court entered conclusion of law 3: “The vehicle did not have a license plate and the trip permit affixed to the back window was *obviously tampered with.*” CP 108. The court’s conclusion of law is not supported by its finding of fact.

The trial court erred when it denied the motion to suppress evidence against Mr. Haag. All evidence obtained as a result of an unlawful seizure is inadmissible. *State v. Reichenbach*, 153 Wn.2d 126, 1135, 101 P.3d 80 (2004). This Court should reverse and remand for suppression of the evidence found as a result of the improper seizure. Because the evidence supporting the charge is insufficient without the controlled substance, the charge should be dismissed with prejudice.

#### IV. Conclusion

Mr. Haag respectfully asks this Court to reverse and remand for suppression of the evidence and dismissal of the charge.

Dated this 2<sup>nd</sup> day of December 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Jonathan Haag do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, of appellant's supplemental brief was sent by first class mail, postage prepaid on December 2, 2016, to:

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